REDIAL PROJECT

National Synthesis Report – Germany

Ongoing Trends Relating to the Interpretation of the Return Directive by German Courts

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I. Preliminary Remarks

Legislative Activities: The Return Directive 2008/115/EC was transposed into German law by an amendment of the Residence Act (*Aufenthaltsgesetz*)[1] which entered into force on 22 November 2011[2] and which provided, in particular, for an individual right of migrants to a limitation of any entry ban. At the time, the legislator considered the existing German legislation on return basically as being in accordance with the Return Directive – with the exception of the rules on entry ban that were amended in order to fully implement the Directive. Corresponding substantial changes relating to the transformation of the Return Directive were made in section 11 of the Residence Act. Its contents will be discussed below in section III.

A further amendment concerning, among other things, the criteria for detention was adopted by the German Parliament on 2 July 2015 and is likely to enter into force in the near future following the signature of the Federal President (usually a formality). It will reorganise the grounds for detention on the basis of earlier previous case law. In doing so, the new statutory rules will re-orientate the structure of the German law on detention at the contents of the Return Directive (they will be based, more specifically, on the concept of 'risk of absconding'). The new amendment also modifies the legal effects of entry bans, in particular after an unsuccessful asylum application. The new provisions are based on a Bill by the Federal Government of 25 February 2015.[3] It should be noted, though, that some modifications were agreed upon by the Parliament, i.e. the Government Bill was not adopted without modification. Substantial changes relating to the criteria for detention are laid down in the news section 2(14) and the revised sections 62-62b. Their contents will be discussed below in section IV.

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[1] A free online edition of the present text of the Aufenthaltsgesetz (Residence Act) can be found at http://bundesrecht.juris.de/aufenthg_2004/index.html (the English translation provided there is not necessarily up-to-date).

[2] Bundesgesetzblatt (Federal Law Gazette), BGBl. 2011 I, page 2258; available online at http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl111s2258.pdf.

[3] For the Bill and corresponding explanations see Bundestags-Drucksache 18/4097, available online at http://dipbt.bundestag.de/doc/btd/18/040/1804097.pdf.

Case law: Initially, the German courts dealt primarily with questions relating to the entry into force of the Return Directive and corresponding national rules on existing expulsion decisions. The found on the basis of the Return Directive that the length of any entry ban has to be decided initially and cannot be postponed until a later date, as was standard practice in Germany before. This means that the Directive effectively established a new administrative practice on the basis of domestic court rulings enforcing the Directive. These rulings will also be discussed below in section II. Most of the more controversial issues, in particular those relating to the criteria of determining the length of entry bans, were decided by the German Federal Administrative Court (BVerwG) and will be discussed in more detail in Section III. Issues relating to the detention of foreigners ordered to leave or expelled and the interpretation of the provisions of the Return Directive with regard to detention were decided by the Federal High Court (BGH) which according to the German judicial system is exclusively competent to decide on issues of detention. They will also be discussed below in Section IV.

II. Obligatory Connection of Expulsion and the Length of Entry Bans

The Federal Administrative Court decided that any entry ban has to be taken as a separate decision simultaneously with an expulsion decision irrespective of any application to limit the effect of an expulsion decision. In contrast to earlier practice, the length of the entry ban has to be determined at this stage already.[4] If the administrative authorities failed to comply with their obligation to determine simultaneously the length of an entry ban, a foreigner affected by a return decision or expulsion order may enforce the individual right of limiting the effects of the entry ban before the courts. An appeal against an expulsion decision is to be considered as an application for a determination of the length of an entry ban.[5] Referring to the provisions of the Return Directive and in particular the right to an effective remedy enshrined in Article 13 thereof, the Administrative Appeal Court of Hesse stated that a foreigner affected by a deportation decision must be given the possibility to file an effective appeal against a subsequent determination on the length of an entry ban which must be taken *ex officio* by the administrative authorities. However, Article 14 of the Return Directive cannot be interpreted as requiring suspensive effect of a return decision for the duration of the appeal procedure against the determination of the length of an entry ban.[6]

With regard to the application of the Return Directive and/or domestic implementing legislation, the Federal Administrative Court left open whether the substantive provisions of the Return Directive on the determination of the length of the entry ban are applicable in relation to entry bans adopted before the expiration of the transitional period.[7] Since it effectively applied the same substantive requirements, derived from fundaments principles of the Basic Law (Grundgesetz) and other fundamental rights documents such as the European Convention of human rights, the underlying question of retroactive application is without any practical relevance.

