REDIAL PROJECT

National Synthesis Report – Czechia

(Draft)

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

by David Kosar

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

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

1. Article 15 RD: detention

a. Competent authorities ordering and reviewing pre-removal detention

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

NO

The Czech administrative courts can only ex post revise the lawfulness of the detention decisions taken by administrative authorities.

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

Control of the lawfulness of the detention decisions falls under the competence of administrative courts.

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. Administrative courts are competent to review the initial detention decision as well as decisions extending the detention.

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

Judicial review is always performed only upon applicant's request.

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.

There are two types of judicial review of the TCN's detention. Both of them are available before administrative courts that consist of two instances – regional courts and the Supreme Administrative Court (hereinafter also the SAC).

Until 31 December 2013, judicial review was available both before civil courts and before administrative courts. However, these two types of remedies had separate and different procedures.

(1) Administrative courts review can be initiated by the TCN in 30-day period after the detention decision was issued. The judgment is adopted by a single, non-specialised judge. Judicial review has to be undertaken within 7–day time-period since acquiring a case-file from the Police. Within this type of review, administrative courts control lawfulness of the decisions, i.e. whether conditions were fulfilled to detain a foreigner, whether the decision contained sufficient reasons, whether the administrative authority did not step out of the limits for discretion. The courts, however, do not have the competence to deal with the question of legality of continuance of the detention – ie. whether any circumstances that would justify termination of the detention have occurred. Administrative courts work on a cassation principle and thus can either dismiss the action or quash the detention decision and refer the case back to the police authority. If the lawsuit was dismissed, the TCN can file a cassation complaint to the SAC within 2 weeks of delivery of the regional court judgment. The Supreme Administrative Court then decides in 3-judge panels.

In the past, administrative courts did not have the power to order the release of the TCN from detention in case they find that the decision was not lawful. In order to rectify this deficiency from the point of view of Art. 5(4) ECHR, a new article was introduced to Alien's Act (hereinafter also ALA), pursuant to which detention had to be terminated as soon as the court annulled the decision on detention. However, the administrative judicial review lacked important aspect required by Art. 5 ECHR – a 'repeated' review of continuing detention. Being governed by *ne bis in idem* principle, the TCN may not attack the same decision twice.

(2) These deficiencies were supposed to be rectified by judicial review before civil courts, which could take decisions repeatedly, which could review whether there were conditions for detention fulfilled at the time of decision-making of the court, and which could order a release of a TCN. These courts, however, could not review 'lawfulness' of the detention decision.

These civil courts review and administrative courts review were supposed to mutually complement each other. However, this 'dual system' did not function effectively and caused a lot of problems. Most importantly, civil courts were not able to provide speedy judicial review of continuing detention (see Judgment of the SAC of 22.07.2010, No. 9 As 5/2010-74; and Judgment of the SAC of 04.09.2012, No. 7 As 97/2012-26), given that unlike administrative courts, civil courts were not bound by the 7–day time period for adopting a decision. In addition, the criteria used by civil courts on the one hand and by the administrative courts on the other diverged significantly.

For these reasons, since 1 January 2014, all powers regarding judicial control of detention of TCNs were vested with administrative courts [Art. 172(4)-(6) ALA] and the competence of civil courts in these matters was abolished.

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

The scope of the review of factual elements of the case differs from the review of legal elements.

The judicial control of facts before administrative courts in the Czech Republic is complex. The standard of review of facts is stipulated in Art. 103(1)(b) of the Code of Administrative Justice (hereinafter also CAJ), which is rather convoluted and reads as follows:

'*[Appeal and] Cassation may be submitted … on grounds of the claimed … (b) fault of proceedings consisting in that the facts from which the administrative authority proceeded in the contested decision had no support in the documents or is in contradiction with them, or in that in determining the facts the law was violated in provisions on proceedings before the administrative authority in a way that could have affected its lawfulness, and for this claimed fault the court deciding on the matter should have quashed the contested decision of the administrative authority; such procedural faults include non-reviewability of the administrative authority's decision on grounds of its incomprehensibility*'

This means that the administrative courts will quash the administrative decision because of the wrong factual assessment only in case when the factual assessment has no support in or is in contradiction with the evidence, if procedural rules in establishing facts were severely violated, or if the administrative decision is incomprehensible. Even though the application of this standard in practice varies from one judge to another, it can be concluded that the control of factual elements of a case of detention is (1) considered as being full and not limited to a manifest error of assessment, when the assessment of facts by the Police is explicitly challenged by the TCN in the appeal; but (2) it is limited to a manifest error of assessment of facts if the assessment of facts by the Police is not explicitly challenged by the TCN or is challenged only generically/superficially in the appeal.

In other words, the answer to this question should be understood in conjunction with the lack of ex officio judicial review of detention that results from the principle of concentration applicable before the Czech administrative courts (i.e. need to disclose the reasons for considering the decision unlawful within the time-limit to lodge the action).

The judicial control of legal elements before administrative courts in the Czech Republic is stipulated in Art. 103(1)(a) CAJ, which reads as follows: '[Appeal and] *Cassation may be submitted … on grounds of the claimed … (a) unlawfulness consisting in incorrect consideration of a legal issue before the court in the previous proceedings*'. The term 'incorrect consideration of a legal issue' has been consistently interpreted by the administrative courts as a full control of legal elements which is not limited to a manifest error of assessment.

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

NO. Judicial control of detention is limited to consideration of the arguments raised by the TCN. However, the negative consequences of the strict application of the principle of concentration has been mitigated by the broad interpretation of arguments raised by the TCN in detention cases and by the case law of the Constitutional Court that prohibits overly formalistic treatment of the arguments raised by the parties. We might thus say that, in practice, judicial review of detention is somewhere in between ex officio review and review of points raised by the parties. Nevertheless, despite the fact that the strict procedural rules have been somewhat relaxed in asylum and immigration law cases in order to ensure the effective access to the court, the judge still limits the control only to the arguments, understood broadly, raised by the parties.

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

There are no significant differences regarding the scope of judicial review. However, there are several differences regarding the procedural rules. In particular, there is a shorter time limit to lodge the cassational complaint before the SAC [2 weeks in contrast to 30 days for lodging an appeal to the regional court; see Art. 172(1) ALA]; (2) the cassational complaint does not have automatic suspensive effect; (3) there is no time limit for the decision of the SAC on detention of the TCN; and (4) there is an obligatory representation by advocates whose quality varies a lot (in other words, in contrast to proceedings before a regional court, a specialized NGO cannot represent a foreigner before the SAC).

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

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)

The Czech Supreme Administrative Court made a preliminary reference in C-534/11 *Arslan*. In the *Arslan* case, a question arose whether a detention of the TCN can continue after he logged an application for international protection.

The case concerned a TCN – national of Turkey – who entered the territory of the Czech Republic in hiding and without valid travel document and residence permit. In the past, he resided with a false passport in Greece, and consequently was returned to Turkey and registered in the Schengen Information System as a person to be refused entry into the Schengen Area. Based on this, a return decision was issued and subsequently the detention decision was adopted on the ground that with regard to his previous conduct, there is a risk that he would obstruct enforcement of the removal decision. On the same day as that decision was adopted, Mr Arslan made a declaration for purposes of international protection to the Czech authorities.

Afterwards, the detention of Mr Arslan was extended by new decision for 120 days on the ground that the extension was necessary for preparing for enforcement of the decision to remove him, in view of the fact, in particular, that the procedure relating to his application for international protection was still ongoing and it was not possible to enforce the removal decision while that application was being considered. The Police considered the application for international protection to be made with an intention of hindering enforcement of the removal decision.

Mr Arslan challenged the decision extending his detention at the administrative court. His action, however, was dismissed pointing particularly to the fact that the action was based on purely self-serving and speculative arguments. Thus Mr Arslan filed a cassational complaint, claiming inter alia that at the time of issuance of the decision on extension of the decision, the realistic prospect of removal was lacking, since it was not probable that his expulsion would take place during the period set for his detention. He claimed that it is very probable that the international protection proceedings

(including the consequent judicial proceedings), during which the return decision cannot be enforced, would not end within the 180 days, which is a maximum period for detention of the TCN.

