REDIAL PROJECT

National Synthesis Report – Germany

(Draft)

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

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

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

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)

According to Art. 104 (2) of the German constitution only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order (according to the police laws of the Länder in order to prevent a violation of public order or security) a judicial decision shall be obtained without delay. In this case the police may hold nobody in custody on their own authority beyond the end of the day following the arrest. The details are regulated by police laws of the Länder and federal legislation.

In Germany, detention is controlled by the so-called ordinary court system (civil and criminal branches of the jurisdiction), while immigration and asylum law is usually being dealt with by the administrative courts. The fact that only civil courts are competent for review of these matters dates back to the 19th century establishment of administrative courts, which were originally part of the

public administration.

In the German legal system there is no administrative discretion with regard to the requirements for ordering detention.

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**~~**:** same authority.

See the answer to question 1.

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

The lawfulness of continuing detention is controlled by the judicial authority in case of a renewal of a detention order as well as independently from the renewal order, if the reason for continuing detention has ceased to exist. Under Sec. 426(1) FamFG (question 1.1) the court an obligation *ex officio* to cancel detention, if the conditions for detention do no longer exist. Before stopping detention, the Court has to hear the responsible administrative authority (see the second sentence of section 426(2) FamFG). On initial review at first level at the initiative of the migrant see below.

Moreover, the migrant may, at any time, ask the Court to decide whether the conditions for detention do still exist (see section 426(2) FamFG).

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 law mentioned above (question 5) regulates the procedure before civil courts in case of judicial orders relating to a deprivation of liberty. According to Sec. 58 of this act any judicial order of detention is subject to an appeal before a court of appeal at the initiative of the migrant. The appeal contains a full examination of the lawfulness of detention, including the factual situation. Sec. 70(3) No. 1 of the Law provides for a third level of jurisdiction limited to questions of law (so-called Rechtsbeschwerde). When it comes to questions of law, there is no difference in the control of lawfulness of detention between the first and second level of jurisdiction.

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)

In this field of the law, German judges are obliged to exercise a full control over all elements, which might effect the legality of the measure *ex officio* (*Untersuchungsgrundsatz*). This extends to both questions of law and of fact. Also, judicial control is not limited to the arguments raised by the parties.

For historic reasons, the judicial control of detention issues is regulated in a law with the (misleading) title 'Act on the Judicial Procedure in Family Law Matters and Concerning Voluntary

Jurisdiction – FamFG' (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG, available online at http://www.gesetze-im-internet.de/famfg/). It is well-established in case law of the Constitutional Court that this judicial review must be all-embracing (see for instance Decision of 7 September 2006, 2 BvR 129/04). These constitutional principles are reaffirmed by Sect. 26 FamFG: 'The court shall pursue all *ex officio* investigations which are necessary to establish all relevant facts, which are necessary to rule on the case.' A full examination of the legal questions is in line with Art. 20(3) of the German Constitution. Throughout the years, there have been various decisions of the German Constitutional Court and the Federal Law Court (*Bundesgerichtshof*), which emphasise the requirement of full control of the law and the facts.

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

YES/~~**NO**~~

See answer to Q5: Legality is controlled *ex officio*, although arguments of the parties will of course be taken into account.

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

See answer to question 4.

b. Judicial Interactions with European and national Courts

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

YES/ ~~**NO**~~

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)

We are unaware of references on Article 35 Return Directive – and the German judge participating in the redial project also did not report any case law which followed up on ECJ decisions.

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?)

German courts will occasionally referred to ECJ rulings, although this does not happen often for the

simple reason that the German Constitution and corresponding dishes inspired the Federal Constitutional Court established strict requirements, which the courts following practice. An exception is the case law by the Federal Supreme Court prohibiting detention due to a risk of absconding, since the German legislature had failed to establish objective criteria in line with the requirements of the Return Directive (the case law will be discussed below in the context of the risk of absconding).

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.)

There are no regular references to either the ECHR or the EU Charter. The underlying reason is Article 104 of the German Constitution, which the Federal Constitutional Court interpreted strictly, thereby giving an orientation to domestic courts which in many cases is above the requirements of EU law or the ECHR. Also, the German judge participating in the redial project did not report any specific 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 15 RD?

YES/~~**NO**~~

If yes: please elaborate further on this issue

The Federal Supreme Court prohibited detention due to a risk of absconding, since the German legislature had failed to establish objective criteria in line with the requirements of the Return Directive (the case law will be discussed below in the context of the risk of absconding).