If the obligatory determination of the limitation of an entry ban is missing, no panel or administrative sanction for violating an entry ban can be taken in case of a subsequent unauthorised entry of a foreigner. Consequently, detention is only admissible if a subsequent decision on the length of an entry

[4] Bundesverwaltungsgericht (Federal Administrative Court) BVerwG, judgment of 13 December 2012, 1 C 14.12, available online at http://www.bverwg.de/entscheidungen/entscheidung.php?ent=131212U1C14.12.0.

[5] Bundesverwaltungsgericht (Federal Administrative Court) BVerwG, judgment of 14 February 2012, 1 C 7.11, para. 30, available online at http://www.bverwg.de/entscheidungen/entscheidung.php?ent=140212U1C7.11.0; Administrative Appeal Court of Hesse (Verwaltungsgerichtshof Hessen), judgment of 13 October 2014, 7 B 1413/14.

[6] Administrative Appeal Court of Hesse (Verwaltungsgerichtshof Hessen), judgment of 13 October 2014, 7 B 1413/14, para. 18; Administrative Appeal Court of Baden-Württemberg [Verwaltungsgerichtshof Mannheim], judgment of 7 February 2012, 11 S 1361/11; of 19 December 2012, 11 S 2303/12.

[7] Federal Administrative Court (above note 5), para. 32; judgment of 10 July 2012, 1 C 19.11, para. 45, available online at http://www.bverwg.de/entscheidungen/entscheidung.php?ent=100712U1C19.11.0; judgment of 13 December 2012 (above note 4).

ban has been taken at the time of the entry and if the foreigner had been given sufficient time to file an effective appeal against such decision according to Article 13 of the Return Directive.[8]

III. Criteria for Determining the Length of Entry Bans

1. Limits of Administrative Discretion

Before the entry into force of the 2012 amendment of the Residence Act,[9] it was recognised by German courts that the determination of the length of an entry ban was a matter of administrative discretion. In its judgement of 2 February 2012,[10] the Federal Administrative Court stated, however, that on the basis of a comprehensive view of the fundamental rights of the Basic Law, the European Convention on Human Rights and the European Union law including the Return Directive, the interests of a foreigner affected by a return decision had to be attributed a higher weight. This assumption led the court to the conclusion that the individual had been attributed a 'right to a comprehensive judicial control of the length of time of an entry ban. Therefore, the previous interpretation of section 11 of the Residence Act whereby the determination of the length of an entry ban was within the administrative discretion of the alien authorities could not be maintained.'[11]

The Court's statement may soon be overruled by the Bill of February 2015 which was adopted by the German Parliament in early July 2015[12] and which states explicitly in the first sentence of section 11(3) of the amended Residence Act that the alien authorities decide 'according to discretion' on the length of an entry ban.[13] This forthcoming legislative amendment does not mean, however, that the criteria established in the Federal Administrative Court in its 2012 judgment on judicial control of administrative discretion will be overturned, since according to the established principles of German administrative procedure and constitutional law any administrative discretion is subject to judicial control. A new statutory rule reaffirming administrative discretion has to be interpreted therefore, in line with human rights standards on which the Federal Administrative Court based its conclusion. One of the reasons of exercising control is non-compliance with fundamental principles, including the principle of proportionality. That said, the principled statement of the Federal Administrative Court that there is *no* margin of appreciation anymore by the administrative authorities cannot be upheld anymore. Instead, discretion will be overturned only when higher legal norms, such as constitutional law or Union law, require a different outcome.

2. Criteria for Judicial Control

The legislative Bill of February 2015, which was adopted by Parliament in early July 2015 and which will enter into force soon,[14] does not change the Federal Administrative Court's substantive rules relating to the Court's judgements on regular maximum limits of any entry ban.[15] In a judgement of 12 December 2012,[16] the Federal Administrative Court had described a procedure and criteria for determining the length of entry bans adopted in connection with an expulsion order. The Court prescribed a two-step procedure. In a first step, the weight of the reason underlying the expulsion order has to be ascertained. The administrative authorities must decide on the basis of a prognosis of every individual case whether the behaviour of a foreigner giving rise to an expulsion decision justifies the public interest to prevent a danger emanating from the foreigner, thereby going beyond the wording of the Return Directive whose Article 11 does not link the adoption of entry bans to a public order issue. In a second

[8] Bundesgerichtshof (Federal High Court): BGH, judgment of 8 January 2014, 5 ZB 137/12.