The Supreme Administrative Court made a reference to the CJEU for a preliminary ruling, asking inter alia, whether an applicant for international protection may, under Return Directive, be lawfully kept in detention. In particular, the SAC asked whether Return Directive should be interpreted as meaning that the detention of a foreigner for the purpose of return must be terminated if he applies for international protection.

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

The changes into Czech law were introduced even before the CJEU adopted the judgment in *Arslan* case. As of 1 May 2013, Law No. 103/2013, amending the Asylum Act (hereinafter also ASA) as well as Alien's Act came onto force and stipulated that once a TCN lodges an application for international protection, the Police must issue a new detention decision within 5 days [see Art. 46a(2) ASA] if they want to keep a TCN in detention. This new decision, however, must no longer be based on the Alien's Act, but on the Asylum Act. Once this new 'asylum detention' decision was issued, the initial 'return detention' decision automatically expires (see e.g. Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124, § 17). The problem, however, was that the reasons for detention of the TCN under Asylum Act did not cover all situations under Alien's Act. Hence the SAC had to decide whether in the cases, when Art. 46a ASA is not applicable, a new detention decision under the ALA must be issued or whether it is enough to review the initial detention decision internally without issuing a new decision. The SAC eventually opted for the former and held that despite the fact the ALA does not stipulate such a process, a new decision on detention must be issued; other interpretation would be inconsistent with the CJEU's *Arslan* judgment (see e.g. Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124, §§ 21-24).

This abovementioned amendment was primarily adopted for the purpose of timely transposition of other EU directives and the changes in regulation of detention of asylum seekers were introduced on the basis of the ongoing preliminary reference proceedings. However, since the adoption of the amendment preceded judgment of the CJEU, the changes did not fully reflect the requirements arising from *Arslan*. Implementation of CJEU's ruling was completed only two years later by Law No. 314/2015 which introduced a new regulation of detention of asylum seekers. Art. 46a of the Asylum Act was significantly complemented and new grounds for detention of asylum seekers were added. One of the new grounds for detaining TCN who applied for international protection is the fact that the application was lodged in the detention facility provided that there are reasonable grounds to believe that the application was made only to avoid or hamper execution of forcible return (deportation, extradition etc.). Similar provision was also added into Alien's act (Art. 124 para 4 ALA). According to this provision, the Police are obliged to issue a new decision in case that a TCN lodged application for international protection provided that the decision on detention in accordance with the Asylum Act is not adopted. New decision needs to be adopted within 3 days from the time when the Ministry of the Interior (which is competent to decide on the detention under Asylum Act) ought to adopt a decision. In other words, if the Ministry of the Interior does not decide that there is a reason to detain a TCN under Asylum Act within the 5-day time period, the Police must either adopt new detention decision under ALA within additional 3 days (thus 8 days after the application was lodged), considering the existence of reasonable prospect of removal with regard to the ongoing asylum proceedings, or end the detention and release of a TCN.

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?)

The Czech administrative courts have referred to the relevant CJEU's case-law regarding the RD rather sporadically so far. They usually engage with the CJEU's rulings only when the applicants make the reference and the court thus has to deal with such argumentation. The Czech administrative courts refer a bit more often to the Return Directive very often. The good example is the Judgment of the SAC No. 9 As 5/2010 of 22 July 2010, that referred to the Return Directive even before the expiration of the transposition deadline. The other good examples of the extensive references to the Return Directive are Judgment of the SAC of 7 December 2011, No. 1 As 132/2011 and Judgment of the SAC of 18 October 2011, No. 7 As 107/2012.

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.)

The Czech administrative courts have been reluctant to refer to the EU Charter in relation to the detention of TCNs (note that, in general, references to the EU Charter by the Czech administrative courts are very rare). On the other hand, ECHR is being referred to rather often in detention cases. The courts, however, usually make just general references to the established ECtHR case law regarding Art. 5(1) ECHR and to the basic principles embodied in this provision. They emphasise the importance of the right to liberty as one of the fundamental rights, and highlight the purpose of Art. 5 ECHR, which is to protect this right by avoiding the risk of arbitrary detention (see e.g. the SAC's judgments No. 7 Azs 11/2016–32, No. 2 Azs 299/2015–27, No. 3 Azs 259/2015-26 and No. 5 As 96/2011-57).

The Czech courts have also referred to the ECHR in connection with the reasonable prospect of removal. Courts point to the fact that the detention is only lawful as long as the purpose of the detention – TCN's expulsion – is followed (see e.g. SAC's judgments No. 9 Azs 3/2016–68, para. 22; and No. 9 Azs 28/2016–32, para. 16). Interestingly, when the SAC ruled for the first time that without the existence of the reasonable prospect of removal the detention is unlawful, no reference to the ECHR was made.

References to the ECHR in the case law of administrative courts are thus mostly limited only to some general remarks and conclusions are rather based on the domestic legislation.

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, in Judgment of the SAC of 18 October 2011, No. 7 As 107/2012 the Supreme Administrative Court rejected the textual interpretation of ALA adopted by the Police and the regional court, and instead relied on the purposive interpretation of the term 'return' in Article 3(3) RD and its implications for Art. 15(1) RD.

In this case a TCN was detained under art. 129 ALA, which regulates detention for the purpose of his/her readmission under international agreement or under Dublin regulation. The problem was that

the detention under Art. 129 (unlike the detention under Art. 124) was not conditional upon the fact that less coercive measures cannot be used. The Police as well as the regional court thus argued that the Police was not obliged to consider less coercive measures before deciding about detention of the TCN. The SAC, however, came to a different conclusion. Firstly, the SAC argued that the term 'return' in Art. 3(3) RD covers also the readmission of the TCN under international agreements or Dublin regulation. Accordingly, if Art. 15(1) RD, which applies to preparation of any form of return (thus not only forced expulsion), allows the detention only provided that any less coercive alternatives cannot be used, such requirement also needs to be applicable to any pre-removal detention, including the case concerned. According to the SAC, the aforesaid can be inter alia concluded from the purposive interpretation of the Art. 15(1) RD – being the effort to minimize the restriction of personal freedom in cases of pre-removal detention of TCNs.

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

NO, I am not aware of such example.

c. National case-law: major trends

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

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

The Supreme Administrative Court has repeatedly emphasized in its case law that 'while interpreting cited provisions [regarding detention of the TCN for the purpose of return], it is necessary to bear in mind that the detention of a foreigner presents limiting, or (depending on the nature, duration, consequences and the method of detention) even deprivation of personal liberty' (see e.g. SAC's judgments No 7 Azs 11/2016-30; No. 4 Azs 262/2015-31; and No. 7 As 79/2010–164).

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

YES/NO

The Czech administrative courts controlling the lawfulness of the detention cannot, in general, control the lawfulness of the very return decision. However, the SAC quashed two decisions on detention concerning an Afghan national (Judgment of the SAC of 10 February 2016, No. 5 Azs 226/2015) and an Iraqi national (Judgment of the SAC of 17 December 2015, No. 5 Azs 236/2015), because the Police in the detention decision did not sufficiently addressed whether there is any reasonable prospect of the return of a given national (due to the complicated situation in Afghanistan and due to the civil war in Iraq). These two SAC's judgments are rather rare though.

The argumentation of the SAC in both cases is almost the same. According to the SAC the Police failed to properly assess the possible barriers regarding the return of the TCN concerned to his country of origin (Afghanistan in one case and Iraq in the other). In both these cases the Police only generally argued that from the common practice, it is known that in the case of the TCN there is a reasonable prospect of removal because there is no obstacle of permanent nature capable of preventing the return. The SAC pointed to the fact that at the time of adopting the decision was generally known that the security situation in the country of origin of the TCN concerned is rather problematic and thus the Police was obliged to at least briefly consider the reasonable prospect of removal in this context before detaining the TCN.