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

We are not aware of such decisions and the German judge participating in the redial project did not report any cases either.

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?

See above, answer to question 1.

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**

While detention is controlled by the so-called ordinary court system (civil and criminal branches of the jurisdiction), return decisions have to be challenged before administrative courts. Civil courts will not examine in case of a detention to safeguard deportation, if an expulsion decision has been taken lawfully by the alien authorities. If an expulsion order is taken against a foreigner, he/she may appeal against an expulsion order with the administrative courts. As long as there is a valid and enforceable expulsion order, civil courts cannot challenge the lawfulness of the expulsion order as a requirement of a subsequent deportation.

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/~~**NO**~~

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

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

According to Sec. 62 (3) Residence Act (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, available online at http://bundesrecht.juris.de/aufenthg_2004) a foreigner may be detained by judicial order in order to prepare a deportation, if one of the following requirements are fulfilled:

1. the foreigner is enforceably required to leave the federal territory on account of his/her having entered the territory unlawfully;

2. a deportation order has been issued pursuant to Sec. 58 a [special possibility to issue a deportation order in case of a threat to public security], but is not immediately enforceable [note that the provision has only be used in very special cases involving allegedly dangerous terrorist suspects];

3. the period allowed for departure has expired and the foreigner has changed his/her place of residence without notifying the foreigners authority of an address at which he/she can be reached;

4. he/she has failed to appear at the location stipulated by the foreigners authority on a date fixed for deportation, for reasons for which he/she is responsible;

5. he/she has evaded deportation by any other means, **or**

6. a well-founded suspicion exists, based on predefined indicators in line with the indications laid down in section 2 (14), that there is a risk of absconding.

The foreigner may also be placed in detention pending deportation for a maximum of forced, if the period allowed for departure has expired and it has been established that deportation can be enforced and that the foreigner may hamper deportation (section 62b Residence Act; judicial order as well required).

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 main limitation of these statutory provisions on return flow directly from the constitutional principle of proportionality, which courts must apply in addition to the statutory requirements, i.e. even if one of the grounds mentioned above is met, the court may not order detention if the letter is disproportionate. As mentioned before, this requirement is applied rigorously by the courts – in line with the requirements of the Federal Constitutional Court. It is established case law that the reasonable prospect of removal is an essential precondition for any detention order (for instance Federal Constitutional Court, BVerfG of 27 February 2009, 2 BvR 538/07).

According to Sec. 62 (3) sentence 4 of the Residence Act, detention pending deportation shall not be permissible if it is established that it will not be possible to carry out deportation within the next three months for reasons, for which the foreigner is not responsible. According to the jurisprudence of the Constitutional Court the prognosis has to be taken by the judge on the basis of a sufficiently complete factual basis (Federal Constitutional Court, BVerfG of 27 February 2009, 2 BvR 538/07; Federal Constitutional Court, BVerfG of 15 December 2000, 2 BvR 347/00). According to the court, decisions on deprivation of personal liberty must be based on a full examination of the factual reasons on which the prognoses is based. It is required that all the files of the alien authorities have to be included in the judicial procedure and have to be examined independently by the judge (Federal Constitutional Court, BVerfG of 10 December 2007, 2 BvR 1033/06). The jurisprudence of the supreme courts has been rather strict with regard to the level of judicial examination of the factual assumption of alien authorities as to the existence of a prospect of removal. Thus, appeal courts have frequently challenged a general assumption of a prospect of removal by alien authorities if the alien authorities have not provided concrete facts on the different steps to be taken in order to effect a deportation order and potential barriers to deportation.

For instance, the Bundesverwaltungsgericht (German Supreme Administrative Court; Judgment of 10 December 2014 – 1 C 11.14) ruled that the detention request by the authorities before a court decides on detention must comprise explanations concerning the obligation to leave the country, concerning the conditions for removal or forcible return, the necessity of the detention, the feasibility of deportation and for the necessary period of detention. The prescribed reasoning of the detention request must be related to the specific case; empty formulas and text modules are not enough. With regard to the feasibility of the intended deportation, explanations are necessary with regard to the country in which the person concerned shall be deported. It is necessary to specify whether and in what timeframe returns in the country in question are usually possible. Concrete information is needed on the conduct of the process and an illustration as to which period is normally needed to execute the individual steps of removal under normal conditions.