[9] See the preliminary remarks in section I above.

[10] Federal Administrative Court (above note 5).

[11] Translation by the author of Federal Administrative Court (above note 5).

[12] See the preliminary remarks in section I above.

[13] See the Bill, above note 3, p. 36.

[14] See the preliminary remarks in section I above.

[15] See the Bill, above note 3, p. 36.

[16] Federal Administrative Court (above note 4).

step, the administrative authorities must evaluate whether the timespan of entry bans determined on that basis is compatible with constitutional guarantees on the protection of personal liberty and family and the provisions of Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention of Human Rights which have to be interpreted identically according to the ECJ in which the Federal Administrative Court effectively employs as instruments strengthening the protection of migrants under the Return Directive. The Federal Administrative Court considered this procedure as a normative corrective providing immigration authorities and administrative courts with a instrument to limit the potentially severe effects of entry bans for the personal situation of the foreigner and family members. In essence, it required a balancing exercise on the basis of rights inspired proportionality taking into account all individual circumstances at the time of the adoption of entry bans by administrative authorities, or at the time of the last oral proceeding in the case of judicial review. If the balancing decision has not been taken properly by the administrative authorities, the administrative court will replace the administrative decision by its own judgement.[17]

3. Consideration of Individual Circumstances

German administrative courts generally apply the rules governing entry bans on the basis of the two-step procedure the criteria laid down by the Federal Administrative Court in its judgement of 12 December 2012.[18] The Federal Administrative Court had emphasised in this judgment the necessity to determine the length of entry bans on the basis of all circumstances of an individual case and to take into account both the principle of proportionality and the human rights requirements under the German Constitution and the European Convention of Human Rights. In its case law, the Federal Administrative Court has frequently referred to the jurisprudence of the European Court of Human Rights in order to examine whether the private interests of a foreigner have been properly taken into account.[19] This is another example of German courts relying on fundamental rights in order to reinforce guarantees for migrants under the Return Directive, in this case regarding the length of entry bans.

At present, section 11 of the Residence Act does not provide any criteria on the determination of the length of an entry ban with exception of the five-years' limit and the exclusion of limiting an entry ban in case of a prosecution of specified crimes against humanity, war crimes or terrorist offences. In the future the statutory situation will be different, since the legislative amendment adopted by the German Parliament in early July 2015 will establish additional rules.

The future section 11(6) will lay down that entry bans 'may' may be imposed on foreigners who do not comply with the obligation to leave Germany within a prescribed time limit unless the person is prevented from leaving Germany without his fault or in case of a minor transgression of the time limit for leaving (this formulation takes up Article 11(1)(b) of the Return Directive). The same paragraph will specify that time limits the regularly be one year for those where subject to the first entry ban and three years for those who have been subject to an entry ban on an earlier occasion, i.e. the time limits are below the five-year period allowed for by the Directive.

According to the future section 11(7) of the Residence Act, foreigners whose asylum application has been validly rejected as manifestly unfounded, an entry and residence ban 'may' be ordered. Again, the length of the entry ban is not to exceed one year at the first time, in other cases the time limit is three years. The provision applies only if the foreigner has not been accorded subsidiary protection or national humanitarian protection on a residence permit according to the Residence Act and are meant, among other things, to render the safe country of origin concept under asylum law more effective.

The new section 11(8), (9) as amended will also provide a for a suspension or withdrawal of an entry or residence ban or reduction of a time limit if the purpose of the entry and residence ban does not require the maintenance of the entry or residence ban. A subsequent prolongation of the length of a residence ban may be ordered for reasons of public order and security. The subsequent prolongation is

[17] Federal Administrative Court (above note 4).

[18] See above section III.2.

[19] See e.g. Federal Administrative Court (above note 5).

only permissible if the requirements of section 11(3) as amended are met which provides that a five-years' time limit may only be exceeded if the foreigner has been expelled due to a penal prosecution or in case of a substantial danger for the public order and security.

