# REDIAL PROJECT National Synthesis Report – Cypru (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)*

~~YES~~/NO

In Cyprus, pre-removal detention is ordered by the Minister of the Interior, without involving judicial authorities.[1] This task is, by convention, delegated to the Chief Immigration Officer whose practices in this field have attracted criticism from NGOs, from the Attorney General's office as well as from the Courts. [2] The courts are not involved at the initial stage of

[1] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(1), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

[2] See for instance the case of Aghselhloo Davood, Civil Application no. 27/2016, 1 August 2016, available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-27-20161.htm&qstring=%F7%E1%F3%E9%EA%2A%20and%20%F5%F0%EF%F5%F1%E3%2A where counsel for the respondents from the Attorney General's office criticised the repeated arrest and unjustified detention of the applicant by the respondents against legal advice from the Attorney General.

detention, except where and to the extent that the detainee challenges the detention order or the length of the detention.

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)

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

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

**~~YES~~/NO**

The lawfulness of a pre-removal detention is controlled by the courts upon application by the detainee through the judicial review process. This can be applied for at any point in time within 75 days from the detainee having received notice of the detention order. The length of detention may also be subjected to judicial control, but using a different procedure (habeas corpus). This may again be done at any point in time and is not restricted to renewed detention orders.

In particular, the law foresees three different procedures for challenging a detention order:

a. Administrative review of the detention from the Minister of Interior-
   - ex officio every two months and
   - at any 'reasonable intervals' upon application by the third-country national concerned.[3] 'Reasonable intervals' are not defined.

Immigration lawyers and NGOs express their doubts as to whether the above processes carry any substantial merit and whether any meaningful review is carried out; to their knowledge, these processes have never led to a detainee's release.[4]

b. An application for judicial review under article 146 of the Constitution, in order to challenge the *lawfulness* of the detention order.[5]

[3] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(4), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

[4] Demetriou, C. (2013), *Evaluation of the Implementation of the Return Directive: Cyprus Country Report*, Matrix Insight in cooperation with the International Centre for Migration Policy Development (ICMPD), the European Council on Refugees and Exiles (ECRE) and the Centre for European Policy Studies (CEPS), commissioned by DG Home Affairs, Directorate C : Migration and Borders.

[5] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(3), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

c. An application for a habeas corpus order under article 155.4 of the Constitution, in order to challenge the *length* of the detention.[6]

The distinction between b. and c. is not always clear and there have been several court decisions rejecting applications on behalf of detainees because they followed a. instead of b. or vice versa.[7]
Until 2015 applications for judicial review were examined by the Supreme Court in its 'Review Jurisdiction'. In 2015 a special Administrative Court was set up examining all applications for judicial review;[8] however applications for habeas corpus continue to be examined by the Supreme Court. This somewhat complicates matters for applicants, because it has reinforced the division of tasks between courts and the distinction between the two procedures has become more embedded.

Prior to 2015, where the court was faced with a rather artificial argument from the authorities as regards the procedure chosen by the applicant and the court's jurisdiction to examine the application lodged, the court had the option of dismissing the argument in favour of a more unified approach. In examining the habeas corpus application of *Vilma Galivan Marcelino* the Court rejected the argument of the authorities about lack of jurisdiction on the ground that the case concerned the legality of the detention (for which the judicial review procedure should be used) and not the duration of the detention (for which the habeas corpus procedure was used). The court ruled that 'it is obvious that the two ways of reviewing the legality of detention, in private and public law, converge to a degree in the framework of the scope of application of the [Return] Directive, aiming in a unified manner, to the control of the legality of detention'.[9] Under the new regime the option of the unified approach is lost because the administrative court is not at liberty to examine habeas corpus applications and the supreme court is no longer competent to examine applications for judicial review.

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

National law transposing the RD does not provide for an ex officio supervision by judicial authorities. As detailed under Q. 2 above, two types of review by a judicial authority are

[6] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(5)(a), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html
[7] Cyprus, Supreme Court, Re. the application of Manzoor Hussain for the issue of a habeas corpus writ, Application No. 52/2012, 31 May 2012, available at www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2012/1-201205-52-12hc.htm&qstring=%E1%F0%E5%EB%E1%F3%2A
[8] Cyprus, Law providing for the establishment and operation of an administrative court (Νόμος που προβλέπει για την ίδρυση και λειτουργία Διοικητικού Δικαστηρίου του 2015) N. 131(I)/2015, 21 July 2015, available at http://cylaw.org/nomoi/arith/2015_1_131.pdf
[9] Cyprus, Supreme Court, Re. the application of *Vilma Galivan Marcelino*, Civil application no. 169/2012, 14 December 2012, available at www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2012/1-201212-169-12.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

foreseen in the law:

- the judicial review of an administrative act[10] and
- habeas corpus. [11]

Neither of these processes is automatic; they must be applied for by the detainee. To the extent that article 15(3) RD requires an ex officio judicial review in the case of prolonged detention periods, then in the case of Cyprus national legislation is not compliant.

In the case of the judicial review, the procedure commences with the filing of an application to set aside a decision of the administration, in this context the detention order, within 75 days from notification of the detention order.[12]

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?)*

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

Detention orders may be reviewed through an administrative and/or a judicial process:

- The administrative review carried out by the Minister of the Interior (ex officio every two months and upon application from the detainee at reasonable intervals). This decision can be subject to judicial review under article 146 of the Constitution. In practice, however, if the judicial review procedure is to be pursued, then it is common (and more correct legally speaking) to challenge the detention order itself rather than subsequent administrative acts relying on the detention order
- The judicial control which can be either a habeas corpus application or an application for judicial review. In *Vilma Galivan Marcelino* the court ruled that once the detainee completes six months in detention, the duration of detention can be controlled through the habeas corpus application, without excluding the possibility of the applicant filing an application for judicial review of the renewal of the detention order. [13]

In either case, the court's decision may be challenged through an appeal. The judicial review application must be filed within 75 days from the notification of the detention order.[14] . If more than 75 days have passed from the issue of the first detention order, it is possible to

[10] Cyprus, Constitution of the Republic of Cyprus, article 146, available at http://www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

[11] Cyprus, Constitution of the Republic of Cyprus, article 155.4, available at http://www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

[12] Cyprus, Constitution of the Republic of Cyprus, article 146, available at www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

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

[14] Cyprus, Constitution of the Republic of Cyprus, article 146, available at www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

request the court to review the renewal order of detention. The application for habeas corpus can be filed at any point in time so long as the applicant is in detention.

A detainee does not have to pursue the administrative review before applying to the court. Indeed, detainees intending to challenge the lawfulness of their detention may lose the 75 days' time limit if they choose to wait for the Minister of the Interior to examine their request, a procedure that hardly ever bears fruit.

If the application for judicial review of habeas corpus is successful, the applicant must be released from detention immediately. In addition, a person who succeeded in having a detention order declared void by the court through the judicial review procedure can institute fresh legal proceedings against the authorities in a civil court for the recovery of 'just and equitable damages'.[15] Such a claim however will in most cases have very slim chances of success as the applicants carry the burden of proving they have suffered quantifiable damage.

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)

According to legal scholars, the role of the court in the judicial review process in general is confined to ascertaining the legality of the decision making process and not to look into its merits or evaluate the correctness of the administrative decision.[16] If the decision-making process is flawed, because it does not meet the checklist (keeping proper records of the decision-making process, making such records available, indicating reasons for the decision, holding a due inquiry into the facts of the case) then it will be annulled and the competent administrative authority may adopt another act. If the checklist has been complied with, then the validity of the detention order will be confirmed. Only if the Court finds that the decision making process was flowed will it order the detainee's release.