The conduct of the country of potential return (refusal of cooperation) will generally exclude the prospect of return unless an alternative country of return can be found. The same is true with regard to the lack of a readmission agreement unless there is a concrete likelihood that even in the absence of a readmission agreement a person may be returned. For instance, a refusal on the side of the receiving state to grant someone travel documents, will usually render detention illegal – unless the

authorities submits new evidence that the state may now, on the basis of new documents, consent. This last conclusion will be not automatic, however, since there always has to be a full assessment of all relevant facts (for the exemple cited see the Regional Appeals Court of Munich, Decision of 17 May 2006, 34 Wx 025/06).

Another typical instance would be the unavailability of flights. If, for instance, a flight had to be cancelled due to fog or a strike, it does not hinder detention, if it can be assumed that the flight will take place later. If it turns out, however, that flights to a certain region will not take place for whatever reason, this lack of ressources on the side of the authorities will hinder detention. Note that this conclusion will never automatic, since there always has to be a full assessment of all relevant facts. For further comments see No. 62.2.5.0 of the Administrative Guidelines on the Implementation of the Residence Act (Allgemeine Verwaltungsvorschrift AufenthG of 26 October 2009).

Additional decisions include:

Federal High Court (Bundesgerichtshof, Decision of 14 April 2011, V ZB 76/11): The extension of a three months detention order is rather not permitted if the removal was omitted for reasons which the third-country national is not responsible for. This requires a forecast that the removal within three months from the date of (the first) detention order could normally be carried out without considering the removal delaying circumstances attributable to the affected.

Federal High Court (Bundesgerichtshof, Decision of 18 August 2010, V ZB 119/10): For the determination of whether the deportation within three months is possible, concrete information about the timing of the procedure and a presentation of the period are required in which the individual steps can be run under normal conditions. The court is not limited to a repetition of the assessment of the applying authority, that the removal is expected to take place within three months. As far as the application does not include concrete and suitable facts, it is the responsibility of the court to inquire.

Federal High Court (Bundesgerichtshof, Decision of 25 February 2010, V ZB 172/09): For the necessary forecast whether the removal may be carried out within three months, the court must take into account the probable result of an application for suspension of the removal submitted by the third-country to the Administrative Court.

Federal High Court (Bundesgerichtshof, Decision of 10 May 2012, V ZB 246/11): Information on the feasibility of the removal within the applied period of detention must occur with a specific reference to the country, in which the affected should be removed. It is necessary to show up how long a removal under which single steps in that country in general is possible.

Federal High Court (Bundesgerichtshof, Decision of 14 February 2012, V ZB 4/12): As far as readmission agreements with third countries exist (in this case the agreement of the Federal Republic of Germany and the Republic of Austria and the Republic of Kosovo), the single steps to be taken for removal according to these readmission agreements must be presented in the application together with the periods of time, the single steps usually take.

Federal High Court (Bundesgerichtshof, Decision of 27 October 2011, V ZB 311/10): For a permissible application for detention the information required on the feasibility of removal must be based on the country in which the affected is to be removed, and must indicate whether and in what time removals in this country are usually possible.

Higher Regional Court of Brandenburg (Brandenburgisches Oberlandesgericht, Decision of 23 September 2008, 11 WX 46/08): The detention pending removal is inadmissible in the case it is ascertained that the removal of the third-country national can not be carried out within three months and the hampering circumstances are not based on a conduct of the third-country national.

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.

The conduct of the third-country national concerned may be taken into account. However, if the conduct of the third-country national concerned successfully frustrates a reasonable prospect of removal, further detention becomes unlawful. The courts have frequently decided that detention cannot be used in order to enforce cooperation.

By way of exception, the order for detention pending deportation pursuant to this provision may be waived, if the foreigner credibly asserts that he/she does not intent to evade deportation.

Hampering the preparation of return of the removal process can be based upon a variety of factors such as use of falsified documents, previous behaviour of a person in connection with a deportation etc. It should be noted that the German law does not distinguish systematically between hampering return and the risk of absconding (the latter is considered to be a specific example of the former). Case law will therefore be dealt with more extensively further down.

For instance, a migrant can be held responsible for having voluntary given his travel documents away knowing that this would suspend deportation (Regional Appeal Court of Cologne, Decision of 13 October 2004 – 16 Wx 194/04). Note again that such a conclusion will never automatic, since there always has to be a full assessment of all relevant facts.

