REDIAL PROJECT

National Synthesis Report – Hungary

(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.

The framing conditions

1. I write this report in the framework of the Redial Project. The report is based on the judgments collected by my good colleague in this project, Judge Árpád Kiss.
2. This report is not an overall description of the implementation of the directive. Its aim is to analyse the judgments collected by Judge Kiss in a wider doctrinal and European case-law context in order to establish if there are any trends relating to the interpretation of the Return Directive by the Hungarian courts
3. The focus is on article 15 of the directive, covering detention. The database of judgments does not include Hungarian judgments on articles 16-18.
4. The information base is limited: it comprises nineteen judgments, coming from two different courts, altogether six judges.
5. Transformation of the Return Directives provisions appear – mainly – in Act II of 2007 on the entry and stay of third country nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról) (as amended) and in its implementing regulation, Government Decree 114 of 2007 (114/2007. (V. 24.) Korm. rendelet a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény végrehajtásáról)
6. As already stated in the first report, Hungarian courts tend to rely on domestic sources. None of the presently reviewed judgments mentions any of the relevant CJEU judgments or EctHR jurisprudence. The refinement of notions as it unfolds in the jurisprudence of the CJEU leaves no visible trace on the Hungarian court practice. Its impact is indirect: once during a recast the

Commission incorporates CJEU dicta into its proposal, then – through the transposition of the directive – the judgments start to affect domestic legal routine, but hardly before that. The Supreme Court ('Kúria') has formed a group of experts, including judges and members of the academia, which delivered an opinion on certain questions related to the law of foreigners, including detention.[1] (Henceforth: Kúria Working Group, 2014)

7. Groundbraking work has been accomplished within the Contention project, which entailed a national report on Hungary, written by Mr. Tamás Molnár and Ms Gabriella Maráth.[2]

8. As a reminder, let it be recalled that there is a problem with the translation of the term 'return decision' and 'obligation to return'. 'Return decision' is translated with the Hungarian term 'kiutasítási határozat' the corresponding English expression of which is 'expulsion decision/resolution'. That term 'kiutasítás' (expulsion) had been part of the Hungarian law on foreigners and carries a strong law-enforcement bias. 'Obligation to return' is translated within the directive as 'visszatérési kötelezettség' which is the proper translation. That means that 'return' does not have a settled meaning: in the context of 'decision' it is 'expulsion' in the context of 'obligation' it is 'going back = return'. The term 'return procedure' is translated as 'kiutasítási eljárás' (expulsion procedure) in preambular para 10 and Article 3 para 7 of the Hungarian version of the directive. In Article 15 para 1 the same English term appears as 'kitoloncolási eljárás' (removal procedure).

   The very same term appearing in para 40 of the El Dridi judgment is an illustration to the uncertainties. The English text of the judgment refers to 'the stages of the return procedure'. The Hungarian version of the same judgment uses none of the terms appearing in the Hungarian translation of the directive but introduces (correctly in my view – BN) a third one: 'visszatérési eljárás szakaszainak' (stages of the return/going back procedure).

   The confusion is then exacerbated by the fact, that 'visszatérés' (return, going back) appears in the official Hungarian text of the Preambular paragraph 2 of the directive, whereas the English uses 'removal'.

9. This report is drafted in accordance with the template provided by the project team.

The fundamental rules on detention in Hungarian law

10. The Hungarian Act on the on the Entry and Stay of Third-Country Nationals[3] (ThirdA) differentiates between two types of 'aliens law' detention.

    1) Detention in order to conduct and aliens law procedure. It is called 'detention in preparation of expulsion [return decision – BN]' and is regulated by section 55 of the ThirdA in the following way:

    Section 55

    (1) The immigration authority may order the detention in preparation of expulsion (return) of the third-country national in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not clarified, or if the return of the third-country national under the bilateral readmission agreement to another Member State of the European Union is pending.

    (2) Detention in preparation of expulsion shall be ordered by way of a formal resolution, and shall be carried out when communicated.

[1] *Case-law Analysing Working Group on Migration Affairs set up by the Hungarian Supreme Court (Kúria): Summary views of the group, adopted by the Admonistrative and labour Law College of the Kúria, on 23 September 2014. 2013.* http://www.lb.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemeny_kuria.pdf

[2] Completed Questionnaire for the project Contention National Report – Hungary Tamás Molnár in collaboration with National Judge Gabriella Maráth, 2014.

[3] 2007. évi II. törvény (Act No 2 of 2007).