Nevertheless, it shall be noted that before a return decision is adopted, the Ministry of Interior is obliged to issue so called 'binding opinion as to whether the TCN's return is possible' (this binding opinion is obligatory part of every return decision by which the Ministry of the Interior considers possible threats to life and/or health of the TCN if he was returned). In vast majority of the cases, the detention decision is adopted following the return decision (however, the SAC allows to detain a TCN even if the return decision was not adopted yet, as long as the proceedings have been initiated). What makes these two cases rather rare is the fact that at the time of deciding about the detention of the TCNs, the return decision was not issued yet and thus the Police did not have a binding opinion of the Ministry. The conclusions of the SAC thus need to be viewed also in this context.

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

YES

The Aliens Act does not explicitly require existence of the reasonable prospect of removal for the lawfulness of the detention. The criterion of the reasonable prospect of removal was implemented into Czech law only through decision-making of administrative courts, especially by the SAC. The leading case on this issue is judgment No. 1 As 12/2009-61 of 15 April 2009. In accordance with the ECHR and the RD (however, without explicitly referring to these instruments) the SAC highlighted the close link between the detention of a TCN and the possibility of carrying out her expulsion. The SAC rejected the position of the Municipal Court in Prague, according to which detention and administrative expulsion are two completely different institutes with different conditions for their use. The SAC held that it is necessary that authorities, when deciding about detention of a TCN, must also consider whether the enforcement of the administrative expulsion is at least potential possible. In contrast, administrative courts usually do not consider whether the reasonable prospect of removal exists or not. They tend to examine only if the existence of a reasonable prospect is sufficiently justified by the Police.

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

- *lack of due diligence;*

  Administrative courts require from the Police to provide evidence of removal arrangements that goes beyond formal acts (such as notices) that shows that reasons for detention still persist (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39). In this case, the Police made an inquiry regarding the expulsion of a foreigner of Chinese nationality, but this inquiry took place only 2 months after his detention and the Police was not able to provide any further evidence regarding other steps (such as contacting the embassy of the Chinese Republic, verifying the identity of a foreigner etc.) taken in order to prepare the expulsion of this foreigner (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 37-38).

- *lack of resources (human and material);*

  There is no relevant case law.

- *lack of transport capacities;*

  There is no relevant case law. However, the lack of transport capacities has been taken into account by the Police in the detention decisions (for instance, the Police did not detain Syrian nationals due to the lack of flights to Syria).

- *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;*

  In Judgment No. 9 Azs 2/2016–71, that concerned a return of an Iraqi national, the SAC dealt with the issue whether statistics that shows that in the past there were no removals to Iraq is the proof that removal will not be possible in the future. It summarised its established case law which essentially says that each case is different and even if no removals took place in the past it does not automatically imply that no removals will take place in the future. The very fact that removals failed in the past should not mean that the Czech state should give up any future attempt at removal.

  In Judgment No. 5 As 96/2011–57 the SAC found the reasoning of the Police insufficient as regards the existence of a reasonable prospect of removal of a TCN, who in the past was detained for the purpose of his removal, but this removal never took place, because the embassy of Ukraine refused to confirm the identity of the TCN and issue him a new travel document. Nevertheless, the SAC did not find that the reasonable prospect of removal is lacking in this case. It only criticized the Police that the previous repeated detention of the TCN and unsuccessful enforcement of his removal were not taken into consideration.

- *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);* There is no relevant case law.

- *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;*

  In Decision of the Grand Chamber No. 7 As 79/2010–150, the SAC discussed the necessity to take into account the right to family life in the detention decision. The facts of the case were as follows: the Ukrainian TCN was pregnant (she was in the 4th month of her pregnancy) and claimed that she had the child with a Slovak citizen (i.e. with an EU national). The Police as well as the regional court did not address the family life of the applicant in the *detention* decision, because under the earlier precedent of the SAC, the family life should have been discussed only in the *expulsion* decision. However, the Grand Chamber overruled its previous case law and held that the Police must take into account the Art. 8 rights of the applicant already in the *detention* decision, even though, due to time constraints, it does not have to conduct a full-fledged proportionality test at this stage (see in particular §§ 27-31 of Decision of the Grand Chamber No. 7 As 79/2010–150).

  In the same decision, SAC argued that if it is apparent that there might be some reasons preventing the return of a TCN arising from non-refoulement obligations, the police cannot detain the TCN before the Ministry of the Interior adopts the binding opinion as to whether the TCN's return is possible. Thus when reviewing the return detention with respect to the existence of reasonable prospect of removal in the light of non-refoulement obligations, the courts are usually satisfied that the binding opinion of the Ministry of the Interior provides that there are no reasons preventing departure of the TCN concerned.

  Recently, however, this position was adjusted. In very similar cases 5 Azs 236/2015 (case concerning Iraqi national) and 5 Azs 226/2015 (case concerning Afghani national) the TCNs were detained before the Ministry adopted the binding opinion. The SAC quashed both the judgment of the regional court and the detention decision of the Police, but it was not because of the missing binding opinion of the Ministry. The SAC

argued that the Police failed to sufficiently addressed whether there is any reasonable prospect of the return of a given national (due to the complicated situation in Afghanistan and due to the civil war in Iraq). See further details of the cases above in Q1 of the section c.

In Judgments No. 9 Azs 28/2016–31 or 9 Azs 2/2016–71, both dated 14 April 2016 (and both concerning a very similar cases or Iraqi national), the SAC went even further and quashed both the judgment of the regional court and the decision of the Police to extend detention despite the existence of binding opinion saying that return to Iraq is possible. The TCN concerned, who was supposed to be removed and that is why he was detained. He did not ask for asylum. The Police prolonged the decision to detain him for additional ninety days. The SAC criticized the Police that it did not justify in detail that removal is indeed possible and that it did not specify where in Iraq the TCN could be safe. Then the SAC stressed out that if TCN does not ask for asylum the proceedings to remove him or her are virtually the only possibility that principle of non-refoulement is not violated.

As regards the health issues, note that the Art. 126b(2) ALA provides that if a TCN is in such a state of health that she has to stay in hospital longer than the remaining period until 180 days (or a lower number of days stipulated in detention decision), she must be released; this provision does not apply if a TCN intentionally caused a harm to itself with the intention to evade detention [Art. 126b(3) ALA]. One can thus infer that if a TCN is hospitalized before being detained, her detention is not possible because reasonable prospect of removal would be missing (however, there is no case law that would confirm this position so far).

In addition,

- Art. 124(3) ALA stipulates that the Police must pay special attention to detention of unaccompanied minors and families with children under 18 years. Regarding the detention of families with minor children in the judgment No. 1 Azs 39/2015 (adopted after the Ombudsman issued a report saying that conditions in the detention facility in Bělá Jezová – the only functioning detention facility at that time – are not suitable for children and amount to violation of Art. 3 ECHR) the SAC quashed both the judgment of the regional court as well as the detention decision of the Police. The SAC argued that the Police (and the regional court) should have consider placing the family in the facility with more suitable conditions, which in fact was available, although it was not a detention facility but a reception centre (which is also a fenced complex of buildings that can only be left upon the permission).
- Art. 124(5) ALA provides that unaccompanied minors can be detained only on public order or state security grounds (see also Art. 129(4) ALA regarding readmission treaties).
- Art. 125(1) ALA stipulates a shorter maximum limit for detention of unaccompanied minors and families with children under 18 years, namely 90 days.

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

  There has been no relevant case law so far.