However, the above rule is not followed strictly or uniformly by the courts in the case of detentions pending return, presumably because both the judicial review and the habeas corpus process are the designated means of judicial control of detention pending return, in compliance with the requirements of sub-articles 15(2) and 15(3) of the RD. In practice, the courts examining applications for judicial review of the legality of detention or applications for habeas corpus challenging the length of detention are essentially looking into the facts, to assess whether the authorities were justified in detaining the applicant or in renewing the applicant's detention. The checklist of article 146 of the Constitution may be used by the Courts but not on its own, in other words the lawfulness of the detention order will not be assessed on those criteria alone but the grounds introduced by article 15(1) the RD, such as less coercive measures, risk of absconding and due diligence in pursuing the detainee's return, will also be looked into in order to assess the lawfulness of the detention. The courts will abstain from performing a thorough check of the legality of the administrative decision when the administration invokes the ground of 'public security'. In the case of *Falak Shad* the judge found that the administration's discretion as regards issues of entry, stay and work of

[15] Cyprus, Constitution of the Republic of Cyprus, article 146(6), available at http://www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

[16] Pikis G (2006), *Constitutionalism-Human Rights-Separation of Powers*, Martinus Nijhoff Publishers, Leiden/Boston, p. 128.

third country nationals is wide and there is no duty to justify its actions when issues of security are invoked. The Court concluded that the administration is not obliged to give reasons for the deportation or refusal of entry of any person and the Court will not look into reasons of state security, as this is a matter purely for the executive and not the judiciary.[17]

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

~~**YES/**~~**NO**

As a rule, the judge will decide only on basis of what is presented in Court. However lawyers representing detainees usually invoke a long list of national, EU and international legal instruments, some relevant and some not, to back their applications. The law transposing the Return Directive is never missing from the list. Depending on the level of expertise of the lawyer representing the detainee, the elements of lawfulness of the detention listed in article 15 may be argued specifically or the Return Directive may be simply cited amongst other legal instruments, which enables the judge to examine the case on the basis of these criteria. Not all elements are always examined or taken into account by the court, only those which the judge considers relevant.

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

The ex officio examination by the Minister of the Interior is more of a routine affirmation of the acts of the immigration department rather than a real and substantive examination of the merits of the detention decision. The same is true of the review performed by the Minister upon application by the detainee.

Only the judicial process can entail a meaningful examination of the lawfulness of detention on the basis of the criteria foreseen in the law. Up until 2015, when the administrative court was set up, applications for judicial review, for habeas corpus and the appeals to these decisions were tried by the same court (the Supreme Court) in its different jurisdictional capacities. The case law does not reveal any significant differences of approach between first instance decisions and appeals.

*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**
This is a rather undeveloped area in Cyprus where generally courts appear very reluctant to refer any issues to the CJEU.

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

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~~**

**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?)

By far the most commonly cited CJEU ruling is El Dridi (28.4.2011, C-61/11 PPU) which is used in order to determine whether an applicant is covered or not by the RD. If the finding is that the applicant was detained as a result of a criminal conviction, then the RD does not apply and neither do the ceilings on detention set by RD sub-articles 15(5) and 15(6). The courts appear unwilling to extend the El Dridi principle to any situation whose facts are not precisely the same as those in El Dridi. For instance, an applicant who had been convicted of illegal work and illegal stay was found to fall outside the scope of the RD because his conviction was not the result of his failure to comply with a deportation order as was the case in El Dridi. [18] The judge in this case ordered the applicant's release relying on ECtHR case law [Quinn v. France A-311 (1995); Chachal v. U.K. (1996)] rather than on El Dridi, which appears to suggest an unwillingness to endorse the principle that immigration should not be criminalized.

The case of *Said Shamilovich Kadzoer (Huchlarov)(C - 357/09 PPU )* was cited by applicants in support of their argument that once the maximum ceiling of detention foreseen in the RD is exhausted then the detainee must be released.[19] In *Hazaka*, a Syrian applicant who had been convicted for attempting to travel to Sweden with a false passport, applied for his release from detention, since there was no realistic prospect for his removal, given the ongoing war in Syria. Relying on the CJEU ruling in the case of *Arslan*, C-543/11, dated 30 May 2013, the applicant argued that he ought to be released from detention because there is no presumption that he filed an asylum application for the sole reason of delaying or averting his return to his country of origin. The Court rejected the aplication on the ground that the applicant was not overed by the Return Directive since his detention and deportation resulted from his criminal conviction.[20]

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

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

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

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.)

Articles 5 and 6 of the ECHR are regularly invoked be lawyers representing detainees and in many cases the Court may rule that the RD is inapplicable (usually because the detainee has a criminal conviction) but the detainee must be released on the basis of the ECHR. In the case of Farak Nessim[21] the Court relied on article 5(1) of the ECHR and on related case law (*J.N. v. United Kingdom)*, to rule that the reasonableness of the length of detention must be seen in light of all circumstances and if it becomes clear that deportation cannot take place within a reasonable time or the authorities are not acting with due diligence then the detention becomes unlawful.

The Courts may equally take a wholly different stand whilst applying the same principles. In In a 2016 decision of the appeal court[22] the Court found that the applicant who was an asylum seeker was not covered by the Return Directive due to his criminal conviction since his detention and deportation were the result of a criminal sanction against him. With references to article 5 of the ECHR, the court found that the applicant failed to prove that his detention was arbitrarily long or that the authorities did not pursue the expulsion proceedings with 'due diligence'. The applicant failed to prove that the authorities acted in bad faith or that the length of his detention was arbitrary. The reasonableness of the length of detention must be examined not only by the actual duration but also by the surrounding circumstances and particularly the reasons for the delay of his deportation. In this context, the Appeal Court endorsed the trial court's findings that five months is not an unreasonably long time to detain a person without a passport and with a criminal conviction. A dissenting opinion by two out of the five judges found that article 5(1) of the ECHR rendered his detention unlawful and that the length of detention should have been examined in conjunction with all surrounding circumstances including the inaction of the administration during his detention and the failure to take steps in order to pursue his speedy deportation.

In the case of *Falak Shad,*[23] the applicant argued that there was a violation of article 19(1) of the EU Charter and of article 4(1) of the Fourth Protocol to the ECHR, both of which prohibit mass deportations, as the authorities deported all persons involved in the incident in which the applicant was also involved and which formed the premise for his detention and deportation. He claimed that the authorities ordered the deportation of all persons involved, without examining each case separately. To this end, the applicant's lawyer also cited the definition of mass deportations given by the ECHR in *Becker v Denmark* (Appl.7011/75). The court rejected the argument of mass deportations concluding that simultaneous deportation of several persons does not necessarily mean mass deportations nor is there any evidence that each case was not examined separately. Generally speaking, however, the EU Charter is a lesser used instrument and although often invoked by lawyers

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

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

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

representing detainees it is usually ignored by judges who prefer to use the more familiar route of the ECHR and its related case law.

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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/**~~**NO**

**If yes:** please elaborate further on this issue.

There was never an issue of the courts consciously choosing to disapply national law in order to implement the RD. The courts will not look into transposition questions unless specifically directed to do so. The courts assume that national immigration law is an accurate transposition of the RD and proceed to apply it on this assumption. There is however a fundamental issue here which essentially impacts the implementation of the RD and of the safeguards it seeks to put in place.

The RD was transposed by adding a series of new provisions into the national immigration law which dates back several decades. Article 6, one of the old provisions of the law, sets out a long list of categories of persons defined as 'prohibited immigrants'. Another provision (article 14) entitles the authorities to deport and meanwhile detain all 'prohibited immigrants'. These provisions continue to be implemented in relation to third country nationals who are deemed to fall outside the scope of the RD.