(3) Detention in preparation of expulsion may be ordered for a maximum duration of seventy-two hours, and it may be extended by the district court of jurisdiction by reference to the place of detention until the third-country national's identity or the legal grounds of his/her residence is clarified, or for maximum thirty days.[4]

2) Detention in order to enable the implementation of a return (expulsion) decision by way of removal

Section 54

(1) In order to secure the removal of a third-country national the immigration authority may take into detention under immigration law the person in question if:

a) he/she is hiding from the authorities or is obstructing the enforcement of removal in some other way;

b) he/she has refuses to leave the country, or it may be assumed on other substantiated reasons, that the person delays or frustrates the implementation of removal, or there is a risk of absconding of the third-country national;

c) he/she has seriously or repeatedly violated the code of conduct of the assigned place of stay;

d) he/she has failed to appear before the authority as ordered despite of a call to do so, and so hinders the immigration proceeding; or

e) he/she is released from imprisonment as sentenced for a deliberate crime.

[(2) [Before ordering detention under immigration law the authority considers of less coercive measures like confiscating the passport or designating a compulsory place of residence may also secure removal[5]]

(3) Detention under immigration laws shall be ordered by way of a formal resolution, and shall be carried out when communicated.

(4) Detention under immigration laws may be ordered for a maximum duration of seventy-two hours, and it may be extended until the third-country national's removal, by the district court with jurisdiction for the place of detention, at each instance for a maximum of sixty days..

(5) Detention under immigration laws may be extended – according to Subsection (4) – by up to six additional months on the expiry of a period of six months, if the implementation of the return order takes more than six months, in spite of having taken all necessary measures, due to:

a) the failure of the third-country national affected to cooperate with the authority, or

b) delays in obtaining the documents required for removal attributable to the authorities of the third-country national's country of origin, or another state liable for readmission under readmission agreement or which is otherwise liable to accept him/her.

(6) Detention ordered under immigration laws shall be terminated:

a) when the conditions for carrying out the removal are provided for;

b) when it becomes evident that the removal cannot be executed;

c) when six months – or twelve months under the conditions referred to in Subsection (5) – have passed since the date when detention under immigration law was ordered,;

[4] The English text of the Hungarian statute is based on that published by one of the commercial legal databases and is amended by this author.

[5] This is the summary of the paragraph containing cross references.

d) the third-country national is – based on his/her application for international protection – entitled to reside in the territory of Hungary in accordance with the relevant legislation; or

e) the third country national is placed under asylum detention.

(7) In the application of Paragraph c) of Subsection (6), the duration of detention in preparation of expulsion [return decision] shall be included in the duration of detention. The duration of asylum detention shall not be included in the duration of detention in immigration proceedings nor in the duration of detention in preparation to expulsion.

(8) In connection with the termination of detention under Paragraphs b) and c) of Subsection (6), the immigration authority ordering the detention shall order the third-country national affected to stay at an assigned place.

11. As the above lines reflect, since 2013 there is a third type of detention, the so-called asylum detention. It has nothing to do with the return directive as its stated aim is the successful conduct of the refugee status determination procedure or – alternatively –the transfer under the Dublin regime.[6] Therefore this report ignores asylum detention as it may not be linked to return/removal. In case the asylum authority or the court finds no need of international protection and the asylum authority orders removal, the normal rules migration detention start to apply.

12. The overwhelming majority of the cases in the database relate to the extension of immigration detention, based on Section 54 of the ThirdA and not detention preparing a return decision, based on Section 55 of that act. For the sake of simplicity henceforth 'immigration detention' will be used without distinction, unless the differentiation contributes to the analysis.

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 they are. The local courts extend detention after the first 72 hours that was ordered by the administrative authority.

Immigration detention is always ordered by the immigration authority. The immigration administration is concentrated in the Office for Nationality and Immigration (OIN) which has seven regional directorates. They adopt return decisions usually including the order to remove the person. The same decision orders immigration detention. The return decision may not be appealed at the administrative level, but is subject to review at the specific Administrative and Labour Court. (Similarly, a decision on not prolonging or on revoking the residence permit is only subject to review at the Administrative and Labour Court) – so that is another track than the judicial review of the detention decision which is conducted at the local court, i.e. the lowest (district) courts.

The local courts overseeing the legality of extension of detention frequently do not specialise to criminal and civil law sections but judges take all kinds of cases, therefore at these courts with few judges, detention extension cases may end up in the hands of judges with different profiles.