- *Else?*

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

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

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

The administrative courts are, right now, somewhere in between these two positions. Their assessment of a reasonable prospect of removal certainly goes beyond an abstract or theoretical possibility of removal (see the abovementioned cases: Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124; Judgment of the SAC of 05.04.2013, No. 7 As 139/2012-59; and Decision of the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010–150), but they have not explicitly required from the Police to provide clear information on timetabling of removal so far. As regards the statistics, as pointed above, the SAC has repeatedly refused to accept the position that if available statistics suggest that removals into particular country repeatedly failed to be carried out, this automatically demonstrates nonexistence of the reasonable prospect. According to the SAC the very fact that removals failed in the past should not mean that the Czech state should give up any future attempt at removal.

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

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

From the legislation as well as from the case law of the SAC one may get an impression that concepts of avoiding the preparation of return, hampering the preparation of return or the removal process and risk of absconding overlap and it is hard to separate them, in particular since the administrative courts have not addressed the distinction between these three reasons of detention.

The most relevant cases regarding *avoiding* of return (bearing in mind the abovementioned caveat that the SAC often does not formally distinguish between the three reasons of detention) are Judgment of the SAC No. 1 As 72/2013–31 and Judgment of the SAC No. 1 As 83/2012-31.

- In Judgment No. 1 As 72/2013–31, the SAC reviewed detention of a Vietnamese TCN who had previously violated the conditions of the alternatives to detention, had failed to depart from the territory of the Czech Republic despite being subject to expulsion decision and several removal orders, and had stopped communicating with the IOM which was organizing his removal. The SAC rejected his cassational complaint and upheld the detention decision (Judgment of the SAC No. 1 As 72/2013–31, §§ 33-36). The fact that the TCN concerned voluntarily reported to the Police every week was not considered, given his 'immigration history', sufficient to dispel the doubts about his willingness to cease avoiding return (ibid, § 36). Moreover, a TCN did not have enough money to meet the conditions of a financial guarantee (ibid.).
- In judgment of SAC No. 1 As 83/2012-31 the SAC reviewed detention of a TCN who had previously failed to depart from the territory of the Czech Republic despite being subject to expulsion decision and several removal orders, had attempted to mislead the Police by submitting false documents, and breached other obligation stipulated in ALA. The SAC rejected his cassational complaint and upheld the detention decision (Judgment of the SAC No. 1 As 72/2013–31, §§ 20-23).

According to this case law detention is proportional, if a TCN violated the conditions of the alternatives to detention in the past, failed to depart from the territory of the Czech Republic despite being subject to removal order in the past and stopped communicating with the IOM which was organizing his removal (Judgment of the SAC No. 1 As 72/2013–31; see also Judgment of the SAC No. 1 As 83/2012-31).

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

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

YES. Illegal stay/entry of the TCN justifies adoption of the return decision, but cannot in itself automatically lead to his/her detention. This was made clear by case law of administrative courts even before RD was adopted. In Judgment No. 7 Ca 209/2005-32 the Municipal Court in Prague adopted the position according to which the fact that proceedings on administrative expulsion of a TCN was initiated (in this case because of illegal stay), cannot in itself justify detention of this TCN. Consequently, the SAC explicitly held in Judgment No. 4 Azs 234/2005 that the mere fact of illegal entry and stay of a TCN (together with the lack of financial resources) is not in itself sufficient for the detention of this TCN.

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

YES

If yes:

- Which ones?

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

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

These criteria have been introduced into Alien's Act only lately by Law No. 314/2015. They include: providing false information about identity or whereabouts, or rejecting to provide such information; expressing an intention not to leave the territory or acting in a way implying such intention. Since the criteria are part of the law only shortly, there is not much of a relevant case law available yet.

In one of the recent cases, the SAC concluded that there was a risk of absconding of a TCN who destroyed his passport and who stated that he had no wish to stay in the Czech Republic but wanted to continue to travel to Germany (see Judgment of the SAC No. 10 Azs 18/2016–26).

Also the fact that a TCN expressed his/her intention to continue the journey through the territory of other EU Member States without having any residence permit within the EU according to the SAC constitutes a reasonable suspicion that the TCN might hamper the removal procedure (see Judgment of the SAC No. 8 Azs 171/2015). In this case a TCN who came to the Czech Republic from Austria told the Police during the interview that he want to continue to Germany and then Sweden where his family lives.

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

YES

Art. 124 para. 1 of the ALA, that governs detention of the TCNs for the purpose of their expulsion, provides also other grounds, besides the existence of a risk of absconding, which may justify the detention. In accordance with this provision, the police are entitled to detain a TCN under following circumstances:

- if there is a risk that the foreigner might endanger national security or seriously disrupt public order;
- if the foreigner did not leave the territory of the Czech Republic within the time specified in the expulsion decision;
- if the foreigner has seriously violated the obligation arising from the imposition of special measures for the purpose of expulsion (alternatives to detention)
- if the foreigner is registered in the information system of the Contracting States.

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

YES

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

Alternatives to detention (or the so-called 'special measures for the purpose of expulsion') are regulated by Art. 123b ALA. Currently, there are three available alternatives:

(a) obligation of the foreigner to inform the Aliens' Police about his/her residence address, to reside there, to report every change of it and to be present there for the purpose of residence control within the set period;

(b) deposit of financial guarantee;

(c) obligation to regularly report in person within the period set by the Aliens' Police.

Until 18 December 2015, measures under letter (a) and (c) formed only one alternative to detention. This was changed by Law No. 314/2015. No additional alternatives are considered by administrative authorities.

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

YES

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

In Judgment of the SAC No. 1 As 132/2011-51 the SAC held that the Police must always consider alternatives to detention before resorting to detention; in order to assess the viability of alternatives to detention the Police must examine whether a TCN lives permanently on a particular address and is willing to report on regular basis, and/or whether he possesses enough money to deposit a financial guarantee. This case was repeatedly cited to in the subsequent cases before SAC (see e.g. Judgment of the SAC No. 1 As 11/2012–81; Judgment of the SAC No. 3 As 30/2011–61; and Judgment of the SAC No. 4 As 12/2012-23).

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

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

The Czech Constitutional Court applies a standard three-step test of proportionality to the limitation of the right to liberty, which consists of the following stages: (1) Test of Suitability/Appropriateness:, i.e. whether the institute restricting a certain basic right allows the achievement of the desirable aim; (2) Test of Necessity, i.e. whether there is an alternative measure allowing to achieve the same objective without impinging upon fundamental rights and freedoms (or that impinges upon fundamental rights and freedoms to a lesser extent); and (3) Test of Balancing. i.e. weighing of conflicting rights and public interests (on the proportionality test in general, see Judgment of the Constitutional Court No. Pl. US 4/94 Anonymous Witness I of October 12, 1994; or Judgment of the Constitutional Court No. III. ÚS 256/01 Photo-Identification of March 21, 2002; for the application of this test to criminal detention, see Judgment of the Constitutional Court No. I. ÚS 2208/13 David Rath of December 11, 2013).

However, administrative courts have not explicitly applied this stringent proportionality test so far in cases of detention of TCNs and the Constitutional Court was likewise somewhat reluctant to require from administrative courts to adopt a more intensive standard of review (see e.g. Judgment of the Constitutional Court Pl. US 10/09 Detention of Foreigners of December 15, 2009).

As a result, administrative courts often proceed on the case by case basis and have not stipulated a coherent set of criteria so far. The leading cases are as follows. In Judgment of the SAC No. 1 As 132/2011-51 the SAC held that the Police must always consider alternatives to detention before resorting to detention; in order to assess the viability of alternatives to detention the Police must examine whether a TCN lives permanently on a particular address and is willing to report on regular basis, and/or whether he possesses enough finance to deposit a financial guarantee. This case was repeatedly cited to in the subsequent cases before SAC (see e.g. Judgment of the SAC No. 1 As 11/2012–81; Judgment of the SAC No. 3 As 30/2011–61; Judgment of the SAC No. 4 As 12/2012-23).

