REDIAL PROJECT

National Synthesis Report – Estonia

(Draft)

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

by Judge Villem Lapimaa

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

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

1. Article 15 RD: detention

a. Competent authorities ordering and reviewing pre-removal detention

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

YES/NO

If yes: please elaborate further on:

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

YES. In Estonia administrative courts (who have competence in all cases related to administrative law) hold a central and decisive role in ordering detention of irregular migrants. The Police and Border Guard Board or the Estonian Internal Security Service may detain a person to be expelled for up to 48 hours without the authorisation of the administrative court. If it is necessary to detain a person to be expelled for longer than 48 hours, the Police and Border Guard Board or the Estonian Internal Security Service shall apply for authorisation from the administrative court for detention to place the person in the detention centre for up to two months.

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

Is it the same authority regardless of the length of the detention and/or the issuance of an explicit

renewal order? Or does the judicial authority concerned control the lawfulness of detention only when a detention order is renewed?

YES/NO

As detention lasting for more than 48 hours must be authorised by an administrative court, a detention order is in most cases a judicial decision that is subject to ordinary appeal procedures (an appeal to the Court of Appeal and then a cassation appeal to the Supreme Court). It is also possible to challenge the detention not exceeding 48 hours ordered by administrative authorities, by lodging a complaint against the relevant authority to the administrative court.

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

The judicial review is automatic after 48 hours of detention.

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.

The Estonian legislation provides for a one level procedure. Detention rulings of the first instance administrative courts are subject to ordinary appeal procedures (an appeal to the Court of Appeal and then a cassation appeal to the Supreme Court). An appeal against the detention ruling must be to submitted the higher instance court within 15 days of notification of the ruling translated to the language that the person understands. These appeals are dealt with priority in the appeal instances and are usually decided quickly (in 1-2 weeks).

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

There is full control. The administrative authority which requests authorisation from the administrative court must state in its application to the court factual grounds and reasons for detention (incl *ultima ratio*). The administrative court is not bound by facts or reasons given by the authority (even in assessing the risk of absconding) and must independently establish all relevant facts and give reasons. However in many cases the opinion and prognosis given by the authority on the issue of the eventual possibility of removal (e.g the existence of an admitting country) or risk of absconding is taken into account by the courts.

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

YES/NO

YES. The courts are not bound by the submissions of the parties and are competent to establish relevant facts on their own motion.

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 different levels of jurisdiction.

b. Judicial Interactions with European and national Courts

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

NO

If yes:

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

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

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

YES

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?)

Usually the courts tend to interpret the relevant provisions of the Estonian constitution and secondary national legislation in conformity with ECJ and ECHR rulings without specifically referring to them. Only in cases of a clear conflict of a directive provision with national provision reference is made to the directive and national law is left unapplied.

For instance, detainees have unsuccessfully tried to argue that the Estonian legislation does not correspond to the ECJ *Mahdi* judgment. Estonian law provides that an alien may be detained if the application of other measures does not ensure the efficiency of the compliance with the obligation to leave and, primarily, in the case: 1) there is a rick of escape of the alien; 2) the alien does not comply with the obligation to co-operate or 3) the alien does not have documents necessary for the return or the obtaining thereof from the receiving state or transit state is delayed. It has been argued that a lack of documents necessary for the return may not be a ground for detention in light of the ECJ *Mahdi* judgment. However, The Tallinn Court of Appeal in its 10.06.2016 ruling 3-16-499 held that art 15 (6b) clearly states that delays in obtaining the necessary documentation from third countries is a legitimate ground for detention. The Bulgarian legislation analysed in the *Mehdi* judgment allowed for detention based solely on the fact that the person does not have any ID. Accordingly, the situations are not comparable in the opinion of the Court of Appeal.

In the same ruling of the Court of Appeal it was held that the Estonian legislation corresponds to art 3 (7) of the return directive, as national law lays down specific objective criteria for the determination of the risk of absconding. The administrative courts are required not to apply these objective criteria mechanically but to give and individual assessment of the risk of absconding in the concrete case, based on objective criteria laid down in the law.