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

[6] Article 31/A of the Asylum Act (Act LXXX. of 2007).

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

The court only controls the renewal /extension of the detention. Then it has to scrutinize if the conditions of detention as stated in the ThirdA are still met.

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

The review is automatic in the sense, that the authority ordering detention has to request its extension before the 60 days expire. The person detained has no specific right to request judicial review but may submit a so-called 'complaint' but only in respect of certain rights related to detention (access to information, treatment of minors, etc.) not to the ground 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?)*

As mentioned above there may be two parallel procedures: one reviewing the denial of the issuance of a residence permit or the decision not to renew it or revoking it, and that is conducted in the Administrative and Labour Court – not subject to this report.

If the person is subject to a return decision – and most cases in the database refer to such, after an unsuccessful asylum application – then the detention until removal is ordered by the administrative authority and immediately implemented. Within 24 hours from ordering detention the authority must request the court for an extension, which decision must be taken by the court within 72 hours from the start of the detention.

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

The court must ascertain if the conditions of detention still are met, including the acts (and omissions) of the authority to actually realize the return by way of removal.

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

The judge has full control, *ex officio*.

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

The authority ordering detention must ascertain that conditions for detention are met. (See the relevant article quoted in the introductory section to this report)

The courts usually accept that decision as lawful at the moment of adoption and concentrate on the presence or absence of changes and on the activity of the authority after the start of detention. At least they should, but frequently do not genuinely evaluate the diligence of the authority in trying to arrange for the return.

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?

Not

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?

Not

Q3. Did national courts refer to the ECHR or the EU Charter in relation to pre-removal detention?

No

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?

Not in the cases analysed

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

No

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?

It is a deprivation of liberty/freedom, not just a limitation.

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?

No, as mentioned above the lawfulness of the return decision is controlled by another court, the Administrative and Labour Court.

However decision No. 16.Ir. 149/2016/3 of the Budai Központi Kerületi Bíróság reviewing (and rejecting) the request to extend detention mentions that its conditions have not existed even at the start of the detention. No specific consequence is drawn from that fact.

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, occasionally they do

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

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

  In a case prolonging detention the court reviewed the steps taken by the authority individually (16 Ir. 4649/2015/2 case)

  '[The authority] in its motion has explained without gaps what procedural and other acts have been taken in order to organise the removal, and on the basis of which concrete facts it expects that the desired result will materialise' – the court stated in its order on extension.

  In another case (16 Ir. 3637/2015/3) the same court and the same judge) refused to extend the detention, recalling that removal to Serbia as to a safe third country the day after the decision ordering that was taken was 'unrealistic' and did in fact not happen, and then recalled that the authority could not give an account of what concrete steps have been taken since in order to effectuate the removal. The 'authority only answered by raising generalities and referred to procedural habits'. That was not enough and the court freed the person after the first 72 hours of detention i.e. denied its first extension.

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

No such case was seen.

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'?**

Courts in general establish that the person does not have a valid travel document, appropriate resources a ticket to travel home and the person declared that s/he wants to stay within the EU (usually in an EU member state other than Hungary) and then they state that 'from her/his behaviour and statements it may be concluded that she/he will not voluntarily submit herself/himself to the implementation of the return decision.' (see *e.g.* 16 Ir. 4185/2015/3

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)*

Absolutely. Courts usually consider earlier behaviour, namely the abandoning/withdrawal of an asylum application and departure for a more Western EU member state from which a return was effectuated under the Dublin regime. That or the stated intention of not returning home together with the lack of resources are seen as a risk of absconding.

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

The risk of absconding is defined in the implementing government decree of the ThirdA (114/2007 (V. 24.) Korm rend, section 126 (5a)

It says:

(5a) In the application of Paragraph *b)* of Subsection (1) of Section 54 of the [ThirdA], risk of absconding is considered to exist if the third-country national affected fails to cooperate with the competent authority in the immigration proceedings, specifically if:

a) the third-country national refuses to make a statement or to sign the report,

b) the particulars the third-country national provided are false, or

c) absconding of the third-country national can be presumed based on his/her statements,

hence there are reasonable grounds to believe that he or she is likely to frustrate the enforcement of the return.

Courts tend to refer to point c) above. No formal statistics or group designations have been used in the reviewed judgments.

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.

