REDIAL PROJECT

National Synthesis Report – Italy

(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.

I. 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

Under Italian law, judicial authorities must endorse a pre-removal detention order. The authority entrusted with this task is the Justice of the peace ('Giudice di pace').

The Justice of the Peace shall validate the Questore's order, by reasoned decree, within forty-eight hours from its adoption, after verifying that the conditions set by the law are met.

The Justice of the Peace is not specialised in immigration matters. They have a broad jurisdiction on minor cases and disputes under civil, administrative and criminal matters and, in principle, have been designed to resolve small claims of a limited value. The Justice of the Peace can be in charge of solving matters like neighborhood disputes, trespass to land, traffic fines, contraventions of legislation concerning the supplying alcohol to drunk people and summary criminal offences.

On the same days the concerned Justice of the Peace may therefore run a plurality of hearings on completely different issues.

The main inconvenience of this choice, made by the legislator, is that decisions which affect personal freedom are taken by a judge without specific expertise and preparation on immigration

matters.

Concerns have also been expressed by the UN Special Rapporteur on the Human Rights of Migrants in his 2013 report following his visit to Italy in September 2012: 'the judge deciding whether expulsion and detention orders should be extended is a Justice of the Peace without any particular expertise on immigration issues. Moreover, there seem to be limited ability of these lay judges to review the detention orders on the merits: rather, the confirmation of the orders appears to be limited to formal checks, thus resulting in a lack of real judicial control over the order'. (A/HRC/23/46/Add.3, page 17).

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

The Justice in Peace is an honorary magistrate to whom judicial duties are temporarily assigned. They hold the office for four years and can be confirmed only once. They are appointed upon resolution of the Judges' governing body ('Consiglio Superiore della Magistratura') and the Minister of Justice, at the end of a competition based on qualifications and an internship of six months.

As to their requirements, they do not include a specific preparation or professional experience on the matter, apart from general knowledge of legal issues. In fact it is not necessary to have years of experience as a lawyer or barrister before undertaking the *Giudice di Pace* role. They must be between thirty and sixty-five years of age, have a bachelor's degree in law and have passed the qualifying examination for the legal profession. When they are appointed they must have ceased, or commit to cease before the entry into office, the exercise of any employed public or private activity.

They are endeavored to apply the law and are subject to disciplinary liability. But it must be stressed that they do not have an employment relationship with the State and are paid a benefit in relation to the work effectively carried out (hearings held, measures taken) rather than to the amount of time that they spend hearing and deliberating over matters (for every validation of detention, pursuant to art. 14, para. 4, Single Text on Immigration, the justice in peace receives 10 euros and for every hearing 20 euros).

These peculiarities have raised critics in relation to their impartiality and independence.

In fact in addition to their limited knowledge and experience in the application of law, they are also criticized since they have less authority in comparison to career Judges. Practitioners point out that the fact that their office is temporary and they can be reappointed limits their independence, neutrality and courage in adopting detention measures.

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

YES

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

Under Article. 14, para. 3, Single Text on Immigration, the Questore of the place where the center is located shall transmit a copy of the records to the territorially competent Justice of the Peace, without delay and in any event no later than forty-eight hours from the adoption of the measure. The Justice of the peace must ensure validation within the following 48 hours. The decree of detention ceases to have effect if it is not observed the deadline for validation by the Justice of the peace.

The judge is therefore charged to control *ex officio* the lawfulness of the measure irrespective of the applicant's request and their timely control is an essential condition for the validity of the detention measure ordered by the Questore.

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?)*

National legislation provides for two levels of jurisdiction. The first review is carried out by the Justice of the peace and the second review (in case the first level decision is challenged) by the Supreme Court.

In fact it is not possible to appeal the decision issued by the Justice of the peace (validation and renewal) to the local Court or appellate Court. Against the decrees of validation and renewal it is only possible to appeal to the Supreme Court (*Corte di Cassazione)* which is Italy's Supreme Court located in Rome.

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 Supreme Court cannot undertake merits review, but it hears questions about the interpretation of law or lawfulness review. Appealing to the Supreme Court is a complicated and time-consuming procedure and not all lawyers can personally appear before it because special requirements are needed. In particular lawyers must have practiced law for at least twelve years.

From a practical perspective this may complicate the possibility to appeal since younger lawyers may apply lower fees and be more interested in cases involving fundamental rights. Nor it is easy for a foreigner detained in the centre to make contact with a senior lawyer, qualified to act before the Supreme Court.

Moreover, the concerned person may have a limited interest in appealing the measure, since in any event the appeal does not suspend the execution of the measure.

The limited number of decisions issued by the Supreme Court in relation to pre-removal detention can be regarded as an index of the practical difficulties to have access to this form of appeal .