The jurisprudence has developed certain criteria in order to examine the requirement that there is a well-founded suspicion that he/she intends evade deportation. The intention to avoid the removal process can be based upon various factors such as criminal convictions provided that they allow the conclusion that the foreigner will not comply with court orders related to previous sentences for criminal offences. The general assumption that penal judgements did not impress a convicted person may justify the conclusion of avoiding the preparation of return of the removal process. This was spelled out more clearly in Federal High Court (Bundesgerichtshof, Decision of 28 April 2011, V ZB 14/10): The reasonable suspicion the affected would seek to evade the enforcement of the obligation to leave can be based on convictions of the affected and multiple specifications of incorrect personal data.

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**~~

Generally, according to case law on the issue the risk of absconding requires concrete facts, in particular statements or behaviour of the foreigner which allow with a certain likelihood the conclusion that the foreigner intends to abscond or hamper the deportation in a way which cannot be simply overcome by the application of ordinary enforcement measures, which do not require a deprivation of liberty. A multiple change of domicile which has not been communicated to the alien authorities in spite of respective warnings and a subsequent going into hiding as well as a flight attempt at the occasion of a police arrest may be taken as a factor justifying a risk of absconding. The mere fact of an illegal stay or entry does not yet justify a risk of absconding.

Examples from the case law include:

Federal High Court (Bundesgerichtshof, Decision of 3 May 2012, V ZB 244/11): The assumption of an risk of absconding is not the pure result, that the third-country national entered the country with the help of smugglers, but the herewith in general associated expenditure of substantial financial resources, which the third-country national would have spent in vain in the case of removal: This fact may be a stimulus of the third-country national not to leave Germany voluntarily but to abscond.

Federal High Court (Bundesgerichtshof, Decision of 15 December 2011, V ZB 302/10): If an extension is applied for, the competent authority has to show up when the obstacle which hampered the removal of the affected in the first three months of detention may be obolished. Detention is only permissible for securing the removal and not for the purpose of coercive imprisonment.

Federal High Court (Bundesgerichtshof, Decision of 29 September 2011, V ZB 307/10): The pure fact, that the third-country national violated the obligation to tell the authority for foreign nationals a change of residence before the deadline to leave the country expired, cannot justify a risk of absconding.

Federal High Court (Bundesgerichtshof, Decision of 15 September 2011, V ZB 123/11): The application for detention is admissible only if it addresses to all essential facts required for the judicial decision.

Federal High Court (Bundesgerichtshof, Decision of 28 April 2011, V ZB 14/10): The reasonable suspicion the affected would seek to evade the enforcement of the obligation to leave can be based on convictions of the affected and multiple specifications of incorrect personal data.

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?

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?

Following two judgments by the Federal Supreme Court, which had ruled that German legislation did not define objective criteria to guide the decision whether there is a risk of absconding (see German Federal Civil Court; Decision of 26 June 2014 – V ZB 31/14 for Dublin cases; and ibid. decision of 18 February 2016 – V ZB 23/15 for the return directive; see also ibid. Decision of 18 February 2016 – V ZB 23/15), the legislature defined objective criteria which go beyond the mere fact of an illegal stay or entry. They include, according to section 2(14) Residence Act:

- prior cases in which the person concerned had evaded public authorities in the context of immigration proceedings, although it was legally obliged to make himself available to the authorities;

- the foreigner deceived the authorities about his identity, in particular by destroying identity or travel documents or by pretending to be someone else;

- the foreign refuses to participate in administrative proceedings to identify him/her despite a legal obligation to do so – provided that it is established that he/she wants to abstract deportation given the circumstances of the individual case;

- the foreigner paid considerable amounts of money for human trafficking provided that the circumstances of the individual case indicate that the/she will abscond in order not to frustrate her financial 'investment';

- whenever a person declared expressly that he/she will abscond;

- he/she has undertaken preparatory action of a considerable degree to frustrate deportation provided that these actions cannot be overcome by the police.

The German judge participating in the redial project did not report any case law concerning the interpretation of these new statutory requirements, which entered into force in the summer of 2015.