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.)

Usually the courts tend to interpret the relevant provisions of the Estonian constitution and secondary national legislation in conformity with ECJ and ECHR rulings without specifically referring to them.

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

YES/NO

If yes: please elaborate further on this issue

See previous 2 replies.

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

YES/NO

If yes: please elaborate further on this issue

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 Court has not specifically ruled on the issue but there is a general understanding in constitutional law that any detention exceeding 48 hours is automatically in the realm of the right to liberty.

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

An appeal against the removal order can be submitted separately to the administrative court. In case the removal order is annulled, detention will be terminated. Suspension of the removal order does not automatically bring about the termination of detention.

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

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

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

Prospect of removal is considered not to exist when the third country has already clearly expressed that they will not accept the person back.

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 assessment is more abstract, since it cannot be ruled out that circumstances have changed and previous failures of removal will not reoccur.

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.

A person is required to co-operate in the organisation of expulsion, among other: 1) to provide governmental authorities enforcing expulsion with oral and written information and explanations; 2) to submit all information and documents and other evidence in his or her possession which are relevant to the proceedings relating to expulsion; 3) to co-operate in the obtainment of the documents necessary for expulsion; 4) to co-operate in the collection of information needed for identification of his or her person, and for verification purposes. Failure to comply with this obligation as a rule is sufficient to justify detention.

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

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

YES/NO

National law lays down specific objective criteria for the determination of the risk of absconding. The administrative courts are required not to apply these objective criteria mechanically but to give and individual assessment of the risk of absconding in the concrete case, based on objective criteria laid down in the law. Previous behaviour and statements of the person are assessed.

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

YES/NO

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?

The risk of escape of an alien occurs if:

1) the alien has not left Estonia or a member state of the Schengen Convention after the term has expired for voluntary compliance with the obligation to leave imposed by the precept to leave;

2) the alien has submitted false information or falsified documents upon application for the legal basis for the stay in Estonia or the extension thereof, for the Estonian citizenship, international protection or identity document;

3) there is a reasoned doubt regarding the identity or citizenship of the alien;

4) the alien has repeatedly committed intentional criminal offences or has committed a criminal offence for which he or she has been sentenced to imprisonment;

5) the alien has not complied with the surveillance measures applied with regard to him or her to ensure compliance with the precept to leave;

6) the alien has notified the Police and Border Guard Board or the Estonian Internal Security Service of his or her non-compliance with the obligation to leave;

7) the alien has entered into Estonia during the period of validity of the prohibition on entry applied with regard to him or her;

8) the alien has been detained due to illegally crossing the external border of Estonia and he or she has not been issued the permit or right to stay in Estonia;

9) an alien has left without permission the residence, assigned to him or her, or another member state of the Schengen Convention.

The administrative courts are required not to apply these objective criteria mechanically but to give and individual assessment of the risk of absconding in the concrete case, based on objective criteria laid down in the law. Previous behaviour and statements of the person are assessed. Previous experience with the same group of people is taken account when making the prognosis but it is still rebuttable and must come down to the individual assessment and the judge's 'inner conviction'.

If NOT:

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

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

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

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

NO

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?*

Alternative surveillance measures are:

1) residing in a determined place of residence;

2) appearing for registration at the Police and Border Guard Board at prescribed intervals;

3) appearing at the Police and Border Guard Board to clarify circumstances ensuring compliance with a removal decision;

4) notifying the Police and Border Guard Board of the changes of residence of the alien and of his or her prolonged absence from the place of residence;

5) notifying the Police and Border Guard Board of the changes in the alien's marital status.

6) depositing of a travel document of a foreign country or an identity document of an alien at the Police and Border Guard Board or the Security Police.

No additional alternatives to my knowledge.

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

YES. An alien may be detained if the application of alternative measures does not ensure the efficiency of the compliance with the obligation to leave

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.*

When risk of absconding is established, detailed analysis of every single alternative is usually not required.

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*)

Detention order is issued by a judge who has full competence and may substitute the assessment of the applicant (government authority). The judge would weigh the need to protect public order and effective execution of removal with personal interests of the person (family ties, integration

into the society, right to free movement and liberty).