In several cases the SAC also explained when detention is proportional and alternatives of detention are insufficient. According to this case law detention is proportional, if a TCN violated the conditions of the alternatives to detention in the past, failed to depart from the territory of the Czech Republic despite being subject to removal order in the past and stopped communicating with the IOM which was organizing his removal (Judgment of the SAC No. 1 As 72/2013–31; see also Judgment of the SAC No. 1 As 83/2012-31); when a TCN has a record at the INTERPOL Criminal Information System (ICIS), is looked for by Interpol and did not leave the Czech Republic after a previous expulsion order (Judgment of the SAC No. 2 As 39/2013–50); when a TCN repeatedly violated the ALA by hampering expulsion and violating the prohibition to stay on the territory of the Czech Republic and when he served a prison sentence for staying in the Czech Republic illegally (Judgment of the SAC No. 8 As 33/2013–35); Most of these cases involved TCNs with a rather convoluted 'history' of violating immigration laws.

Under any circumstances, the Police must provide reasons why it did not use the alternatives to detention and no time constraints may justify departure from this duty (see Judgment of the SAC No. 9 As 130/2011-83; Judgment of the SAC of 18.10.2012, No. 7 As 107/2012-40; Judgment of the SAC of 28.03.2012, No. 3 As 30/2011-57; Judgment of the SAC of 18.01.2012, No. 8 As 36/2011-83; Judgment of the SAC of 07.12.2011, No. 1 As 132/2011-51; or Judgment of the SAC of 23.11.2011, No. 7 As 79/2010-150). If the Police fails to consider any of the alternatives in the detention decision, administrative court will, most probably, annul the decision for non-reviewability, even if in practice, the alternative could not be used.

Administrative courts, working on a cassational principle, however, can only either dismiss the action or quash the contested decision. They thus cannot substitute their own discretion to that of the Police. However, it is important to note that if the administrative court quashes the detention decision of the Police, it always means that the TCN concerned must be released from detention.

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

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

Article 125(1) ALA stipulates that 'detention cannot exceed 180 days' (unless strict conditions for renewal of detention beyond 6 months are met). In case of minors and families with children, the detention cannot exceed 90 days. Nevertheless, Art. 124(3) ALA (that concerns expulsion) and Art. 124b(3) ALA (that concerns removal) provide an additional condition that the Police, when determining the length of detention, must take into account:

i. the complexity of the preparation of removal/expulsion; and

ii. the needs of unaccompanied minors and the families with children under 18 years.

In practice, the length of the initial detention varies. There is no statistics available, but, after the transposition of the Return Directive, detention is usually ordered for a period shorter than six months (e.g. for 30, 60 or 90 days). On the other hand, the standard 'as short as possible' is not explicitly mentioned in the ALA and is not explicitly applied by the Police.

There is very little case law that would deal with the length of detention in more detail and no coherent set of criteria or a test to review the exact length of detention has been developed by Czech courts so far. In the Judgment No. 1 As 93/2011 the SAC emphasised that the determination of the length of the detention needs to be properly justified so that the courts are then able to examine whether the Police did not misuse the administrative discretion or exceed its limits. The main criterion for determining the length of the detention according to the SAC is the anticipated complexity of preparing the removal. Therefore the reasoning of the detention duration must necessarily include a list of envisaged actions that need to be taken in order to execute the removal, together with the estimated time required for these actions.

According to the ALA, detention starts running from the date of apprehension [Art. 125(1) ALA]. The Police interpreted this provision to mean that detention starts running from the date of apprehension under the ALA. This interpretation meant that detention under the Police Act (see Q.1) did not count towards the 6-month limit. However, the SAC changed this practice and held that both detention under the ALA and detention under the Police Act count towards the 6-month limit (Judgment of the SAC of 10.04.2014, No. 2 As 115/2013-59). This means that detention starts running from the moment of apprehension no matter under which regime this apprehension was ordered.

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

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

The term 'due diligence' has not been explicitly transposed to the ALA and hence there are only few relevant cases. In Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, the SAC concluded that deprivation of liberty is a serious interference in TCNs' rights and hence the Police must in the process of arranging the removal act with due diligence, actively, dutifully and without undue delays (see § 31). Interestingly, the SAC drew its conclusions from the extensive discussion of the Strasbourg case law (see §§ 27-28). Subsequently, the SAC required from the Police to produce evidence of removal arrangements that goes beyond formal acts such as notices that

reasons for detention still persist. In this case, the Police made an inquiry regarding the expulsion of a Chinese national, but this inquiry took place only 2 months after his detention and was not able to provide any further evidence regarding other steps (such as contacting the embassy of the Chinese Republic, verifying the identity of a foreigner etc.) taken in order to prepare the expulsion of this TCN (see §§ 37-38).

The problem regarding the due diligence criterion lies also in the Czech version of the RD, which shifts the original meaning of the RD. While the English version clearly stipulates that '*Any detention shall be … only maintained as long as removal arrangements are in progress and executed with due diligence*' (emphasis added), the Czech version reads as follows '*Jakékoli zajištění musí trvat … pouze dokud jsou s náležitou pečlivostí činěny úkony směřující k vyhoštění'*, which means *'Any detention shall be … only maintained as long as actions towards expulsion are taken with due diligence'*. This means that the 'as-long-as-removal-arrangements-are-in-progress' criterion and the due diligence requirement were merged together and thus the due diligence criterion is not explicitly considered a separate criterion for review of actions taken by the Police.

The interpretation of what 'due diligence' in Art. 15(1) RD means is a legal question and thus the full judicial control applies. The good example of the standard of review exercised by the Czech administrative courts is the abovementioned Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39. In this case, the SAC explicitly rejected the deferential review exercised by the Municipal Court in Prague, which held that it is up to the Police how to proceed with removal arrangements. The SAC held that such a limited judicial control would not be able to exclude arbitrariness and is contrary to the ECtHR's case law (§§ 22-31). Therefore, administrative courts are not satisfied with the basic information that the Police made some progress in removal arrangements. Instead, they require the Police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before courts (§ 37 in fine).

Regarding the possibility of the reviewing administrative court to take initiative and search for new elements in order to prove that the action taken by the competent administrative authorities could have taken less time than that claimed by those authorities, there has been no case law so far.

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

YES

As mentioned above, the Czech Supreme Administrative Court was the court that made a preliminary reference to the CJEU in *Arslan.*

In the follow-up procedure in the *Arslan* case before the SAC, the SAC held that detention under ASA counts towards the maximum length of detention stipulated by ALA. Moreover, if the maximum detention limit under ASA expires, the TCN who lodged an application for international protection cannot be re-detained again under ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013–44).

As of 18 December 2015, this changed due to amendments introduced into ALA and ASA by Law No. 314/2015. As a result of this amendment, Art. 125 para. 5 ALA newly provides that if the detention decision is adopted after the detention under Art. 46a ASA is terminated, the elapsed period of the detention under Art. 46a ASA shall be disregarded. Similarly, Art. 46a ASA provides that if the decision on detention of asylum seeker is adopted after the detention under ALA was terminated, the elapsed period of the detention under ALA shall be disregarded. According to the explanatory memorandum to Law No. 314/2015, these changes reflect CJEU's judgment in *Kadzoev.*

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

Detention of the TCN can last longer than 180 days only in two circumstances:

(a) Art. 125(2)(a) ALA stipulates that detention can be prolonged beyond the 6 month limit if a TCN 'hampers the preparation of expulsion *during her detention*' (emphasis added)

(b) Art. 125(2)(b) ALA stipulates that detention can be prolonged beyond the 6 month limit if a TCN 'provides false information regarding data that are necessary for obtaining her substitute travel document'. However, the SAC narrowed down the application of this provision as it held that detention of a TCN can be prolonged under Art. 125(2)(b) ALA only if there is causal nexus between providing false information and the impossibility to remove her (Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54; this is in line with the CJEU's position in *Mahdi*, § 82).