As quoted in the introductory section 54 of the ThirdA contains the following grounds for detention with a view to removal:

a) he/she is hiding from the authorities or is obstructing the enforcement of removal in some other way;

b) he/she has refuses to leave the country, or it may be assumed on other substantiated reasons, that the person delays or frustrates the implementation of removal, or there is a risk of absconding of the third-country national;

c) he/she has seriously or repeatedly violated the code of conduct of the assigned place of stay;

d) he/she has failed to appear before the authority as ordered despite of a call to do so, and so hinders the immigration proceeding; or

e) he/she is released from imprisonment as sentenced for a deliberate crime.

Subpara a) and b) roughly correspond to the directive, even though they include 'hiding'. In terms of the expressions used, the ThirdA extends beyond the directive. The directive's 'avoids or hampers' were translated as 'meghiúsítja vagy akadályozza' in the Hungarian edition of the directive, which in turn mean 'frustrates or hampers/obstructs'. The ThirdA uses 'hampers/obstructs' in subpara a) and 'delays or frustrates' in subpara b).

Obviously subparas c)-e) do not derive from the directive in a direct way.

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?*

Three alternatives are considered by a report written by the EMN Hungarian section: 1) **Seizing the travel document, the return ticket or financial resources** of the person to assure the coverage of the return ticket and to prevent onward travel (Sections 50 (2) and 48 (2) of the ThirdA

2) Ordering to stay at a designated place of stay.

Conditions:

Section 62

(1) The immigration authority shall have powers to order the stay in a designated place of a third-country national in a designated place, if the third-country national in question:

a) the rejection at the border or the return cannot be ordered or implemented due to treaty obligations of Hungary;

b) is a minor who should be placed under detention;

c) should be placed under detention, in consequence of which his/her minor child residing in the territory of Hungary would be left unattended if he/she was to be detained;

d) the maximum length of detention has expired, but the grounds for detention still exist;

e) has a residence permit granted on humanitarian grounds;

f) has been subject to a return decision (expelled), and is lacking adequate financial resources to support himself and/or does not have adequate dwelling.

*g)*should be placed under detention under immigration laws according to Paragraph *a)* or *b)* of Subsection (1) of Section 54, and detention would result in a disproportionate detriment taking into account the state of health and age of the third-country national concerned.

3) Reporting obligations if the designated place of stay is not a community shelter or reception center maintained by the authority

Does the administration consider additional alternatives?

The authority is – in principle – obliged to consider the alternatives Section 54 (2) ThirdA. The Budai Központi Kerületi Bíróság repeatedly includes into its decision a reference to the Summary views of the Case-law Analysing Working Group on Migration Affairs set up by the Hungarian Supreme Court (Kúria) and, adopted by the Administrative and Labour Law College of the Kúria, on 23 September 2014, which stresses the obligation to consider the alternatives before ordering detention.

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

Yes, see answer to the previous question

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*)

I see no case in which the court would terminate the detention in order to favour an alternative to detention. Those cases which deny extension of detention simply set the claimant free.

Order 16 Ir. 149/2016/3 observes that due to the family links of the person subject to return decision his accommodation and subsistence is secured until the removal and ‘there is no individual factor which would prevent the substitution of detention with another tool, like designating his previous residence’. Then the court notes, that the conditions for detention have not been present even at the moment of taking into detention, so obviously they are not present at its intended extension either.

However, the court does not decide on the alternative in the order which terminates detention.

In case IR 1403/2016/3 the court approves the decision of the competent authority of not designating a compulsory place of stay instead of detention, as the third country national ‘was unable to tell where he was living exactly, he could only state that somewhere in the 10th district [of Budapest]’.

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)

There is no trace of the courts controlling the proportionality of a detention ordered by the authority. In all the instances when detention is terminated (not extended) they base the non-extension on other factors, frequently claiming that the grounds were not available right from the outset.

In decisions extending the detention recurring phrase is the following:

'As no change occurred in the circumstances serving as the legal basis of starting the detention since the moment of ordering the detention and the conditions for the return of the named person are not provided for, the court has extended the detention of … until [date] based on Section 54 para (4) of the thirdA' (Quoted from 2 Ir.0.307/2014/2)

There is no trace of any proportionality investigation.

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.)