In transposing RD article 15(1), the national immigration law[24] does not exclude the imposition of a prison sentence for all categories of third-country nationals illegally staying in Cyprus. Imprisonment is prohibited for certain specific categories of illegal immigrants but is indirectly allowed for other categories listed in article 6 of the law, such as persons who have previously been deported,[25] persons whose entry in the Republic is prohibited by virtue of any legislation in force[26] and persons considered as illegal immigrants by virtue of the provisions of the immigration law.[27] This leaves room for the criminalisation and detention of migrants for the mere fact that they are illegally staying in Cyprus. If third-country nationals are convicted for the offence of being illegal immigrants under the catchall list of article 6, they are removed from the ambit of the RD and must serve their prison sentence in jail together with ordinary prisoners. In theory, those provisions of the national law which transpose the RD take priority over other provisions they may be in conflict with, but in practice the Courts do not dispute the validity and operation of article 6 as being contrary to the RD. An example of this is the 2010 case of third country national who was detained for the purpose of her deportation because she was HIV positive, under article 6(1)(c) of the national immigration law which defines carriers of contagious diseases as 'illegal immigrants'. The Court found that HIV did not fit the

[24] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18OC, available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

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

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

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

description of a contagious disease as found in article 6 of the immigration law and ruled that discrimination on the ground of HIV status was unlawful, but did not dispute the validity of 6(1)(c) as an authority for declaring a person to be an illegal immigrant.[28]

CJEU rulings are often cited in national decisions as guidance. Whether they are correctly applied in the national context is a matter of interpretation. National courts consider that a criminal conviction for unlawful stay renders the RD inapplicable. *El Dridi* is deemed inapplicable because the facts related to a failure to comply with a deportation order and cannot be extended to apply to criminal convictions for unlawful stay.[29]

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

**YES/~~NO~~**

**If yes:** please elaborate further on this issue

National courts do not cite foreign domestic judgements except UK court decisions, as these are deemed to have persuasive effect on national courts.[30] In *Farak Nessim* [31] the court referred to two English decisions, *Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department* [2011] UKSC12 *and R (A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 in order to establish the criteria for determining whether there is a risk of absconding. Generally speaking, however, where there is a Cypriot precedent or a precedent from the ECtHR, Courts are unlikely to adopt a precedent from the courts of another member state as there is always the risk that other national courts are applying a law that is not identical to the Cypriot law.

*C. National case-law: major trends*

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?

Jurisprudence does not regard freedom of movement as an unconditional right of third country nationals and detention under the RD was never ruled by the courts to impede freedom of movement. It ought to be noted that national legislation on detention of third

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

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

[30] Cyprus, Courts of Justice Law N. 14/60, article 29(1)(e), available at http://cylaw.org/nomoi/enop/ind/1960_1_14/section-sc9979fc56-b4b4-4d1b-80dc-8c70ba5cdcb1.html

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

country nationals gives the authorities far wider powers of detention without any upper limits or safeguards for those persons who do not fall under the RD. However, the right to liberty, guaranteed under article 5 of the ECHR is often cited to argue that detention cannot be arbitrarily long or sustained whilst the authorities fail to pursue the expulsion proceedings with 'due diligence'.[32]

Q1. 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/~~NO~~**

Where detention is challenged through an application for habeas corpus, which is aimed at the *length* rather than the *lawfulness* of detention, then the Court will only look into the detention order and not the deportation order. This route is only intended to bring about the applicant's release from detention. Having said that, when confronted with administrative excesses, the Court will not refrain from challenging the lawfulness of detention and deportation orders when examining a habeas corpus application. In *Todorovic*,[33] where the immigration authorities issued a fresh detention order and re-arrested the applicant the moment he was released by the court, the court stated that the fresh issue of the detention and deportation order amounted to a clear violation of the provisions of the law transposing the RD and a disrespect towards the court's verdict for his release. The judge pointed out that if the immigration authorities disputed the correctness of the court's decision to release the applicant, then they should have appealed that decision rather than proceed to issue new orders against him. The obiter comments of the judge do not automatically lead to the annulment of the deportation order, however they can provide the basis for challenging the deportation decision through the judicial review procedure.

Where the lawfulness of detention is challenged through an application for judicial review, the applicant has the choice of challenging both the detention and the deportation order as a single act or challenging only the detention order. That is very much a tactical choice which will depend on whether the applicant has a strong case against the deportation order or not. If the case against the deportation order is weak, the applicant is better off pursuing the annulment of only the detention order. In *Lokugamage* the applicant filed for the judicial review of both the detention and deportation order, since these two formed a single administrative act, and a separate judicial review request for the act of declaring him an illegal immigrant. The judicial review request for the detention and deportation order was dismissed on the ground that the sovereign right of the state to control stay in its territory is paramount. As regards the judicial review request for the act of declaring him an illegal immigrant, the court found that the filing of two judicial review requests for what is essentially the same case amounts to an abuse of process and rejected that as well.[34]

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

[33] Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

[34] Asanka Ariyarathne Kariyawasam Lokugamage v. The Republic of Cyprus, Case No. *1264/2013*, 26 February 2014, www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2014/4-201402-1264-13.htm&qstring=Asanka%20and%20Ariyarathne

In the case of *Fawzy Mohamed*, the applicant sought to set aside both the detention and the deportation, but he had very solid grounds for challenging the deportation order: he was still an asylum seeker when it was issued. A subsequent order for his deportation was issued when he was serving a prison sentence for an offence for which he was subsequently acquitted. The court accepted the judicial review request and ordered his release.[35] It ought to be noted that even where the deportation order is annulled as a result of a judicial review procedure, there is nothing stopping the authorities from issuing a fresh deportation order; that is one major weakness of the judicial review process.

Q2. 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~~**

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

- *lack of due diligence;*
- *lack of resources (human and material);*
- *lack of transport capacities;*
- *conduct of the Member State of potential return (e.g. an embassy in a given MS refuses generally the cooperation in cases of forced return and accepts only voluntary returns or it does not confirm the nationality of the person concerned (Cf. ECtHR, Tabesh), lack of cooperation of third-countries' embassies;*
- *conduct of the TCN concerned, especially if the latter refuses the cooperation which is indispensable for the issuance of relevant documentation by the Member State of return (cf. ECtHR, Mikolenko);*
- *non-refoulement in a broad sense; best interest of the child; family life; the state of health of the third Member State national concerned and individual considerations in accordance with Article 5 RD;*
- *the lack of a readmission agreement or no immediate prospect of its conclusion*
- *Else?*

National courts will assess the lawfulness of detention in light of whether, inter alia, there is a reasonable prospect of removal. The considerations most often cited are lack of due diligence on the part of the authorities in pursuing the applicant's deportation, the non-cooperation of consulate authorities or embassies in Cyprus in issuing travelling documents and non-refoulement in the case of Syrians. In the case of an Iranian applicant who had been detained for a total of almost four years, the court ordered his release because was no reasonable

[35] Supreme Court, Review jurisdiction, Shahin Haisan Fawzy Mohamed v. The Republic of Cyprus, Case No. *1718/2010,* 25 April 2013, available at www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-1718-10.htm&qstring=Shahin%20and%20Haisan%20and%20Fawzy%20and%20Mohamed

prospect for his removal due to the non-cooperation of the applicant with the Iranian Embassy and also the latter's unwillingness to issue travel documents to him.[36]

The conduct of the applicant concerned, such as the destruction of travelling documents or a refusal to cooperate, is not accepted as a valid reason to justify a TCN's release on the ground of a non-realistic prospect of removal; on the contrary this is seen as evidence of a risk of absconding. As it emerges from the ruling in *Majid*,[37] TCNs are not expected to cooperate with their embassy in order to have travel documents issued, particularly when there is no possibility for travel documents to be issued by their embassy in any case. The fact that a TCN's asylum application is still pending, which renders the prospect of his removal impossible, is not seen by the court as a reason justifying his release.[38]

The fact thatt the court may accept that there is no reasonable prospect for the TCN's removal does not necessarily lead to the applicant's release. In the 2013 case of *Antoan Hazaka* the court rejected the habeas corpus application of a Syrian asylum seeker even though there was no reasonable prospect for his removal, as that would infringe the principle of non-refoulement given the war in Syria. The court conlcuded that he was not covered by the RD because of a criminal conviction and did not see any other reason to grant him the habeas corpus writ.[39]

Other judges may take a different view. In *Laal Badh Shah* the applicant was found to fall outside the scope of the RD as a result of a criminal conviction, but the Court nevertheless ordered his release because the authorities failed to justify his continued detention (over 21 months).[40] According to the court, in the absence of any justification from the authorities, the long detention of the applicant, in excess of 21 months, was not in line with ECtHR case law in *Quinn v. France* A-311 (1995) and in *Chachal v. U.K.* (1996) which required the authorities to act with due diligence

Q2B. 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?