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/~~**NO**~~

The ordering of a detention in order to enable the *preparation* of an expulsion order, i.e. during the preparatory phase before the Return Directive is applicable, is regulated in Sec. 62 of the Residence Act. Sec. 62 (2) regulates detention by judicial order in order to prepare an expulsion order. A judicial order is only admissible, if it is not possible to decide immediately upon expulsion, and potential future detention would be complicated substantially or frustrated without such detainment. The duration of custody to prepare expulsion should not exceed six weeks. In case of an expulsion or being issued no new judicial order shall be required for the continuation of custody up to expiry of the ordered term of custody. Sec. 62 (2) regulates detention in order to prepare an expulsion order. It is laid down explicitly that the duration of custody to prepare expulsion should not exceed six weeks (see the second sentence). The six-weeks-time limit may only be extended if there are special circumstances which make it necessary for reasons for which the alien authorities are not responsible to exceed the time limit in order to effect a likely deportation order. In addition, the termination of the expulsion procedure must be foreseeable.

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

YES/~~**NO**~~

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

Under section 62 (1) courts have to consider alternatives to detention, although the law does not specify which alternatives might be applied in practice. The requirement to consider alternatives to detention also flows from the constitutional principle of proportionality. Since deprivation of liberty is a severe restriction of a fundamental freedom, any other less stringent measure must be taken if they are suitable to further the purpose of return respectively to enable an execution of a deportation order.

However, some alternatives to detention are mentioned indirectly in German legislation. These measures are part of a return procedure and do not relate directly to the traditional decision about detention, but they can be used by the courts also in the context of detention. These include the deposit of travel documents, registration obligation, and designated residence (see section 83 of the Residence Act). Other stringent measures such as electronic tagging, home curfew etc. mentioned cannot be taken under the German legislation.

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

YES/~~**NO**~~

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

See the answer to Q8 and 10, since under the German system detention is always ordered by courts, never by administrative authorities.

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)

As described above, judicial review under the constitutional principle of proportionality strict, i.e. there is no administrative discretion – and since courts are taking the decision in the first place, they have to come to a conclusion by themselves, and not correcting substituting someone else.

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.)

In accordance with Section 62(3) sentence 4 the judicial assessment of the prospect of removal relates to a three-month time-frame in regular circumstances, i.e. when assess all the different factors addressed above, the Court will ask whether they will result in deportation within 3 months. Under sentence 6 this time-frame can be extened, if the migrant is responsible for a delay. However, in line with constitutional law, such extension will never be automatic, i.e. there always has to be an assessment of the proportionality in each individual case. In cases in which the foreigner frustrates his/her deportation is may be extended by a maximum of 12 months under Section 62(4). A period of custody to prepare an expulsion order shall count towards the overall duration of detention pending deportation. The period will start with the actual placement in detention.

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.

Since judges decide on detention by themselves they will always perform a full assessment and will not limit themselves to manifest errors. Various examples which are discussed as questions of due diligence in other legal orders have been mentioned above in the answer to question two concerning the prospect of removal.

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

Under Sec. 14 (3) Asylum Procedure Act the application for asylum does not as such exclude the ordering of detention or continuation of detention for executing a return order. However, courts will have to examine whether on account of the asylum procedure a deportation may be executed within the required time frame under Sec. 62 of the Residence Act. However, since under the court's decision in *Kadzoef* and *Arslan*, the application for asylum of a detainee results in a change of the legal basis of detention, it follows that the period of asylum proceedings should not be taken into account when calculating the maximum length of detention.

High court cases, which have elaborated upon the issue include: Federal High Court (Bundesgerichtshof, Decision of 21 July 2011, V ZB 222/10): A third country-national who applied for asylum again may in principle only be removed after the decision of the competent authority that a new asylum procedure will not be taken place.

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)

As previously noted, the maximum period of six months according to Sec. 62 (4) of the Residence Act can be prolonged in cases in which the alien prevents his/her deportation for up to six months and, in accordance with Sect. 62(4) Residence Act, for up to 12 months if the person concerned in this deportation. Again, the decision must be subject to a strict proportionality assessment. A prevention of deportation is not yet proven by a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation. It requires concrete obstruction measures attributable to the foreigner and evidence that the obstruction measure has caused the impossibility of a deportation.

As always in German detention proceedings, there is a full control by the courts and there is always the new proportionality assessment required meeting the conditions outlined above. The requirement of a new assessment follows from the general principle that deprivation of liberty must always comply with the legal requirements of proportionality and that under Sec. 426 courts are obliged *ex officio* to quash a detention order if the reason for deprivation of liberty does not exist anymore. The court is only obliged to hear the competent alien authorities (Sec. 426 (1) sent. 2).