The Czech legislature thus transposed only Art. 15(6)(a) RD (this was confirmed by Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54). According to the Explanatory Memorandum to Law No. 427/2010 Coll. that transposed the RD, the Czech Republic:

- transposed Art. 15(6)(a) RD, because some TCNs intentionally declined to cooperate with the Czech authorities in order to delay their expulsion. They often destroyed their travel documents and lied to the authorities about their identity. The Czech authorities were then forced to verify their identity with the authorities in the state of their nationality, which often took several months (37 % of requests for verification of identity of a TCN were not replied within 180 days in 2008 and 2009);
- did not transpose Art. 15(6)(b) RD, because it would unnecessarily infringe upon the liberty of a TCN and because it was thought that this provision would apply only to few cases.

In Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54, the SAC reviewed the detention of a Vietnamese TCN beyond 180 days pursuant to Art. 125(2)(b) ALA [which transposed Art. 15(6)(a) RD] in a situation, when the Vietnamese authorities refused to cooperate with the Czech Police and did not issue the travel document to the TCN concerned. The SAC eventually quashed the decision of the Police on the ground that it detained the TCN pursuant to the provision which transposed Art. 15(6)(a) RD, even though the factual situation fell within Art. 15(6)(b) RD [it was the Vietnamese authorities that were the reason for the impossibility to expel the TCN concerned], which was not transposed by the Czech Republic, and the fact that the TCN concerned mentioned untrue information about his identity was secondary (as his identity was already known, when the request was made to the Vietnamese authorities). In other words, according to the SAC, the Police wanted to keep the Vietnamese TCN in detention without a proper legal ground (see in particular Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54, §§ 39-43).

As regards the new assessment of the grounds justifying detention (e.g. a continuing risk of absconding of the detainee). There is no case law, but the ALA is explicit in providing that the Police must assess a risk of absconding (or any other reason for detention of a TCN) in any decision on detention, be it the decision on the initial detention or the decision on the renewal of detention [Art. 124(1) ALA] or the decision on the request to be released from detention [Art. 129a(1) ALA]. This conclusion is also confirmed by the explicit wording of the Explanatory Memorandum to Law No. 427/2010 Coll. that transposed the RD.

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

YES

Art. 127 para. 1(b) ALA provides that detention shall be immediately terminated if an administrative court annuls the decision on detention (or decision on prolongation of detention or decision not to release the TCN from the detention facility). Obligation to release the TCN arises by announcement of the annulling judgment.

If the detention decision was cancelled, the TCN has a right to seek compensation for damage caused by an unlawful decision under the law No. 82/1998.[1] The claim must be lodged with the Ministry of Interior and if the claim is not fully satisfied within 6 months, the injured party may seek damages at the court. The limitation period is 6 months as regards the non-pecuniary damages and 3 years as regards the pecuniary damages.

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.

In Judgment of the SAC of 01.11.2012, No. 9 As 111/2012–34, the SAC held that if detention is found unlawful by an administrative court, the TCN concerned must be released irrespective of whether the reasons of unlawfulness were procedural flaws[2] or issues of substantive law.

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

NO

In the past, it was possible to issue a new decision on detention within three days from the date of the annulling judgment of the administrative court. This subsequent re-detention was found inconsistent with Art. 15(2) RD and, given the direct effect of Art. 15(2) RD, also inapplicable by the aforementioned judgment of the SAC of 01.11.2012, No. 9 As 111/2012–34 (note that this judgment of the SAC was also heavily influenced by the ECtHR's judgment in *Buishvili v. the Czech Republic*, 25. 10. 2012, No. 30241/11). The Czech legislature eventually abolished this re-detention system.

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

The provision of legal aid is a general and structural problem in the Czech Republic, which does not affect only detained TCNs, but also Czech citizens. As there is no comprehensive system of legal aid for Czech citizens, it is not surprising that there is no such system for foreigners either.

As regards the detained foreigners, the ALA merely regulates the right of a detained foreigner to receive visits of a lawyer or a lawyer of a non-governmental organization which provides legal

[1] The law No. 82/1998 Coll., on liability for damage incurred in the course of exercise of public powers through a decision or incorrect administrative procedure, as amended.

[2] This case was rather complex. In the first detention decision the Police detained the Nigerian TCN for 90 days. However, the Regional Court of České Budějovice (in the judgment of 3 May 2012, No. 10 A 40/2012-16) quashed this decision for procedural flaws, as the Police did not justify the length of TCN's detention. The Police then issued the second detention decision, by which it detained the same TCN for 120 days, but this time it carefully explained the complexity of the case (the Nigerian TCN did not have a passport and there is no Nigerian consulate in the Czech Republic, which meant that the Czech authorities had to request this passport from a consulate abroad; in addition, the Czech authorities had to wait with its request until the decision on TCN's application for international protection comes into force) which justified the length of detention in the second decision. This time the Regional Court of České Budějovice (in the judgment of 13 June 2012, No. 10 A 52/2012-21) was satisfied with the reasoning of the Police and rejected the appeal of the TCN. However, the SAC quashed both the judgment of the Regional Court of České Budějovice of 13 June 2012 and the second detention decision of the Police for another reason – because it was not possible to 're-detain' the TCN after the end of his application for international protection under ALA again.

assistance to foreigners [Art. 144(3) ALA]. In practice, lawyers from non-governmental organizations commute to detention facilities on a regular basis, approximately once per week.[3] However, they describe diverse difficulties that impede their full access to all the detained foreigners, for instance the Prague NGO Organization for Aid to Refugees (OPU) described a problematic practice of certain detention facilities, according to which lawyers had to hand over their mobile telephone at the entrance to the facility. This in the end impeded their communication, but the Police have recently allowed lawyers to use mobile phones to contact an interpreter in order to be able to communicate with the client. This problem is further exacerbated with the obligation of clients to also hand over their mobile phones, which results in their limited possibility to communicate with outside world. In sum, free legal assistance to detained TCNs is not fully guaranteed.

In contrast to administrative proceedings, anyone has access to free legal assistance in judicial proceedings on the condition that it is necessary for defending his or her rights and that he or she could be liberated from paying court fees (i.e. on the condition that he or she does not have sufficient financial resources to afford legal aid by a lawyer, and on the condition that asserting his or her rights is not clearly abusive or clearly lacking any prospects of success) [Art. 35(8) CAJ]; however, the quality of the assigned lawyers varies a lot (some of them do not visit a TCN at all and file just a formal action). Apart from that, lawyers from specialized non-governmental organizations working with refugees or migrants may represent them in front of regional courts [Art. 35(5) CAJ]. However, lawyers from non-governmental organizations, in contrast to appointed advocates, do not have their expenses for legal representation before courts covered.

The lack of a comprehensive system of legal aid has also led to poorly argued motions to administrative courts.

Shortcomings in regulation of providing of legal aid to detained TCNs have been also subject to criticism of the Supreme Administrative Court (see judgment of the SAC of 30 June 2015, No. 4 Azs 122/2015), which pointed to the fact that while transposing Art. 13(3) of the Return Directive into Czech law, legislators failed to sufficiently fulfil its objective of ensuring the effective access of TCNs to legal aid or representation. The SAC highlighted that on the one hand, the Alien's Act does not oblige administrative authorities to ensure the TCNs legal aid, so that they do not suffer any harm on their rights, and thus there is no guarantee that every TCNs subjected to return would get legal aid and that it will be provided in time. At the same time, no legislation guarantees right to obtain free legal aid or representation to those without sufficient resources. These deficiencies are according to the SAC particularly evident in cases of detained foreigners.

A proposal of new law on free legal counselling, which should change the system of free legal aid in the Czech Republic for any administrative procedures and for representation before courts (that is both for Czech citizens and foreigners), is still being prepared by the Ministry of Justice. However, this law has not been adopted yet.

[3] This might be problematic due to the short time-limit (5 days) for challenging the detention decision of the Police before administrative courts. If lawyers come to the detention centres only once a week, the time-limit for appealing the detention decision may have already passed.