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

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

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

Initial detention may be ordered for up to 2 months which may subsequently be prolonged every 4 months (maximum 18 months).

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?

There have been no instances where lack of due diligence in expulsion proceedings have resulted in releasing the person to be expelled. Lack of cooperation by the person and subsequent lack of prospects of removal did become decisive in the Mikolenko case that was decided by me and ended up in the ECHR. However in that case the problem was not lack of due diligence of the Estonian authorities but the illegal refusal of a third country to take back its citizen.

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

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

Periods of detention under asylum regime and under expulsion regime are calculated separately (maximum of both is 18 months and they can be summed up to 36 months).

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

If the person continuously fails to comply with the obligation to co-operate or the obtaining of the documents, which are necessary for the return, from the receiving state or transit state is delayed, the administrative court may extend the term of detention by four months at a time after the expiry of the initial 6 months but for no longer than 18 months as of the day of detention.

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

The release is immediate under the concept of *habeas corpus*. The person who has been detained under a ruling that has been quashed, is also entitled to compensation for pecuniary and non-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.

A majority of detention cases actually deal with detention of asylum-seekers. In many cases the ground for releasing them has been the age of the person and family ties.

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

YES/NO

I know of no such instance when a person to be expelled has been re-detained for the purposes of expulsion. It is however possibly to release a person who has applied for asylum and immediately re-detain under the asylum rules.

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

It is always possible to request a bar appointed lawyer when the detainee has not sufficient resources to hire a lawyer. Due to low quality of state legal aid in detention the Bar Association had an internal tender between law firms and one law firm was selected to specialize in the representation of clients in asylum and detention cases.

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

Detention centres are structural units of the Police and Border Guard Board the function of which is to enforce the judgments on the detention of persons to be expelled or asylum-seekers. The detention centre is a guarded enclosed territory which is marked by clearly visible signs and which enables constant supervision of persons. Persons to be expelled are prohibited to leave the detention centre without supervision.

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

It is not possible to place TCN-s in prisons, except in prison hospital, where ordinary prisoners are not separated from them but all stay in hospital beds.

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?

All the above-mentioned rights are guaranteed by law and in practice.

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

Not by the current law (the number of irregular migrants and asylum-seekers in the lowest in Europe).

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

If appropriate conditions are not met (e.g to nurse a young child, health conditions etc), detention is not allowed as an unproportional measure.

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

Yes, for health reasons.

b. Judicial Interactions with European and national Courts

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

NO

If yes:

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

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

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

NO

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

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

NO

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

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

NO

If yes: please elaborate further on this issue

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

NO

If yes: please elaborate further on this issue

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

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

NO

Family members are accommodated together. A minor shall be accommodated separately from adult persons except if this is evidently in conflict with the interests of the minor. A minor person is organised age-appropriate activities for spending leisure time and the means necessary therefor is provided. A person to be expelled who is subject to the obligation to attend school shall be ensured access to education. Minors to be expelled are very seldom detained and therefore there is little jurisprudence. Most minor detainees are family members of asylum seekers.

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

YES/NO

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

See Q1

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?

See Q1.

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

YES/NO

If yes: please elaborate further on this issue

See Q1.

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

YES/NO

If yes: *please elaborate further on this issue*

See Q1.

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

Ombudsman (who is also the children's ombudsman) carries out regular inspections.

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

4. Article 18: Emergency situations

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

NO

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

General remarks and transversal issues

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

The scope of application of pre-removal detention is clearly stipulated by law as required by the constitution.

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.?

There is more emphasis on the proportionality test. The most important change is the maximum length of detention that was no in place before (see Mikolenko case in ECHR).

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, detention was and still is fully controlled by courts.

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.

There is still much improvement need in assessing alternative surveillance measures. Since Estonia is a transit not a destination country for most irregular migrants, the necessity to avoid of risk of absconding is probably more pre-eminent than in other countries, therefore detention is probably more widespread in Estonia. There is usually much publicity when an irregular migrant is released from the detention centre and the whole topic has a rather political nature.