More specifically, In case of a lack to cooperation in the procurement of travel documents the alien authorities have to proof that the passed detention time has been fully used to organise the issuance of such documents in so doing, the denial of the due participation of an affected justifies an extension of detention beyond six months only if that refusal is causal for the non removal. Therefore, a potential refusal to cooperate has to be taken into account by the alien authorities in planning and organising the process of return (Bundesgerichtshof, Decision of 13 October 2011, 5 ZB 126/11).

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/~~**NO**~~

Please elaborate further on possible differences whether 'unlawfulness' results from procedural flaws or substantial grounds. Please also indicate what are the most often cited grounds for deciding the unlawfulness of detention decision, and for striking down detention measures.

Detention requires a court order in Germany. If that order does not longer exist, the migrant will be

released. Note also that there is a specific law for compensation after unlawful detention after criminal proceedings, which does not apply to return detention (see Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen, StrEG, available online at http://www.gesetze-im-internet.de/streg/BJNR001570971.html). There are, however, customary rules for state liability (not much different from Francovich liabilities under EU law), which migrants may rely upon. There are laid down in Art. 34 of the Constitution and Sect. 839 of the German Civil Code. In essence, it has to be proven that detention was unlawful.

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

YES/~~**NO**~~

The same criteria apply for later re-detention, i.e. the statutory provisions must be met together with the strict proportionality assessment in light of the circumstances described above. Re-detention will usually not take place unless the circumstances have changed and detention is likely. According to Federal High Court (Bundesgerichtshof, Decision of 13 February 2012, V ZB 46/12) earlier detention periods are to be included in the total duration of detention, if the detention goes back to the same obligation of the third-country national to leave Germany. This is different in cases a gap occurred between the detention periods. Such a break is assumed if there is gap of several years between detention orders or the third-country national's stay in Germany was tolerated for a multi-year period.

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

Those without sufficient resources may obtain legal aid in line with section 114-127 of the Civil Procedure Code (Zivilprozessordnung ZPO, available online at http://www.gesetze-im-internet.de/zpo/BJNR005330950.html#BJNR005330950BJNG052302301). These rules apply to detention issues due to a reference in section 76(1) FamFG. According to these rules, the applicant has to apply for legal aid with the Court which will decide the case in the end. The Court then embarks upon an analysis of both the economic-financial situation of the applicant and the suitability of the complaint (in situations of complaints without any reasonable chance of success no aid will usually be given). In cases of denial, the applicant may complain against the decision in line with the procedural rules in the Civil Procedure Code. Moreover, section 78 FamFG provides for a lawyer being assigned to the applicant under certain circumstances.

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/~~**NO**~~

Please elaborate further, including the practice in your Member State

Implementing the decision of the Court of Justice of 17 July 2014 (ECJ, Bero & Bouzalmate, C-473/13 & C-514/13, EU:C:2014:2095), 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 (Bundesgerichtshof (Federal High Court): BGH, judgment of 12 February 2015, V ZB 185/14; judgment of 29 October 2010, 5 ZB 233/10). This meant that a particular building for the detention under the Return Directive within the compound of an ordinary prison cannot be considered as a special detention facility in the sense of the Return Directive (ibid.

judgment of 25 July 2014, V ZB 137/14, para. 9). 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 (judgment of 12 February 2015, V ZB 185/14).

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

Section 62a Residence Act enshrined the case law of the Federal High Court into positive law. In exceptional cases they may be detained together with regular prisoners, although there will have to be separated locally.

Q2. In case irregular third-countries nationals are detained in prisons, are they separated from ordinary prisoners as required by the RD? In all circumstances? (ECJ, *Pham*)

~~**YES/NO**~~

Not applicable (see above).

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?

Detainees are authorised to contact NGOs under Section 62a Residence Act. There have been complaints about detention conditions (detention is notoriously controversial from political perspective), although it seems that the substantial reform of detention following the two ECJ cases mentioned above resulted in an improvement of detention conditions. Moreover, the number of detainees dropped considerably. For a more detailed assessment see the reply by the federal government to a parliamentary question:

Antwort der Bundesregierung auf die Große Anfrage der Fraktion Die Linke: Die Praxis der Abschiebehaft und Fragen zum Haftvollzug, BT-Drs. 18/7196 of 6 January 2016.

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?