2. Article 16 RD: conditions of detention

a. National jurisprudence: major trends

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

YES

Please elaborate further, including the practice in your Member State

Art. 130(1) ALA provides that detention decision shall normally be carried out in the facility ('facility' is a legislative abbreviation for 'facility for detention of foreigners'). Currently there are three facilities for detention of TCNs (Drahonice, Vyšní Lhoty and Bělá-Jezová) with a total capacity of around 1000 TCNs. These facilities are used only for TCNs awaiting administrative expulsion or their return pursuant to Dublin regulation or readmission agreements.

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

Foreigners detained for the purpose of administrative expulsion are always detained in one of the facilities for the detention of foreigners. Czech law does not allow placing them in prisons.[4]

Only foreigners who are subject to return as a criminal law sanction can (if there is a risk of absconding or risk of hampering of the expulsion) be placed in expulsion custody in Praha-Ruzyně. In this facility, there are not only foreigners awaiting their expulsion are detained, but also Czech citizens accused of committing a criminal offence or persons serving a prison term. Foreigners awaiting expulsion are usually (if they do not violate internal rules) placed in the facility's department with a moderate regime.

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?

Detention facilities are composed of a section with moderate regime and a section with strict regime, which are separated from each other. The section with moderate regime is composed of accommodation rooms, common social and cultural facility and other space, where detainees can move freely. The section with strict regime, on the other hand, is composed only of accommodation rooms and a space reserved for walks. This section serves for detention of foreigners who are aggressive, who repeatedly seriously violates internal rules or who repeatedly seriously violates their obligation under ALA (see Art. 135 ALA).

When determining the accommodation area, a religious, ethnic or national particularities as well as family ties, age or health state should be taken into consideration [Art. 141(1) ALA]. Unaccompanied minors shall be accommodated separately and men shall also be separated from

[4] However, please note that the facility for the detention of foreigners in Drahonice was transformed from a former prison and the building remained virtually unchanged (i.e. still includes iron bars etc.). Hence, even though de iure it is not a prison, de facto it feels like a prison.

women (with the exception of close persons, if the agree). Law does not provide any other safeguards or special rules as regards detention of vulnerable persons.

Art. 134(1) ALA lays down rights of the detained TCNs. According to this provision, an operator of the facility [which is the Refugee Facilities Administration (hereinafter as RFA)– an organisational unit of the Ministry of Interior] shall (under conditions set by ALA):

- provide the TCN with a bed, chair, closet for personal belongings, food and basic hygiene products. Food is provided three times a day, in case of minors five times a day and, where possible, a consideration should be taken to the cultural and religious traditions of the TCN (Art. 143 ALA);
- allow the TCN to receive and send written correspondence without any limitation;
- allow the TCN to receive visits. A TCN has a right to receive a visit twice a week for one hour and a maximum of four people. On the other hand, the right to receive a visit of attorney or a lawyers from non-governmental organizations providing legal aid to foreigners is not in any way limited (Art. 144 ALA);
- according to the current possibilities provide books, newspapers and magazines, including foreign ones if they are being distributed in the Czech Republic
- allow the TCN to file an application or another submission to the authorities of the Czech Republic or international bodies in order to exercise his/her rights; the operator shall send those immediately
- at the request of the TCN without delay to facilitate a meeting with the head of the facility, his deputy or with the Police
- allow the TCN uninterrupted eight-hour sleep at night time
- allow the TCN free movement within the section with a moderate regime as well as contact with other foreigners placed in this section.

Moreover, once a week detained TCNs are allowed to receive a package with food, books and personal items weighing up to 5kg. Foreigners can also receive money without any limitations, but they must be deposited with the RFA. These money can be used for buying food, personal items, books, newspapers or magazines, but only once a week in a maximum amount of 300 CZK (approximately 11 EUR).

A TCN placed in the section with strict regime shall be allowed to take a walk for at least one hour every day [Art. 134(3) ALA].

When a TCN is placed in the detention facility, the RFA shall ensure his medical examination as well as other necessary diagnostic and laboratory examinations and vaccinations and preventive measures set forth by the authority of public health protection [Art. 134 (2) ALA]. A TCN is obliged to undergo the initial, periodical and final medical examination and the other possible necessary examinations or vaccinations. Medical examination is normally performed without the presence of the Police, but the doctor may request otherwise. Any resistance of the TCN may be overcome by the Police [Art. 136(2) ALA]. The RFA may also provide the foreigner psychological, social and other services necessary for his stay in the detention [Art. 134 (4) ALA, emphasis added]. Health care is provided to the detained TCNs only to the extent of essential medical care.

Certain human right issues arose during the second half of 2015 when the Czech Republic faced an influx of hundreds of immigrants. At that time, only the detention facility in Bělá-Jezová was opened and its capacities were greatly exceeded. Detention facility in Vyšní Lhoty was opened during August 2015 and Drahonice were opened only during October 2015. Due to lack of accommodation capacities (detention facility in Bělá-Jezová had a capacity for around 270 persons, but it had to deal with more than 700 detained persons), people were accommodated in a gym, tents or portacabins. Employees of Ombudsman's office, who monitor places where people are deprived

of their liberty, visited Bělá-Jezová in August and October 2015 and expressed concerns especially as regards detention conditions with respect to children. The Ombudsman found that the detention conditions amounts to violation of Art. 3 ECHR. Among other things, the Ombudsman identified the following problems:

- detainees lacked sufficient clothing, some of them did not received basic hygiene supplies;
- detainees were not sufficiently informed about their situation – they did not understand why were they detained and they were not informed about their rights;
- detainees were unable to contact their family or friends (their mobile phones were taken from them and the given telephone cards had only a small credit, not everybody had the access to the telephone and there was no access to internet);
- lack of mutual understanding between detainees and facility employees as well as medical personnel caused by lacking interpreters (only one Arabic interpreter was present in the facility during work weeks; second largest group – people speaking Farsi – did not have any interpreter);
- lack of legal aid – legal aid in detention was provided by two NGOs (lawyers were available once a week or once in two weeks) and some of the detainees did not have information about the possibility to talk to a lawyer;
- the facility's environment was a prison-like with the clear demonstration of power caused by the presence of uniformed personnel of private security agencies, the Police, police riot units and police dogs, high fence with barbed wire, escorts within the facility who used handcuffs;
- parents felt frustration and humiliation resulting from the conditions and the treatment by the facility employees as well as from the fact that they were unable to explain their children the situation
- children did not have sufficient clothing, even the smallest children were given food of the same quality as adults, free-time activities were lacking, some of the children were accommodated in the gym or in the portacabins.

For more detailed information (including pictures) see

http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Zarizeni_pro_cizince/2015-rijen-Bela-Jezova-ZZ_vyhodnoceni.pdf

It is also worthy of mentioning that ECtHR granted interim measure in *A.O. v. Czech Republic* (application no. 52274/15), which concerns an Afghan family consisting of parents and four minors, who were detained at the Bělá-Jezová. The ECtHR required the Czech government to place the applicants in conditions compatible with the requirements of Article 3 ECHR. It made reference to the case of *Popov v. France* and requested further factual information from the Czech government on the conditions of detention of foreigners at Bělá-Jezová, in particular in relation to the capacity of the centre, the number of persons there, the hygiene conditions and the reception of children. The interim measure is in French available here:

http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/A.O.%20and%20Others%20v.%20Czech%20Republic%20IM%2022.10.15.pdf

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

NO

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

Lawfulness of the detention conditions is assessed by administrative courts only if the TCN (or his representative) raises this issue.

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

YES

In judgment no. 1 Azs 39/2015, adopted after the Ombudsman issued a report saying that conditions in the detention facility in Bělá Jezová – the only functioning detention facility at that time – are not suitable for children and amount to violation of Art. 3 ECHR, the SAC quashed both the judgment of the regional court as well as the detention decision of the Police.