In general, the administrative courts determining the length of an entry ban have taken the following criteria into account in previous case law:

1. The attempt of a foreigner ordered to prevent the execution of his obligation to leave the Federal Republic by absconding or other means.[20]

2. In case of repeated illegal entries the reimbursement of deportation expenses of previous deportations prescribed by German law.[21]

3. The behaviour of a foreigner subsequent to a deportation, in particular disregard of entry bans and renewed illegal entry.[22]

4. Conditions Attached to Entry Bans

The question whether section 11 of the Residence Act is interpreted in accordance with Article 11(1) of the Return Directive 2008/115 in so far as the determination of time limits of entry bans can be connected to substantive conditions set by the administrative authorities (such as the absence of a criminal record) has been answered differently by administrative courts. A majority of administrative courts have argued that the right of administrative authorities to attach conditions to a limitation of an entry ban is compatible with the general systematic and purpose of the Return Directive although there are no explicit rules in the Directive on that matter. The purpose of the Directive according to this view did not support an interpretation restricting the administrative authorities to mere decisions on the length of an entry ban. The flexibility inherent in the Directive to exceed the five-year limitation under the second sentence of Article 11(2) and the obligation to take into account all relevant circumstances in the wording of the same para argues, according to the sea courts, for an authorisation of the administrative authorities to connect time limits with conditions in order to prevent a potential danger emanating from a foreigner affected by a return decision. The argument is supported by the assumption that administrative authorities and courts could not reliably assess future dangers on the basis of a prognosis only: conditions can help to render the purpose underlying the entry ban effective, not least since effective conditions can result in lower time periods for entry bans. This flexible interpretation of the Return Directive connecting the length of an entry ban to additional conditions should be considered as more suitable to fulfil the purposes of the Return Directive.[23]

The Bill of February 2015 will amend section 11(2) of the Residence Act by introducing a provision entitling administrative authorities explicitly to attach conditions to a determination of the length of an entry ban, particularly with regard to a proven absence of a criminal record or drug abuse in order to prevent dangers to the public order and security. If the condition is not met, a larger time period will apply which has been determined at the time of determining on the entry ban.

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[20] Administrative Court (Verwaltungsgericht) Freiburg, judgment of 18 September 2014, 4 K 2304/13; Administrative Court (Verwaltungsgericht) Düsseldorf of 15 August 2012, 7 K 2869/12.

[21] Administrative Court (Verwaltungsgericht) Freiburg, op. cit.; Administrative Court of Düsseldorf, judgment of 15 August 2013, 7 K 2868/12; Administrative Appeal Court North Rhine-Westphalia (Oberverwaltungsgericht Nordrhein-Westfalen), decision of 18 April 2011, 18 E 1238/10; Administrative Appeal Court Lower Saxony (Verwaltungsgerichtshof Sachsen-Anhalt), decision of 15 June 2013, 8 PA 98/13.

[22] Bavarian Administrative Appeal Court (Verwaltungsgerichtshof München), judgment of 10 April 2013; Administrative Appeal Court Lower Saxony (Verwaltungsgerichtshof Sachsen-Anhalt), decision of 25 June 2013, 8 PA 98/13; Administrative Court (Verwaltungsgericht) Düsseldorf, judgment of 15 August 2013, 7 K 2868/12; Administrative Court (Verwaltungsgericht) Freiburg, judgment of 18 September 2014, 4 K 2304/13.

[23] Bavarian Administrative Appeal Court (Verwaltungsgerichtshof München), judgment of 21 November 2013, 19 C 13.1206, para. 20 – condition of absence of drug addiction.

5. Five-years' limit

In accordance with the Article 11(2) of the Return Directive, German administrative courts have upheld a determination of entry ban exceeding five years only in case of a substantial criminal prosecution representing a serious threat for public policy or public security. Interpreting the somewhat wide formulation of section 11 of the Residence Act,[24] the Federal Administrative Court decided that even if the requirements for exceeding the five-years' limit are met, the timeframe of a maximum of ten years constitutes the time horizon for which a prognosis can realistically be made, i.e. shorter timeframes are possible and maybe mandatory. The Court derives from this consideration a regular maximum time limit of ten years which, however, does not necessarily mean that in case of a continuing existence of an expulsion reason or the realisation of new expulsion reasons a residence permit would have to be granted.[25] The Federal Administrative Court has justified an entry ban for ten years in case of a criminal prosecution for murder and a continuing high risk of substantial crimes.[26] Moreover, an Administrative Appeal Court has considered an entry ban for seven years as justified in case of an expulsion of a Turkish national following an expulsion for repeated drug trafficking resulting in a criminal prosecution of an eleven-year imprisonment.[27] Finally, the Administrative Appeal Court of Hamburg has stated that in order to determine whether a foreigner represents a threat to public policy or public security, criminal prosecutions may be taken into account even if no expulsion decision has been taken on the basis of such criminal prosecutions. The Court emphasised that Article 11(2) of the Return Directive does not require such expulsion order.[28]