No, the judicial review process does not entail an inquisitory role for the court to look into the merits of the administrative decision. The assessment relies exclusively on the parties' submissions and the party that fails to prove its allegation will see its arguments fail. No statistics or data are maintained by any authority as regards the process of pursuing the return of a third country national so none can be presented in court. Evidence as to previous handling of similar cases is unlikely to be considered by the court unless the facts of the cases

[36] *Majid Eazadi v. Republic of Cyprus*, Supreme Court case, Civil Appeal No. 137/2012, 22 November 2012.
[37] *Majid Eazadi v. Republic of Cyprus*, Supreme Court case, Civil Appeal No. 137/2012, 22 November 2012.
[38] Cyprus, Supreme Court, Appeal jurisdiction, *Habibi Pour Ali Faysel v. Republic of Cyprus through the Chief of Police and the Minister of the Interior*, Civil appeal No. 236/15, 31 March 2016.
[39] Re the application of Antoan Hazaka, asylum seeker from Syria and now at the police detention centre in Menoyia for the issue of a habas corpus writ, Case No. 110/2013, 19 July 2013, available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2013/1-201307-110-2013..htm&qstring=Antoan%20and%20Hazaka

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

are identical to the case at hand.

Q3. 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.

The typical reason invoked by the authorities to justify detention is the risk of absconding and, as a result, this is the reason examined by the court. Because detention of TCNs who find themselves in an irregular situation is a rule[41] and does not follow after an evaluation of the facts of each case, citing the risk of absconding has become part of this automated and standardised process. The invocation by the authorities of actions of the TCN which have impeded the removal process would necessitate a prior examination of the facts of each case before detention orders are issued, which does not happen in Cyprus. The destruction of travelling documents by the detained TCN or his refusal to cooperate for his removal have been referred to in court decisions but not as the sole justification for detention, but rather in justification of the authorities' claim that there is a risk of absconding. [42]
The justification that the TCN is avoiding or impeding the process of removal is invoked by the authorities when they can no longer invoke the risk of absconding, because the TCN concerned is already held in detention, i.e. upon seeking to renew the detention order. A standard document issued from the immigration authorities in order to justify the renewal of detention of TCNs awaiting deportation states that removal was not possible because of various obstacles since the TCNs concerned avoid or impede the removal procedure or because the authorities are awaiting for documents to be dispatched from a third country. In *Farak Nessim*, the Court found that this standard document was not sufficient to justify the renewal of the applicant's detention as it does not describe the facts of the individual case which have impeded removal and because it appeared from the facts of the case that removal was indeed delayed for other reasons. [43]

Q4. 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 immigration authorities invoke the risk of absconding in defending the detention orders

[41] Council of Europe (2016), *Report by Nils Muiznieks, Commissioner for human rights of the Council of Europe following his visit to Cyprus from 7 to 11 December 2015*, Strasbourg, 10 March 2016, available at http://www.childcom.org.cy/ccr/ccr.nsf/All/3395F3B3F73B53AAC2257F8E00241176?OpenDocument
[42] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016
[43] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016

issued against TCNs. The courts do not necessarily look into the facts of the case in order to evaluate this claim. In the case of *Re. Rita Kumah*[44] the court rejected the applicant's habeas corpus application concluding that there is a risk of absconding. The court essentially adopted the argument of the authorities that there was a risk of absconding because the applicant did not have a passport or a residence permit. The courts generally accept the view that

In the case of *Farak Nessim*, the national court citing a UK Court decision[45] concluded that the risk of absconding *may* be deduced by a person's refusal to cooperate but not necessarily and that the tendency to commit serious crime is also relevant.[46]

Q5. Does your Member State's legislation define objective criteria based on which the existence of a risk of absconding can be assumed?

**~~YES~~/NO**

**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?

The legal provision which transposed article 15(1) of the RD copies verbatim the wording of the Directive and provides no definition or criteria on how the risk of absconding can be established.[47] Currently there are no initiatives for its amendment. The risk of absconding is the main reason cited by the immigration authorities in order to justify the first detention order and there is generally an assumption that the risk is present in all cases of TCNs who, for one reason or another, find themselves in an irregular situation. Courts have generally endorsed this approach, making little effort to introduce objective criteria on the basis of

[44] *Re the application of Rita Kumah*, Supreme Court, Civil application No. 198/2013, 29 November 2013. Available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2013/1-201311-198-13.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

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

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

[47] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(1), 1st subpara., available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html Article 18PST(1).

which the risk can be assessed. In 2016 one court decision tried to take a step further from the standard approach of applying the risk to all situations indiscriminately, by suggesting obiter that the TCN's tendency to crime can be examined in order to determine whether there is a real risk of absconding.[48] Other than that, there has not been a serious effort so far to develop criteria or guidelines for assessing the risk.

Q6. 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~~**

Subject to those provisions of the law which transpose the RD, Article 14 of the national immigration law entitles the authorities to deport and meanwhile detain all 'prohibited immigrants'. The term 'prohibited migrants' is defined in article 6 to include, inter alia, persons who have previously been deported,[49] persons whose entry in the Republic is prohibited by virtue of any legislation in force[50] and persons considered to be illegal immigrants by virtue of the provisions of the immigration law.[51] The courts apply these provisions for those TCNs whom it considers to fall outside the scope of the RD.

In addition, a new amendment to the asylum legislation which was introduced in October 2016 in order to transpose the recast Directive 2013/33 on common procedures for granting and withdrawing international protection, allows the detention of asylum seekers:

- For ascertaining their identity or nationality;
- For determining the elements on which the asylum application is premised, especially in cases where there is a risk of absconding;
- For deciding on whether the applicant has a right of entry into Cyprus;
- For preparing the removal procedure where the Minister is convinced, relying on objective grounds, such as the fact that the person already had access to the asylum procedure, that there are reasons to believe that this person is filing for asylum in order to delay or impede the execution of the removal order;
- Where necessary for the protection of national security or public order;
- In accordance with article 28 of the Dublin Regulation, which allows detention where there is a risk of absconding.[52]

Q7. Does your Member State's legislation (and/or practice) provide for alternatives to

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

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

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

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

[52] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

detention?

**YES/~~NO~~**

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

The national provision transposing article 15(1) has copied the Directive's provision, providing that detention shall be ordered only where other 'sufficient but less coercive measures' cannot be applied effectively.[53] In its practical implementation, this safeguard did not have any impact because there was no system of alternatives to detention. In the absence of such alternatives, the courts were ready to accept that detention was necessary in all cases of TCNs in an irregular situation, except where the length was unreasonably long.

A new amendment to the asylum legislation which was introduced in October 2016 in order to transpose the recast Directive 2013/33 on common procedures for granting and withdrawing international protection, provides for the first time a set of measures as alternatives to detention, in order to minimise the risk of absconding:

- Regular visits to the authorities,
- A monetary guarantee
- The duty to reside in a specific place indicated, including the state reception centre
- Supervision by an inspector. [54]

Q8. Are decision-making authorities obliged to consider **alternatives measures** before resorting to detention?

**YES/~~NO~~**

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.*

As stated above, in the case of TCNs in an irregular situation who fall within the scope of the RD, detention is lawful only where other 'sufficient but less coercive measures' cannot be applied effectively.[55] The absence of any alternatives to detention, combined with the use of the terms 'sufficient' and 'effectively' suggests that, although the authorities are under a duty to examine the option of less coercive measures, they essentially have a wide margin of discretion to decide whether the measures are adequate or whether detention is more suitable.