Courts will ensure appropriate contention conditions as part of the overall proportionality assessment described above, although specific instances of apparent wrongdoing will require an application by the individual. Bundesgerichtshof (German Federal Civil Court, Decision of 25 July 2014 – V ZB 137/14) confirmed that a court must reject the detention if it was foreseeable that the person concerned would be accommodated contrary to the requirements of EU law. In cases of doubt it has to reject imprisonment, as confirmed by the Bundesgerichtshof (German Federal Civil Court, Decision of 18 February 2016 – V ZB 74/15), in which the Court could not order detention

because it was clear that the detention would be executed in the Büren prison and thus in violation of Article 16(1) of Directive 2008/115/EC.

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

Yes, see above regarding the ECJ cases.

b. Judicial Interactions with European and national Courts

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

YES/~~**NO**~~

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.)

The German references are:

ECJ, *Bero & Bouzalmate*, C-473/13 & C-514/13, EU:C:2014:2095 was mentioned above concerned the requirement of specific detention centres.

ECJ, *Pham*, C-474/13, EU:C:2014:2096 was similarly mentioned above and concerned the question whether individuals could ‚voluntarily' to be detained elsewhere.

The response by the Federal High Court and the German legislature was described above.

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

YES/~~**NO**~~

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

In the cases mentioned above declaring the German practice illegal.

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

~~**YES/NO**~~

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

There are no regular references to either the ECHR or the EU Charter. The underlying reason may be the German courts are relatively strict already and do not require an 'additional' so as frustration is therefore. Also, the German judge participating in the redial project did not report any specific 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 16 RD?

YES/~~**NO**~~

If yes: please elaborate further on this issue

See above.

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

We are not aware of such decisions and the German judge participating in the redial project did not report any cases either.

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

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

YES/~~**NO**~~

Section 62a(1) Residence Act states that members of the family shall be detained together, locally separated from other detainees, and that they are to be granted an appropriate degree of privacy. Section 62a(2) Residence Act specifies, moreover, under direct (!) Reference to Article 17 Return Directive that age-specific considerations must be considered when detaining minors, whether unaccompanied or not.

In practice, the detention of minors and/or families is extremely rare as the statistical data in the answer by the federal government to the parliamentary question mentioned earlier (BT-Drs. 18/7196 of 6 January 2016) indicates. There have been, over the past years, very little cases, zero in many regions in many years. (Rare) Court cases include:

Bundesgerichtshof (German Federal Civil Court, Decision of 30 October 2013 – V ZB 90/13) found in the context of court proceedings for the family from Egypt that a decision by a lower court to allow the continuation of airport proceedings was similar, considering that the German legislature had ordered equal treatment to the forced residence of an alien in the transit area of an airport to a detention when the residence lasts beyond 30 days, i.e. continuation of the airport proceedings required the court order after that date. For this Court order, the same rules apply as for a detention order. In particular, the extension of the transit stay may only be ordered in exceptional cases towards families with minor children and only as long as is reasonable, taking into account the child's welfare. The appellate court has found that one of the minor children of the applicant is severely disabled and suffers from epileptic seizures. The family had to be released.

Bundesgerichtshof (German Federal Civil Court, Decision of 6 December 2012 – V ZB 218/11) rules in the context of a legal challenge to the renewal of detention that a lower court must include the decision as to whether the cohabitation of the third-country national with a German partner precludes deportation. This did not concern a joint detention of the family directly, but shows that wider family relations (with people not being detained) have to be considered in the context of detention cases.

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.)

There are no regular references to either the ECHR, the EU Charter of the UN Convention. Also, the German judge participating in the redial project did not report any specific cases. One reason is the extremely small number of detentions involving minors in Germany mentioned above.

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?

The German judge participating in the redial project did not report any specific cases. One reason is the extremely small number of detentions involving minors in Germany mentioned above.

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

Detention has been declared unlawful in individual cases, but German legislation as such (which is rather abstract) was not set aside explicitly.

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

We are not aware of such decisions and the German judge participating in the redial project did not report any cases either.

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

YES/NO

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

Courts are on an obligation to review the legality of each detention, i.e. there are as a matter of law no special rules for families or children, although it is to be expected that courts will usually exercise particular thorough assessment families and/or children are involved. One reason is the extremely small number of detentions involving minors in Germany mentioned above.

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?

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

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

Not applicable.

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.?

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.?

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?

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.