6. Absence and Review of Entry Bans

The Federal Administrative Court has interpreted the requirement that a determination on an entry ban has to take into account all relevant circumstances (first sentence of Article 11(1) of the Return Directive) as an obligation to refrain from an ordering an entry ban if individual circumstances argue against. This may be the case if a long time has passed between an expulsion order and the execution of that decision if the reasons justifying the original expulsion decision do not exist anymore or if overriding considerations of proportionality, in particular protection of the family, require refrain from an entry ban. Foreigners may still be obliged to leave the country in order to comply with the existing return decision, but now entry ban can be imposed, i.e. the foreigner can return immediately if he meets the requirements for entry.[29]

Based on principles of proportionality, administrative courts decided that even before the entry into force of the Bill of 2015 the immigration authorities have to examine on the basis of an application whether there are new considerations arising subsequently to a decision on an entry ban which require a shortening of the length of the entry ban. The applicant may at any time file an application for shortening the length of an entry ban if the circumstances have changed in favour of the applicant.[30]

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[24] Administrative Court (Verwaltungsgericht) Freiburg, judgment of 18 September 2014, 4 K 2304/13.

[25] Federal Administrative Court (above note 4).

[26] Ibid.

[27] Administrative Appeal Court (Oberverwaltungsgericht) Berlin-Brandenburg, judgment of 13 March 2015, 11 N 30.14, para. 3.

[28] Administrative Appeal Court (Oberverwaltungsgericht) Hamburg, decision of 15 September 2014, 3 Bs 185/14.

[29] Bundesverwaltungsgericht (Federal Administrative Court) BVerwG, judgment of 6 March 2014, 1 C 2/13, para. 13, available online at http://www.bverwg.de/entscheidungen/entscheidung.php?ent=060314U1C2.13.0; Bundesverfassungsgericht (Federal Constitutional Court): BVerfG, Decision of 17 September 2014, 2 BvR 1795/14, available online at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/09/rk20140917_2bvr179514.html. The Constitutional Court, however, mentioned that this ruling is not applicable in case of criminal prosecutions for serious offences resulting in prison sentences (para. 20).

[30] Administrative Appeal Court (Oberverwaltungsgericht) Berlin-Brandenburg, decision of 29 April 2014, 3 N 138/13; Bundesverwaltungsgericht (Federal Administrative Court): BVerwG, judgment of 11 November 2013, 1

IV. Detention

Detention has raised a number of questions in relation to the interpretation of Art. 15 and 16 of the Return Directive, in particular relating to detention grounds. In addition to the extensive information contained in the national report for Germany produced for the CONTENTION project on questions of the judicial control of immigration detention,[31] the following information is crucial for understanding the legal status quo and the forthcoming legislative amendment. The latter is based on a proposal of the federal government of February 2015 and was adopted by the German Parliament in early July 2015. It is suspected to enter into force fairly soon following the signature of the President.[32]

1. Grounds for Detention

The Federal High Court (Bundesgerichtshof) decided in a landmark-decision of June 2013 that section 62 of the Residence Act regulating detention does not comply with the requirements for a legislative determination of the detention reasons according to the detention under Dublin Regulation 604/2013.[33] It is controversial whether this decision can be applied as well to deportation decisions outside the scope of application of the Dublin-III-Regulation. According to decisions of some civil courts, the conclusions of the Federal High Court cannot be applied to detention on the basis of the Return Directive, since Article 15(1) of the Return Directive cannot be interpreted as making detention subject to a risk of absconding, since the Directive did not list exhaustively the grounds for ordering detention. In addition, Article 15(1)(b) establishes an additional ground for detention: the third-country national concerned avoids or hampers the preparation of return of the removal process. Therefore, the Directive primarily intended to ensure the return of illegally residing third-country nationals rather than harmonising detention reasons, in the eyes of some civil courts.[34]

This dispute will soon be irrelevant, since the Bill which was adopted by the German Parliament in early July 2015 will amend fundamentally the grounds for detention in section 62(3)-(5) of the Residence Act. The new wording of the Residence Act will maintain the previous grounds for detention, in particular the well-founded suspicion of a risk of absconding which, however, will in the future be defined further under recourse to criteria for the existence of such a risk. The requirement of such additional criteria was the central legal argument of those claiming that the status quo ante violated the Return Directive was Article 3(7) define the term 'risk of absconding' as 'the existence of reasons in an individual case *which are based on objective criteria defined by law* to believe that a third-country national who is the subject of return procedures may abscond.' The news law sets out to establish these grounds.