In the case of asylum seekers, the new amendment to the asylum law foresees a set of alternatives to detention (see above) but again falls short from casting a legal duty on the authorities to adopt any of these measures in lieu of detention. The provision empowers the Minister of the Interior to use one or more of these measures were deemed necessary and the

[53] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(1), 1st subpara., available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

[54] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

[55] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(1), 1st subpara., available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

Minister's right to detain asylum seekers is rendered subject to the adopting one or more of the above measures 'where this is feasible'.[56] At the time of writing, this law was very fresh and none of these measures had been implemented in any case.

Q9. 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)*

Until October 2016 no alternatives to detention were foreseen or were available for use in the case of TCNs and therefore courts were never directed to examine whether the authorities had adequately considered less coercive alternatives before proceeding with detention. In October 2016, a set of alternative measures were introduced in the asylum legislation[57] but there was no case law at the time of writing to highlight how the issue was treated by the courts.

As elaborated under Q.5 of section (a) above, the judicial review process is restricted to examining the decision making process and not to examine the merits of the administrative decision challenged.[58] The relevant constitutional provision provides that the Court in the judicial review process is empowered to examine whether a particular administrative act is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of the powers vested in the administrative authority. However, given that judicial review was the process designated in the law for controlling the lawfulness of detention under the RD, the courts have in the majority of cases gone further than merely examine the decision making process to check whether the facts of the case justified the decision taken, thus overstepping in a way the limits set by the judicial review process. This however was never raised in the course of judicial proceedings as both litigants assumed that in the particular context the courts were mandated with going beyond the strict boundaries set by jurisprudence.

Proportionality is primarily assessed by the length of detention, in combination with the issue of due diligence demonstrated by the authorities in pursuing the TCN's removal. The same criteria and arguments are used both in judicial review processes which are intended to challenge the lawfulness of detention and in the context of applications for habeas corpus which are intended to challenge the length of detention. In the case of *Majid Eazadi* the court ruled that the principle of proportionality requires that detention of returnees should not

[56] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

[57] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

[58] Pikis G (2006), *Constitutionalism-Human Rights-Separation of Powers*, Martinus Nijhoff Publishers, Leiden/Boston, p. 128.

extend for a disproportionate amount of time and in the case at hand the applicant had been held for a disproportionately long time (four years in total).[59] On the other hand, in *Ali Faysel*, the court ruled that five months is not an unreasonably long time to detain a person who is without a passport and who had been convicted for criminal impersonation, without examining whether due diligence was meanwhile used in pursuing his speedy removal. [60]

Q10. 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.)

National law has copied verbatim articles 15(5) and 15(6) of the RD in setting a six-month and an 18-month ceiling to detention.[61] Although the law is silent as to when the timeline starts to run, it may safely be assume that this is the date of apprehension, which is the same as the date of actual placement in detention. The date of the order may precede the date of apprehension by several months until the TCN is located.

Although case law is by no means uniform, most court decisions accept that a habeas corpus application may be filed even where the applicant is in detention for less than six months. In *Malak Shawki Farak Nessim* the Court rejected the respondents' argument regarding the absolute right of the authorities to detain a person for any period of time, ruling that detention must always have the shortest possible duration and can be sustained only if a deportation procedure is in progress and is carried out with due dilligence; a detention which does not fulfill these requirements may be ruled to be illegal irrespective of whether the six month limit was reached or not.[62]

Q11. 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.*

The courts will not adopt an inquisitory role as to what actions were taken by the authorities

[59] Supreme Court, Re. Majid Eazadi from Iran and now in Block 10 at the Central Prison, Case No. Civil Application No. 137/2012, 22 November 2012.
[60] Cyprus, Supreme Court, Appeal jurisdiction, *Habibi Pour Ali Faysel v. Republic of Cyprus through the Chief of Police and the Minister of the Interior*, Civil appeal No. 236/15, 31 March 2016.
[61] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, articles 18PST(7)-(8), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html
[62] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016

and when, in order to pursue the speedy removal of a TCN in detention. However, where removal did not take place within a few months from apprehension and the authorities failed to prove that this was due to the TCN's actions or omissions or due to the delay of a third country to dispatch necessary documents, the court is likely to attribute the delay to the authorities and to their failure to use due diligence, in which case the detention is rendered unjustifiable and therefore unlawful. In *Todorovic*, the Court accepted the applicant's habeas corpus application and ordered his release on the ground that the authorities produced no proof of theirs efforts to proceed with the deportation arrangements or of its exercise of due diligence in the meantime.[63]

Q12. Does the period when asylum proceedings are pending have any impact on calculating the length of detention? (See *Kadzoev* or *Arslan*)

Where TCNs are detained whilst awaiting for the determination of their asylum applications, this detention period is calculated together with the rest of the period during which they remain in detention. The period of detention during which the detainee was an asylum seeker is not treated differently than any other detention period and is not calculated separately. Asylum seekers who are detained in relation to a crime are not entitled to be released even though their status means there is no reasonable prospect of removal due to the principle of non-refoulement. In *Hazaka*, a Syrian asylum applicant filed for habeas corpus and asked to be released since there is no realistic prospect for his removal, given the ongoing war in Syria. Relying on *Arslan*,[64] the applicant argued that he ought to be released from detention because there is no presumption that he filed an asylum application for the sole reason of delaying or averting his return to his country of origin. The Court rejected the aplication for habeas corprus on the ground that the applicant is not overed by the Return Directive since his detention and deportation resulted from his criminal conviction which led to his classification as a 'prohibited immigrant'.[65]

A new law adopted in October 2016 provides for the detention of asylum seekers for a list of reasons which are not related to the commission of any offence (ascertaining their identity or nationality or elements on which the asylum application is premised etc).[66] At the time of writing, however, there was no case law on these provisions to shed light on their implementation and interpretation.

Q13. 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)

[63] Cyprus, Supreme Court, Writs jurisdiction, Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

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

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

[66] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

A common scenario is to declare a TCN as a prohibited immigrants following a criminal conviction regarding any offence, which could be very minor and / or immigration related, such as unlawful stay or work. The authorities then issue an order of detention and deportation claiming that there is no maximum detention period since the TCN is not covered by the Return Directive. Such was the case of Laal Badh Shah who was charged with illegal stay and illegal work, was sentenced to two years' imprisonment and was subsequently detained for the purpose of his deportation as a prohibited immigrant. The court adopted the authorities' argument that he fell outside the scope of the RD but decided to release him relying on the ECHR and ECtHR case law prohibiting unreasonably long detention. [67]

The procedure followed by the authorities for those TCNs who do not have a criminal conviction and cannot be declared 'prohibited immigrants' is again standardised. If removal was not carried out within the first six months for whatever reason, including the authorities' inaction, the immigration authorities will request the Minister of the Interior to renew the TCN's detention on the ground that he or she is not cooperating. The Minister will issue the renewed detention order without enquiring into the facts. If the TCN challenges the renewed detention in court, the latter is likely to rule that it is unlawful, if it relies on essentially the same facts as the first order and where the authorities fail to produce evidence of their endeavours to carry out the TCN's removal with due diligence.