The SAC, however, did not address the question whether the material conditions in the facility were or were not suitable for detention of families with children. The SAC criticised the Police and the regional court for not paying any attention to the conditions in Bělá Jezová. Hence the SAC argued that the Police (and the regional court) should have consider placing the family in the facility with more suitable conditions, which in fact was available, although it was not a detention facility but a reception centre (which is also a fenced complex of buildings that can only be left upon the permission).

b. Judicial Interactions with European and national Courts

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

NO

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

NO

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

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

YES

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.)

There is only a limited case law regarding the assessment of the material conditions of detention. The EU Charter has not been referred to in the relevant judgments and reference to ECHR's case law is usually made only when parties of the proceedings bring this up. Judgment of SAC no 2 Azs 300/2015 of 21 January 2016 may serve as a good example. The TCN, an Afghani woman, was arrested on her way to Germany. She was detained and her detention has been prolonged for additional thirty days. She challenged the decision on the extension of detention, claiming, among other things, that the conditions of her detention did not meet the just requirements stipulated by the EU law. In fact, according to her they resembled torture. She claimed inadequate space of detention

centre, which resembled a prison, inadequate access to legal assistance (she met the lawyer 70 days after she had been detained; there are not enough lawyers to provide legal assistance), inadequate medical care (there was no psychologist), the absence of leisure time activities (there was no access to printed media and radio, very limited access to TV, no gym or similar facilities), small amount of food (she claimed she was hungry) and the personnel was not trained sufficiently (there were no people who would talk native tongue of detained persons, rare presence of interpreters, personnel was composed of security agency people without sufficient training and qualification). The regional court rejected her arguments and noted that the Police are not responsible for this; if the TCN is not happy with the conditions in her detention centre she could make complaint to the Administration of detention centres. Therefore, no problems of this type could affect, according to the regional court, the lawfulness of the detention decision.

The Supreme Administrative Court (SAC) rejected the position of the regional court that serious problem in detention centres could never affect the lawfulness of the detention decision. That is why it could happen that conditions in a detention centre might be subject to hearing and fact finding before the court. If the conditions in a particular detention centre are in conflict with international treaties requirements a TCN cannot be placed in such a detention centre; if no detention centre satisfies those requirements no TCN could be detained.

The TCN in this case referred to the ECHR 2013 judgment in Suso Musa v. Malta and the 2012 judgment in *Popov v. France*. The SAC rejected this argument, as there was nothing in those judgments which would suggest that conditions in the Czech detention centres do not meet the Convention standards. Moreover, those judgments were made before the 2015 refugee crisis which made the Czech Republic to place thousands of refugees in its detention centres. The plaintiff herself voluntarily decided to leave her country and entered the Czech Republic illegally. '*It cannot be justly argued that conditions in detention centres should be much better than in those facilities for other people who committed illegal action on the territory of the Czech Republic. […] internal regime of detention centres cannot be similar to regular prisons; quite the contrary detained foreigners should enjoy freedom of movement within detention centre*.' But TCNs should be prevented from leaving the centre on their own and thus guards of military type are also adequate measure in detention centre. TCNs are entitled to shelter, hygienic standards, food and medical care of basic type. On the other hand, no TCN can claim an average living standard in the Czech Republic or standards of an average hotel: '*Aliens must accept certain discomfort, the absence of privacy and the fact that their centre would not be full of entertainment and fun. Every human being in the Czech Republic must be treated decently […] but he or she is not entitled to living comfort usual in our country*.'

With respect to the lack of legal assistance the SAC noted that the plaintiff could have challenged the initial decision even after the lapse of statutory deadline. However, she did not do so (the plaintiff challenged the second decision on detention, arguing, inter alia, she could not challenge the first one due to the absence of any legal assistance earlier).

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

NO

If yes: please elaborate further on this issue

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

NO

If yes: please elaborate further on this issue

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

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

NO

Generally, there is only a limited case law regarding detention of minors. In the past, courts refused to accept the argument that minor can challenge the detention decision. Czech legislation does not allow detention of minors under 15 years. If such minor is accompanied with his/her parents (or other close person) and this parent is detained, a minor can be 'accommodated' in the facility together with the parent. Thus, the minor is not formally detained and he is free to leave the facility (if the parent agrees). In Judgment No. 7 AS 103/2011 of 30 September 2011, a TCN, a mother of an alien minor, was detained in order to be returned. The minor challenged the detention. The regional court dismissed the lawsuit, arguing that the minor was not technically detained, but rather she stayed with her mother. The SAC quashed the decision of the regional court and remanded the case for further proceedings. Even though the minor is not technically the addressee of the detention decision, in reality she has no option but to follow her mother and stay with her in a detention centre. That is why the minor is affected by the detention decision and is entitled to challenge the decision before the court. The minor was also entitled to be the party of detention proceedings. The SAC emphasized that the best interest of the child should always be considered when making a decision on detention; at the same time this does not automatically preclude the possibility of detention of the mother. No reference to the Return Directive was made by the SAC though.

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

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.)

In cases of placing children in the detention facility, the courts held that the right of the child to liberty and security is not affected, given the fact that the child id not really detained (see above). Thus courts only assess whether the right to family life was infringed.

In Judgment No. 1 Azs 39/2015 of 17. 6. 2015 the SAC referred to the ECtHR's judgments in *Muskhadzhiyeva and other v. Belgium* and *Popov v. France.* The SAC eventually quashed the judgment of regional court, because conditions of detention (considering also the report of the Ombudsman, see above) were not properly assessed by regional court. However, the SAC did not assess the conditions of detention on the merits.

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?

In the abovementioned Judgment No. 7 As 103/2011, referring to the ECtHR case law (Elsholz v. Germany) the SAC emphasised the need to respect interest of the child when assessing the necessity and proportionality of interference with his/her right to family life. At the same time, the SAC concluded that although the best interest of the child shall be considered as a primary consideration, it is not the only one. Therefore, even if the detention of a parent will usually not be in the best interest of the child, if it will meet the criteria of Art. 8(2) ECHR and Art. 3 of the UN Convention on the Rights of Children, the detention will be possible.

In Judgment No. 4 Azs 115/2014 of 24 July 2014 the SAC approved the position of the regional court and the Police that is was in the best interest of the child to accommodate him with his parents in the facility, since the only alternative would be to separate him from parents and leave him homeless and without any financial resources. Thus the Article 8 of the ECHR was not violated.

In judgment No. 1 As 39/2015 (already mention above) the SAC quashed the judgment of the regional court as well as the detention decision referring to ECHR case law *(Muskhadzhiyeva and others v. Belgium* and *Popov v. France*). It particularly criticised the Police and the regional court for considering the interest of the child only towards the duration of the detention (which cannot exceed 90 days in case of unaccompanied minors or families with minor children). No additional circumstances were taken into consideration, especially the material conditions in the detention facility.

Article 24 of the EU Charter was not cited by national courts in these cases.

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

NO

If yes: please elaborate further on this issue

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

NO

If yes: *please elaborate further on this issue*

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

YES/NO

Unfortunately, there is no relevant case law.

4. Article 18: Emergency situations

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

NO

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

General remarks and transversal issues

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

NO

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 Return Directive brought several important changes. Most importantly, it introduced alternatives to detention, which did not exist in Czech law before. In addition, it resulted in the possibility of prolonging the detention over 180 days. Additional important changes were introduced regarding the detention of TCNs who applied for international protection.

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

NO. The only change in the judicial review of detention was the elimination of the review before civil courts. This change, however, was not triggered by the Return Directive or CJEU's and ECtHR's case law, but rather by the malfunctioning of the whole system.

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

The Czech ALA and administrative courts need to clearly distinguish between the concept of the risk of absconding, the concept of avoiding the preparation of return and the concept of hampering the preparation of return. In order to fully comply with the Return Directive, the courts should also differentiate more clearly between the existence of the risk of absconding and risk of avoiding or hampering the return on the one hand and the impossibility of using the alternative measures on the other hand. Return Directive constitutes these as two separate conditions that need to be fulfilled in order the detention to be lawful, but Czech administrative courts as well as administrative authorities hold the view that the risk of absconding prevents using less coercive measures than detention.