The apprehending agency may hold back the person for an initial period of 12 hours, extendable once by 12 hours. Then it must order detention for a maximum of 72 hours. Within that 72 hours, namely after 24 hours it must request the local court to extend detention if it wishes to extension of the detention. Its duration is fixed: maximum 60 days. Eight working days before the expiry of the 60 days the aliens law authority must request the extension with another 60 days. The absolute maximum (with exceptions) is 6 months. The court may order shorter detention (16 Ir 4231/2015/4 extending detention for 40 days 'only'.) The detention with a view to return (expulsion) under section 55 of thirdA which may not last longer than 30 days is counted to the maximum of 6 months allowed for detention in order to enable the implementation of a return (expulsion) decision by way of removal (section 54 of ThirdA). This latter may be extended by another 6 months (in 60 days units) if the third country national is non-cooperative or the authorities of the country of origin or the country obliged to admit the person delay the issuance of the documents necessary for removal. (The rule transposes Article 15 (6) of the directive.)

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?

The courts have full control over the steps of the competent authorities.

The order 16 Ir. 3637 explicitly recalls the duty of the court to check whether 'based on union and Strasbourg norms' the authority has proceeded with due diligence. As a matter of fact, the court then blames the authority for designating the day right after the apprehension for return, without designating the time and place of removal and then condemns the authority for not having revealed any concrete steps taken beyond generalities. The authority did not make it clear – in the eye of the court – why it expected the realisation of removal during the next 60 days. So the court refused the request for the extension of detention.

However, the investigation of the Supreme Court led to discouraging results in terms of the depth of the judicial control. The Working Groups Summary Views state: 'Based on the examination of cases it may be established that the court scrutinise during the review if there is a change in the circumstances considered at the time of ordering detention. The courts do not scrutinise in any form

– especially as no motion to proceed so is submitted – what steps the authority has taken in order to implement the return decision and whether there is a realistic chance for its successful implementation' Summary views of the Case-law Analysing Working Group on Migration Affairs set up by the Hungarian Supreme Court (Kúria) and, adopted by the Administrative and Labour Law College of the Kúria, on 23 September 2014, p. 48.

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

Since 2013 a separate type of detention has been introduced into the Hungarian law: asylum detention. That is applied in the appropriate cases (See sections 31 A – 31 I of the Asylum Act /2007. évi LXXX tv./)

If the asylum application is submitted after the immigration detention has been ordered, the implementation of the removal decision is suspended.

The period spent in asylum detention does not qualify when counting the maximum length of immigration detention and vice versa.

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)

The text of ThirdA renders the conditions as this (section 54 para (5)):

(5) Detention under immigration laws may be extended – according to Subsection (4) – by up to six additional months on the expiry of a period of six months, if carrying out the expulsion (return decision) order takes more than six months, in spite of having taken all necessary measures, due to:

a) the failure of the third-country national affected to cooperate with the competent authority, or

b) delays in obtaining the documents required for deportation attributable to the authorities of the third-country national's country of origin, or another state liable for readmission under readmission agreement or which is otherwise liable to accept him/her.

The cases did not include a precedent for this.

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 it leads to immediate release, but the immigration authority may designate a compulsory place of stay

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.

The releasing decisions at hand all referred to substantive legal grounds, i.e. to the lack of factual basis for detention as evaluated by the court.

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

Yes, for example once the asylum procedure is concluded with a final denial of the need for

international protection or if after the release because of the expiry of the deadline the person repeatedly gravely violates the rules in a designated place of stay.

Section 56 para (4) of the ThirdA states:

'If a third-country national who was previously detained is placed under immigration proceedings on the basis of new facts, the duration of such previous detention shall not be factored in the duration of detention.'

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

According to section 59 para (4) 'The court shall appoint a representative ad litem for any third-country national or his/her family member who does not understand the Hungarian language and is unable to contract the services of a legal representative on his/her own.'

The representative ad litem is payed from the budget of the court, but the activity of such representatives was subject to serious criticism in the Summary views of the Case-law Analysing Working Group on Migration Affairs set up by the Hungarian Supreme Court. (see pp. 41-42)

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. See section 61 para 2 of the ThirdA and Section 129 of the implementing decree. Any foreigner under removal order may be detained except for unaccompanied minors.

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*)

In principle prisons may not be used for immigration detention, but see response to question 4 below.