In *Todorovic*, the court found that the extension of the detention period was not based on sufficient evidence proving that the applicant was not cooperating for the issue of travelling documents necessary for his repatriation, as the authorities had alleged. Immediately after his relase and whilst still in the court building, the applicant was re-arrested on the basis of a fresh detention order. He once again challenged his renewed detention with a fresh habeas corpus application which was again succesful. The court found that the fresh detention order did not rely on any new evidence that could justify the new order. In addition, the authorities failed to produce proof of their efforts to proceed with the deportation arrangements or of their exercise of due diligence in doing so. The court noted that if the immigration department disagreed with the court's first decision to release him, the correct procedure would be to appeal that decision and not to isse a fresh detention order relying on the same facts. Their failure to use the appeal procedure and the process chosen instead showed that the case was handled as a mere administrative task without looking into the facts.[68]

A standard document issued from the immigration authorities in support of the request to the Minister to renew the detention of TCNs awaiting deportation states that removal is not possible because of various obstacles since the TCNs concerned avoid or impede the removal procedure or because documents were expected to be received from a third country. In *Farak*

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

[68] Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

*Nessim*, the Court rejected this justification because it failed to describe the facts of the individual case which had allegedly impeded removal.[69]

Q14. 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**

*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.*

TCNs seeking to secure their release in the fastest possible way are likely to choose the habeas corpus procedure over the judicial review. Strictly speaking, the habeas corpus procedure is intended to challenge the duration of the detention and the judicial review is intended to challenge the legality of detention but in practice the two processes converge and either procedure may be used to achieve the same end, which is release from detention. In the case where a habeas corpus application is successful, the applicant will be released on the spot. Such release does not prevent the authorities from re-arresting the person on the same or other grounds, in which case another habeas corpus application must be lodged.[70] Other than release from detention, the habeas corpus procedure does not lead to any other results.[71]

TCNs may also challenge the detention orders through the judicial review process. If the court finds in their favour and annuls the detention order, the TCN will be released on the spot but may also initiate fresh legal proceedings against the authorities in a civil court for the recovery of 'just and equitable damages'.[72] The civil court will award damages only if and to the extent that the claimant can prove to have suffered damages as a result of the administrative act annulled.

The most common reason relied upon by the court for ordering a TCN's release is that detention was unreasonably long and the authorities failed to use due diligence to pursue removal. This is a direct result of the fact that several months and sometimes years go by before the court examines an application for judicial review, whilst in the meantime the applicant remains in detention. The long duration of the detention combined with the inability

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

[70] Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

[71] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PST(5)(a), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

[72] Cyprus, Constitution of the Republic of Cyprus, article 146(6), available at http://www.cylaw.org/nomoi/enop/non-ind/syntagma/full.html

of the authorities to produce evidence as to their efforts to pursue removal are the main reasons cited by the courts leading to a person's release from detention.[73]

Q15. **After being released, can the detainee be re-detained and under which circumstances?**

**YES/~~NO~~**

The immigration authorities have on a number of occasions re-arrested persons on the day of their release, following the successful outcome of the detainees' application to the Court for judicial review or habeas corpus. The arrest often takes place on the spot, upon the issue of the court's decision and before the released persons have the chance to exist the court building, to eliminate 'the risk of absconding'. To pursue this policy, the immigration authorities issue a fresh detention order immediately upon being informed of the court's decision to release a detainee. The fresh detention order is then faxed to the arresting officer in the court room to enable the released person's re-arrest before he leaves and the court building, even though there are no new facts justifying such re-arrest.[74] This practice is rendered possible by the very nature of the judicial review process, which is restricted to annulling only a particular administrative decision and does not extend to an over-arching prohibition of detention of the person acquitted in the absence of new facts justifying such re-arrest. Same applies to the habeas corpus writ; TCNs may succeed in securing their release following a habeas corpus application, only to be re-arrested in the courtroom a few minutes later. Even though this is a practice severely criticized by the court, there is no measure in place stopping the police from the re-apprehensions or providing consequences for the authorities who pursue such re-apprehensions. The only measure available to a TCN who is wrongly re-arrested is a fresh habeas corpus application. [75]

Q16. Please provide a short description of the system of legal aid for pre-removal detainees in your Member State.

Legal aid is, subject to conditions, available to TCNs in an irregular situation seeking to challenge the lawfulness of their detention through the judicial review process. No legal aid is available for detainees to challenge the *length* of their detention through the habeas corpus process.

The grant of legal aid for the judicial review process is discretionary upon the court and is

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

[74] Cyprus, Supreme Court, Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

[75] Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-2-14_1.htm&qstring=ZORAN%20and%20TODOROVIC

subject to the means and merits test. This involves an assessment of the financial means of the applicant the Social Welfare Services of the Ministry of Labour and Social Insurance. In order for the Court to grant legal aid, it must be satisfied that the economic situation of the applicants, by taking into account their income from work and other sources and the basic needs of themselves and their families, is such that they are unable to pay for legal advice or representation ('the means test'). In addition, the court must be satisfied that the case at hand has good chances of success ('the merits test'). [76]

The application of the 'means and merits' test has led to the rejection of the vast majority of legal aid requests from returnees, the most serious obstacle being that this process requires the applicants to argue before the judge and without a lawyer about the merits of their case and the judge must make an essential assessment of the case before hearing the evidence. Since the legal aid law was extended in 2012 to cover returnees, fewer than ten legal aid requests were successful. [77]

TCNs who are deemed to be 'subject to return as a criminal law sanction' in accordance with RD Article 2(2)(b) are removed from the ambit of the RD and lose their entitlement to legal aid. [78]

## *II. 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/~~NO~~**

*Please elaborate further, including the practice in your Member State*

National law transposing the RD has incorporated the option, available in RD article 16(1), of resorting to prison accommodation where a specialised detention facility is unavailable, provided returnees were kept separately from ordinary prisoners.[79]

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

[76] Cyprus, Law on legal aid of 2002 (Ο Περί Νομικής Αρωγής Νόμος του 2002) N.165(I)/2002 as amended, article 6C. Available at www.cylaw.org/nomoi/enop/non-ind/2002_1_165/full.html

[77] Council of Europe (2016), *Report by Nils Muiznieks, Commissioner for human rights of the Council of Europe following his visit to Cyprus from 7 to 11 December 2015*, Strasbourg, 10 March 2016, available at http://www.childcom.org.cy/ccr/ccr.nsf/All/3395F3B3F73B53AAC2257F8E00241176?OpenDocument

[78] Cyprus, Law on legal aid of 2002 (Ο Περί Νομικής Αρωγής Νόμος του 2002) N.165(I)/2002 as amended, articles 6C(5)(b). Available at www.cylaw.org/nomoi/enop/non-ind/2002_1_165/full.html

[79] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PZ(1), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

run by a committee, chaired by the Permanent Secretary of the Ministry of Justice, the Chief of Police and representatives from the Ministries of Health, Labour and Social Insurance, Finance and Interior. Since the opening of this centre, returnees detained in other spots were gradually transferred to this. Currently, the centre in Menoyia is used to detain only TCNs awaiting removal.

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**

No ordinary prisoners are detained in the Menoyia Detention centre, which is used exclusively for returnees. However, TCNs convicted for the offence of being 'prohibited immigrants' under article 6 of the immigration law will serve their sentence in prison together with ordinary prisoners. Article 6 defines 'prohibited immigrants' to include, inter alia:

- Persons who have been deported from Cyprus; [80]

- Persons whose entry in the Republic is prohibited by virtue of any legislation in force; [81]

- Persons considered as illegal immigrants by virtue of the provisions of the immigration law.[82]

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 entire spectrum of article 16 of the RD has been transposed verbatim into national legislation,[83] however practical implementation of the material conditions has been described as lacking. There are no special facilities or accessibility features or programs for vulnerable detainees. There are no health professionals on site and there is no access to educational or recreational activities. There is no list of rights posted on any wall and detainees appear uninformed of their rights. Although the authorities had issued a booklet with the rights of detainees, this is kept in the detainees' personal file which is not in their possession. Catering

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

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

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

[83] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, articles 18PZ(2)-(5), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

does not respect cultural and religious habits of the detainees. Access to the asylum system is problematic, as members of staff tend to refuse or delay transmitting their asylum applications to the Asylum service.[84]

The most serious issue facing detainees, however, is the repressive regime imposed by the guards which often manifests itself into outright violence. The report of the Council of Europe's Committee for the Prevention of Torture on Cyprus published in December 2014 focused on the ill-treatment of TCNs in detention, consisting of slaps, punches and kicks to the head and body, the inappropriate use of tear gas, the inappropriate conditions of detention and the detention of migrant unaccompanied minors under conditions of solitary confinement.[85] During the same year, Amnesty International also published an article on detention of TCNs in Cyprus criticizing the practice of Cypriot immigration authorities to routinely detain hundreds of returnees in prison-like conditions for extended periods of time, including Syrians and women separated from their young children.[86] This was not the first time Amnesty examined the conditions of detention of TCNs in Cyprus; in 2012 Amnesty published a comprehensive report on the detention conditions at Menoyia highlighting several problematic practices.[87] The Ombudsman documented practices of violence and repression as follows:

- Excessive force is often used to discipline detainees (e.g. pepper gas was used to force protesting prisoners to return to their cells). There have also been complaints to the Ombudsman's office about severe forms of violence which the Ombudsman's investigation showed to be well-founded.[88] Measures taken by the guards can be disproportionate to the conduct they intend to address, like the case of a detainee who refused to get up in the morning and was denied visits and was deprived of his mobile phone for seven days.
- Detainees are transferred within the detention center, e.g. to visit the washroom, handcuffed.