More specifically, the future section 2(14) of the Residence Act provides a set of criteria indicating a risk of absconding. As indications they are not meant to lead automatically to a detention, since section 62(3)(5) of the Residence Act as amended will stipulate that there have to be 'grounds to believe in each individual case that on the basis of indications as set out in section 2(14) that there is a real risk that someone will abscond.'[35] Moreover, the German Federal Constitutional Court requires courts to always apply a strict proportionality assessment as described in the national report to the project CONTENTION mentioned above.

Bf/13; judgment of 13 July 2013, 1 C 9/12, available online at http://www.bverwg.de/entscheidungen/entscheidung.php?ent=300713U1C9.12.0.

[31] See Kay Hailbronner and Daniel Thym, Completed Questionnaire for the project Contention National Report – Germany, 2014, available online at http://contention.eu/docs/country-reports/GermanyFinal.pdf.

[32] See the preliminary remarks in section I above.

[33] Bundesgerichtshof (Federal High Court): BGH, judgment of 26 June 2014, V ZB 31/14; Bundesgerichtshof (Federal High Court): BGH, judgment of 22 October 2014, 5 ZB 124/14.

[34] District Court of Nuremberg (Landgericht Nürnberg), judgment of 18 February 2015, 18 T 522/15; similarly District Court (Landgericht) of Stuttgart, judgment of 16 February 2015, 19 T 43/15; for a different view Municipal Court (Amtsgericht) of Hannover, decision of 19 January 2015, 44 XIV 64/14, referring to the wording of Art. 15 (1) of the Directive.

[35] Translation of the new statutory text by the authors.

Against this background, Section 2(14) will in the future define the risk of absconding under recourse to the following objective criteria:

1. The foreigner has prevented being returned by changing residence without informing the authorities in the past.

2. The foreigner is deceiving the authorities about his identity, particularly by falsifying or destroying identity or travel documents or pretending a false identity.

3. The foreigner has violated obligations to cooperate in the process of clarifying his identity if it can be concluded on the basis of the circumstances of the individual case that prosecution of a deportation is actively being prevented.

4. The foreigner has spent a substantial amount of money for organising illegal entry.

5. The foreigner has explicitly declared his intention to prevent deportation.

6. The foreigner has, in order to prevent deportation, taken concrete acts to prepare a preventive action which cannot be overcome by the application of direct force.

2. Detention of Minors

The Federal Administrative Court has interpreted Article 10(2) of the Return Directive, which states that the abstract possibility to return a minor to a member of his or her family, a nominated guardian or adequate reception shall be satisfied before any return, is not met if the relatives in the country of origin or the adequate reception facilities in the state of return have to be identified upon return. Rather, immigration authorities are obliged to ensure that a transfer to the nominated persons or facilities can be actually made *before* execution of a deportation order.

With regard to the restriction of detention of minors under Article 17 of the Return Directive, the Federal High Court decided that the immigration authorities have to apply the protective rules set out in Article 17 also in case of doubt relating to the age of an applicant, i.e. if it is not clear whether the applicant is a minor.[36]

3. Specialised Detention Facilities

Implementing the decision of the Court of Justice of 17 July 2014,[37] the Federal High Court decided that detention of foreigners under the Return Directive must be executed in special detention facilities in accordance with Article 16(1) of the Return Directive. This means, more specifically that a particular building for the detention under the Return Directive within the compound of a ordinary prison cannot be considered as a special detention facility in the sense of the Return Directive.[38] A detention order cannot be applied if the execution of a detention order in specialised detention facilities cannot be ensured due to the lack of sufficient facilities.[39]

It should be noted that the case law has resulted in the release of many detainees and that the regional states are currently undertaking considerable efforts to establish detention facilities complying with the Return Directive.

[36] Bundesgerichtshof (Federal High Court): BGH, judgment of 12 February 2015, V ZB 185/14; judgment of 29 October 2010, 5 ZB 233/10.

[37] ECJ, Bero & Bouzalmate, C-473/13 & C-514/13, EU:C:2014:2095.

[38] Bundesgerichtshof (Federal High Court): BGH, judgment of 25 July 2014, V ZB 137/14, para. 9.

[39] Bundesgerichtshof (Federal High Court): BGH, judgment of 12 February 2015, V ZB 185/14.