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)

The relevant rules of the Government decree are the following

Section 129

(1) Hostels of restricted access [detention centers] shall satisfy the following criteria:

a) the living quarters of detained third-country nationals must have at least 15 cubic meters of air space and 5 square meters of floor space per person, plus a separate living space of at least 8 square meters for married couples and families with minor children, taking also into account the number of family members;

b) they must have a common area for dining, for recreational purposes – including games and other similar activities for minors – and for receiving visitors;

c) they must have separate washrooms and showers and toilets for men and women, with hot and cold running water, in sufficient capacity consistent with the number of detainees;

d) they must have an infirmary for providing basic medical care;

e) they must have a medical examination room and an isolation room;

f) they must have sufficient space for outdoor activities;

g) they must have lighting sufficient to satisfy the standards laid down in the national requirements concerning regional development and construction;

h) they must have an uninterrupted power supply;

i) they must have a separate room for receiving visitors;

j) they must have telephone facilities;

k) they must have natural ventilation in the living quarters of third-country nationals and in the staff rooms, in the medical rooms, in the visitors areas, in the kitchen and in the dining room, and in the common areas.

(1a) Where justified by the duration of detention, education shall be made available to minors according to their age and level of development in the hostel of restricted access or in another suitable institution.

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?

Yes, places are overcrowded, even though new capacities have been opened in 2015

The Commissioner for Fundamental Rights (Ombudsman) had an investigation in Nyirbátor (Case: AJB-1953/2012.) and has established a number of critical points, from the lack of free exercise of religion to alleged violence against the foreigners in immigration detention, not to mention minor issues as not calling persons by their name but by their nationality. health and cleanliness concerns were also raised.

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)

YES. Article 61/A provides

(1) Subsection (1) of Section 58 [on the duty to request the extension of the initial 72 hours long detention within 24 hours] and Subsection (1) of Section 61 [on the designation of specific detention centers] shall not apply in situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of hostels of restricted access, or on the immigration authority itself.

(2) In the case defined in Subsection (1), as long as the exceptional situation persists, the immigration authority may decide to appeal to the district court within five days from the date when the detention was ordered to extend the period of detention past seven days.

(3) In the case defined in Subsection (1), the immigration authority may carry out the detention at a place other than what is contained in Subsection (1) of Section 61.

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

Not in the cases at hand and not according to the law. The individual may submit a complaint and then the court must within eight days assess the claim in the complaint. section 58 of the ThirdA.

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

Not to my knowledge.

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?

Not

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?

There are no such judgment in the pool.

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

There are no such judgment in the pool.

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?

There are no such judgment in the pool.

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

There are no such judgment in the pool.

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

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

There are no such judgment in the pool.

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?

There are no such judgment in the pool.

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?

There are no such judgment in the pool.

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?

There are no such judgment in the pool.

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

There are no such judgment in the pool.

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?

I am unaware of such specific controls. As mentioned the Parliament Commissioner for Fundamental Rights did have such general controls and NGO-s occasionally also report on immigration detention. (The Hungarian Helsinki Committee has produced a specific report on immigration detention back in 2010 / Bevarrva Idegenrendészeti őrizet Magyarországon (2010) / and a report on one of the detention centers (Kiskunhalas) in 2015. / Jelentés a Magyar Helsinki Bizottság 2015. április 28-i látogatásáról a bács-kiskun megyei rendőr-főkapitányság kiskunhalasi őrzött szállásán/)

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?

See answer to Q4 in the context of Article 16

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 relationship of these measures are fairly clearly delineated in the law. The introduction of asylum detention as a separate type of deprivation of liberty has further refined the landscape. The Supreme Court has issued to Working Group reports analysing the jurisprudence which brought further clarity. One is the frequently mentioned Summary Views, the other a similar report on asylum matters.

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.?

Yes, some of the courts stress much more that detention is a last resort. This was also stressed by the

Act on Asylum in connection with the asylum detention. At the same type the more subtle elements of proportionality, requiring due diligence and the like have not achieved the perception threshold of many judges. That may be attributed to their extreme overburdening and the short deadlines too.

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?

Immigration law enforcement was not a major segment of the judicial activity before and after the RD. Courts tend to by deferent to the immigration authority, e.g. they have only denied the extension of detention in three cases out of many thousands before 2014.

There is only one judicial level, so the second question is not applicable.

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

The courts should realise that they are not 'partners' of the immigration authority, but their checks and balances. They should insist on receiving the appropriate documentation of the case, not just the submission for the extension. Much more emphasis on alternatives to detention and on the scrutiny of the due diligence of the authorities is needed.

That ought to entail a shift of the conceptualisation of the matter before them. So far the emphasis is on whether at the time of ordering the detention its conditions were met. If the answer is in the affirmative, the court is ready to extend it. The shift would entail that emphasis moves to the scrutiny of the authority's action after the start of the detention, clarifying if due diligence is exercised in order to implement the return decision (and actually remove the person).