A number of criminal investigation were launched into the detention conditions in Menoyia, following complaints for degrading treatment and violence against detainees but investigators could not reach a finding because of the reluctance of detainees to give testimony, which led the investigations to a deadlock.[89] Detainees usually have a mobile phone which they can use if they know the number of a lawyer, but gathering evidence to substantiate a complaint

[84] Independent Authority for the Prevention of Torture (2013), Report regarding the visits carried out at the Centre for the Detention of Migrants in Menoyia on 14 February, 3 April and 19 April 2013, Ref EMP 2.13 dated 16.05.2013

[85] Council of Europe, *Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 September to 1 October 2013*, 9 December 2014, available at www.cpt.coe.int/documents/cyp/2014-12-09-eng.htm.

[86] Amnesty International (2014) *Cyprus: Abusive detention of migrants and asylum seekers flouts EU law*, 18 March 2013, Available at www.amnesty.eu/en/news/press-releases/region/eu/cyprus-abusive-detention-of-migrants-and-asylum-seekers-flouts-eu-law-0720/#.VIivOtKUfTo

[87] Amnesty International (2012) "Punishment without a crime: Detention of migrants and asylum-seekers in Cyprus", available at http://reliefweb.int/report/cyprus/punishment-without-crime-detention-migrants-and-asylum-seekers-cyprus

[88] Report of the Commissioner for administration and human rights regarding allegations of abuse of foreigners by members of the immigration police during arrest, detention and deportation (*Έκθεση Επιτρόπου Διοικήσεως και Ανθρωπίνων Δικαιωμάτων σχετικά με ισχυρισμούς κακοποίησης αλλοδαπών από μέλη της ΥΑΜ κατά τη σύλληψη, κράτηση και απέλαση τους)* File Nos. A/P 738/2013, A/P 960/2013, A/P 1063/2013, A/P 1283/2013, A/P 1378/2013, A/P 1470/2013, A/P 1472/2013, 18 September 2013.

[89] Hadjivasilis M. (2013) 'Καταγγελίες για κακοποίηση στη Μεννόγια' (Complaints for abuse at Menoyia) in *Philelefheros* (08.08.2013)., http://www.philenews.com/el-gr/top-stories/885/156970.

against an abusive guard may be an issue; NGOs report that complaints are not possible unless a detainee has a lawyer.[90] The Ombudsman reports that police officers circulate in the detention center in civilian clothing with no visible sign as to their name or I.D. and interview detainees in a room not covered by a camera (CCTV), thus putting obstacles in the way of investigating complaints against them for any conduct of the police officers during interviews.[91]

In spite of the damning reports from monitoring bodies about detention conditions, there have never been any court cases on the subject, presumably because detainees would understandably prefer to utilize whatever resources are available to them to secure their release rather than to improve their detention conditions.

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)

National law has transposed, almost verbatim, Article 18(1) of the RD.[92] It provides for cases where an emergency situation occurs due to an exceptionally large number of TCNs to be returned, which places an unforeseen heavy burden on the capacity of the detention facility or on its administrative or judicial staff. The option to provide for longer periods for judicial review than those provided for under RD Article 15(2), third subparagraph, was not transposed. However, the national law has transposed the option with regard to the conditions of detention, providing that in these situations Cyprus may take urgent measures in respect of the conditions of detention derogating from those set out in Articles 18PZ(1) and 18PH(2) of the national law (which correspond to Articles 16(1) and 17(2) of the RD). The type or nature of emergency detention measures which can be adopted are not specified in the law.

There is no case law on the subject, nor has Cyprus been faced with an exceptionally high flow of migrants at any point.

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

There is no procedure in Cyprus for ex officio judicial intervention. The court will examine a particular case when applications by persons with a legitimate interest are submitted.

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

[90] Demetriou, C. (2013), *Evaluation of the Implementation of the Return Directive: Cyprus Country Report*, Matrix Insight in cooperation with the International Centre for Migration Policy Development (ICMPD), the European Council on Refugees and Exiles (ECRE) and the Centre for European Policy Studies (CEPS), commissioned by DG Home Affairs, Directorate C : Migration and Borders.

[91] Independent Authority for the Prevention of Torture (2013), Report regarding the visits carried out at the Centre for the Detention of Migrants in Menoyia on 14 February, 3 April and 19 April 2013, Ref EMP 2.13 dated 16.05.2013

[92] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, article 18PTH(1), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

There have been no such decisions in Cyprus.

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?

~~**YES/**~~ **NO**
There have been no cases in Cyprus on detention conditions.
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?

**YES/NO**

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

There have been no cases in Cyprus on detention conditions.

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

~~**YES**~~**/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?

**YES/NO**

**If yes:** please elaborate further on this issue

N/A. There have been no cases in Cyprus on detention conditions.

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

similar issues?

**YES/NO**

**If yes:** please elaborate further on this issue

### c. *Article 17: detention of (unaccompanied) minors and families*

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

~~**YES**~~**/NO**

There have not been any cases tried in court regarding the detention of children or families. However there is considerable literature documenting the systematic detention of minors in prison like conditions up until 2014, when there was a change of policy. Currently, the policy is not to detain children either in the context of asylum or of immigration and that there are at the time of writing no children or families in detention. However, this had not always been the case. For several years up until 2014 the police would arrest and detain unaccompanied children in non-specialised facilities for months before the Social Services would take over. The facilities included the Menoyia Detention Centre where third country nationals awaiting deportation are detained in prison-like conditions,[93] in police stations and even in prison, serving sentences for (often immigration-related) offences. The repetition and frequency of cases of detaining unaccompanied children was such that in 2014 the Ombudsman concluded that they are not merely based on reduced sensitivity on the part of the authorities but on a deliberate effort to by-pass the favourable protection framework for unaccompanied minors.[94]

The 2014 CPT report on Cyprus also criticised the practice of detaining children, stating that the CPT's delegation had met unaccompanied minors in police stations held in conditions akin to solitary confinement for several months without having been offered any support or clear information on their situation, without assessment of their particular vulnerabilities by a psychologist, without free access to legal or other assistance such as the assignment of a guardian or a social worker and without access to recreational or educational activities. The CPT concluded that detention was clearly a punitive

[93] Amnesty International (2014) Cyprus: *Abusive detention of migrants and asylum seekers flouts EU law*, available at https://www.amnesty.org/en/latest/news/2014/03/cyprus-abusive-detention-migrants-and-asylum-seekers-flouts-eu-law/; Amnesty International (2012), *Punishment without a crime: Detention of migrants and asylum seekers in Cyprus*, available at www.sos-europe-amnesty.eu/content/assets/docs/Cyprus-Migration-Report_June-2012.pdf

[94] Intervention of the National Independent Human Rights Authority regarding the treatment of unaccompanied minors until their care is taken over by the state (*Παρέμβαση Εθνικής Ανεξάρτητης Αρχής Ανθρωπίνων Δικαιωμάτων αναφορικά με τη μεταχείριση των ασυνόδευτων παιδιών μέχρι την ανάληψη της φροντίδας τους από το κράτος*) , Ref. 5/2013, 29 May 2014, available at www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/657C0ADCA0B2F779C2257E7B003AE3CC/$file/%CE%A4%CE%BF%CF%80%CE%BF%CE%B8%2005.2014-29052014l.doc?OpenElement

measure to force unaccompanied minors to "voluntarily" return to their countries and described the situation as "totally unacceptable".[95]

Detention on unaccompanied minors was further documented by the Commissioner for the rights of the child whose research established that children could be detained for as long as 10 months without the Social Welfare Services having been informed.[96] The intervention of both these institutions and pressure from Council of Europe monitoring body reports[97] has brought about a change of policy to the effect that persons who allege to be under 18 are not detained but are placed in child protection institutions until their age determination procedure.

The new asylum legislation adopted in October 2016 empowers the authorities to detain unaccompanied minors seeking asylum on the same grounds as adults (for ascertaining their identity or nationality or the invoked grounds of persecution etc).[98] The concerns and objections expressed by the Commissioner for the rights of the Child in relation to this provision during the consultation process which preceded adoption of this law were essentially ignored.[99] At the time of writing, it was still not clear whether the policy of not detaining unaccompanied minors which was implemented between 2014-2016 will continue to be applied or will be reversed in light of the new law.

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

**YES/NO**

**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.)

[95] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2014), *Report to the Government of Cyprus on the visit to Cyprus carried out by the from 23 September to 1 October 2013*, Ref CPT/Inf (2014) 31, Strasbourg, 9 December 2014, available at www.cpt.coe.int/documents/cyp/2014-31-inf-eng.pdf

[96] Cyprus, Commissioner for the Rights of the Child, *Position of the Commissioner for the Rights of the Child Leda Koursoumba regarding the first instance handling of unaccompanied minor- Findings from the investigation of complaints, from NGO consultations and from interviews with unaccompanied minors*, File No. G.E.P. 11.11.44.01, November 2014. Available at www.childcom.org.cy/ccr/ccr.nsf/All/5F744453BEEA3543C2257D8F003A7EDD?OpenDocument

[97] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2012), *Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 19 May 2008*, Strasbourg, Council of Europe, 6 December 2012, available at www.cpt.coe.int/documents/cyp/2012-34-inf-eng.htm#_Toc216522049

[98] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

[99] Cyprus, Commissioner for the rights of the child, *Position of the Commissioner for the rights of the child on bills entitled 1. Law on refugees (Amendment) of 2015 and 2. Law on refugees (Amendment)(No. 2) of 2015 [Θέσεις της Επιτρόπου Προστασίας των Δικαιωμάτων του Παιδιού, Λήδας Κουρσουμπά, επί των Νομοσχεδίων με τίτλους*

1. *Ο περί Προσφύγων (Τροποποιητικός) Νόμος του 2015*
2. *Ο περί Προσφύγων (Τροποποιητικός) (Αρ.2) Νόμος του 2015]*

available at http://www.childcom.org.cy/ccr/ccr.nsf/All/7DFF6DA6A4184AC1C2257FE9003DEB67?OpenDocument

There have been no such cases examined by the Cypriot courts. There are also no specialised facilities where children or families may be detained.

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?

No cases were examined by the courts in relation to the detention of minors and families.

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**

**If yes:** please elaborate further on this issue

No cases were examined by the courts in relation to the detention of minors and families.

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

**YES/NO**

No cases were examined by the courts in relation to the detention of minors and families.

*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**

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

The courts do not carry out any ex officio supervision or control of places of detention and do

not have any special powers relating to places for detention of families and children. Currently there are no specialised facilities for detaining children or families. Up until 2014, prior to the change of policy regarding detention of minors, unaccompanied children were detained either at the Menoyia detention centre where TCNs awaiting deportation are held or in police stations. Both the Equality Body/Ombudsman and the Commissioner for the rights of the child have access and mandate to inspect these facilities but this is not done systematically partly due to lack of resources but mainly because they were not always informed by the police whenever minors were detained.

d. *Article 18: Emergency situations*

Q3. Has the national legislation implementing Article 18 RD - or Article 18 as such - been activated in your Member State?

~~**YES**~~**/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.?

Serving a prison sentence following a conviction for a crime under the penal code is a wholly different matter than immigration detention. In the former case, convicts may only challenge their sentence through an appeal against their conviction or against the sentence imposed by the court. Where the two types of procedures appear to merge is through the automatic process of declaring TCNs who have served a prison sentence as 'prohibited migrants', following which detention and deportation orders are issued against them.[100] TCNs who have served their sentences in prison, irrespective of how minor the offence, are served with a detention and deportation order and are transferred from the prison to the Menoyia Detention Center where TCNs awaiting deportation are detained. These detainees are typically treated as falling outside the scope of the RD[101] and the safeguards of the RD are seen as inapplicable to them,[102] although the courts may decide to apply the safeguards and standards of the ECHR and ECtHR case law in order to order their release after prolonged detention.[103]

[100] Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, articles 6 and 14, available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html

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

[102] Re the application of Antoan Hazaka, asylum seeker from Syria and now at the police detention centre in Menoyia for the issue of a habas corpus writ, Case No. 110/2013, 19 July 2013.

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

Distinction between detention in the context of asylum and detention in the context of pre-removal procedures is even further blurred. Asylum seekers are routinely detained for the purpose of removal immediately upon rejection of their asylum claim and very often before rejection. The new asylum law adopted in 2016 grants the authorities wider powers of detaining asylum seekers prior to the determination of their asylum claim essentially to address the risk of absconding and in circumstances which are similar to those of TCNs in an irregular situation.[104]

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 implementation of the RD has been instrumental in the setting of ceilings to long detention periods. The ECHR was applicable in Cyprus for several decades prior to the transposition of the RD, but it was only after the RD was adopted that the ECHR was invoked as the legal basis for invalidating detention orders which could not have been invalidated by the RD as a result of a criminal sanction that placed the detainee outside its scope.

The implementation of the RD did not bring any changes in the field of alternatives to detention. The requirement in RD article 15(1) for less coercive measures had no impact in Cyprus because the RD did not specifically require that Member States introduce such alternatives; in the absence of any alternatives to detention, the authorities proceeded with their practice of detention without infringing the RD.

The RD did not bring about any changes to access to justice or to effective remedies. The mechanism foreseen under the law transposing the RD for the challenging of detention makes use of existing procedures and does not introduce more contemporary and effective routes to justice. The legal aid law was amended as a result of the RD in order to provide for the first time for legal aid in judicial review procedures, but this right is so severely curtailed by the means and merits test that only a handful of people have benefited from this right.

The RD has for the first time provided legal justification for the detention of children, which started to be practiced at a large scale shortly after transposition. After three years of systematic detention of children, the government was forced to change its policy following criticism from national monitoring bodies and especially from the monitoring bodies of the Council of Europe. However in 2016 new asylum legislation adopted pursuant to another EU directive has once again introduced the possibility for detaining children. It remains to be seen whether the government will revert to its previous policy of detaining children and whether the Council of Europe bodies will maintain their pressure in order to preserve the standards and safeguards of international law.

Although the RD and the CJEU case law did not bring about a significant shift in judicial trends away from criminalizing migration, they have contributed to putting the issue on the agenda for a more enlightened generation of judges to debate and develop.

Q3. Has the Return Directive and/or European jurisprudence impacted on the division of

[104] Cyprus, Law amending the Refugee Law (No.2) N. 105(I)/2016, 4577, 14 October 2016, available at http://cylaw.org/nomoi/arith/2016_1_105.pdf

competences between the administration and national judiciaries? What about the relation between the different levels of the judiciaries?

The RD has not impacted the strict division of competences between the courts and the administration. The national law transposing the RD did not introduce any competencies for the courts to conduct ex officio investigations or monitoring or to perform any tasks not previously foreseen under national legislation.

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

Cyprus still lacks a properly and fully functioning monitoring body, with resources and expertise to properly follow up the process of return, from the point of issue of the return decision up until the return flight. The ombudsman's office was appointed as monitoring body in 2013 but is yet to be allocated a budget to be able to carry out its functions.