The time limit to appeal to the Supreme Court is 6 months from the issuance of the validation order

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 Justice of the peace must verify whether the conditions for the application of detention, namely that it is not possible to carry out immediately the expulsion through forced escort to the border or turning the foreigner away because of temporary situations that hinder the preparation of return or the making of removal, including the risk of absconding indicated under art. 13, paragraph 4-bis Single Text on immigration, the need to render assistance to foreigners, to make additional checks on his identity or nationality, acquire travel documents, or the availability of a suitable means of transport.

The justice of the peace should check that the Questore has provided adequate documentation about the existence of these conditions and that they are adequately motivated in the detention order.

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

YES

As to elements of lawfulness of detention, the Justice of the Peace must control whether the time terms prescribed by the law have been respected, the existence of the expulsion order, the existence of an order for coercive enforcement of the expulsion, and the adoption of precautionary measures.

The existence of all the aforementioned lawfulness conditions must be verified by the Justice of the peace *ex officio,* irrespective of the arguments of the parties.

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

The justice of the peace carries out a review of the above mentioned legal and factual issues.

Pursuant to art. 360 civil procedure code, a judgment may be challenged before the Supreme Court, in case of violation or misapplication of the rules of law as well as for failing to examine one crucial fact for the trial that has been discussed between the parties.

The control of lawfulness between the first and second levels of jurisdiction has therefore a different scope, the second level being in fact centered on the assessment of the proper conduct of the first level proceedings.

b. Judicial Interactions with European and national Courts

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

NO

If yes:

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

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

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

YES

If yes: which cases and which legal effect did they attribute to them? (*e.g.* do national courts refer to CJEU preliminary rulings when assessing the legality or proportionality of detention, or remedies to unlawful detention?)

National Courts have not operated many references to CJEU preliminary rulings.

Especially in 2014 the Supreme Court made reference to El Dridi when referring to the previous legislation in force, that was declared contrary to the return directive by the ECJ. It clarified that the risk of absconding cannot be assessed only because the foreigner failed to comply with an order of

expulsion placed under the previous legal regime that was considered contrary to the Directive. Such an assessment would not be valid, failing an individual evaluation of the foreigner's personal situation, in light of all the criteria currently set forth by the law (see Supreme Court no. 437 of 10 January 2014).

A reference was also made to Arslan in order to point out that those who have submitted an application for international protection are subject to a different regime than that provided by the return directive (for further details see below part c, Q13 – Court of Rome of 10 April 2014 no. 5107).

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

YES

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

National Courts have referred to Art. 5 ECHR

In particular the recent Supreme Court's orientation on the possibility to assess the manifest lawfulness of the expulsion order, when validating pre-removal detention, is expressly based on the application of art. 5 ECHR (see below part c, Q2 – Supreme Court, order no. 12609 of 5 June 2014; Supreme Court no.17407 of 30 July 2014; Supreme Court no. 24415 of 30 November 2015).

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

One of the aspects on which it can be noted an orientation intended to give effect to the Directive, by departing from national law, regards the review of the detention measure on the foreigner's request.

Paragraph 3 of Art. 15 of Directive 2008/115/EC provides that in every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

However, the possibility that the detention measure is reviewed upon the party's request has not been specifically transposed into national law. It could be affirmed that the obligation to periodically review the measure has been implemented through the provision that the extension of detention, after thirty days, must be validated by the justice of the peace.

However, some merits decision, considering that such provision of the Directive is self-executing, have admitted the judicial review upon the party's request.

It is, however, for the moment a minority orientation. Some commentators have argued that national law complies with the directive since this latter states that the court should review the detention order only in cases of prolonged detention, which can be referred to the validation of extension after thirty days.

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

NO

If yes: please elaborate further on this issue

c. National case-law: major trends

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

YES

Pre-removal detention is in fact a coercive measure that affects personal freedom whose legal nature is embodied in a form of deprivation of liberty, albeit of an administrative nature. It is an issue much debated and criticized by the constitutional and criminal law scholars in Italy (from its establishment by the Single Text on immigration in 1998).

It can be noted that the recent law n. 10 of 2014 establishing the National Ombudsman of the rights of those detained or deprived of personal freedom (art. 7), calls him/her to perform his/her duties (even) within CIEs, where he/she can access without restriction (art. 5, letter. e).

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

The Constitutional Court in its decision no. 105/2001 stated that pre-removal detention 'is a measure affecting personal freedom, which cannot be taken outside of the guarantees of Article 13 of the Constitution,' resulting in 'even when it is not separated from the purpose of providing assistance, the mortification of human dignity that occurs in case of physical subjugation to another's power, this being a secure indication of the relevance of the measure to the sphere of personal freedom'.

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

In relation to judicial review by the magistrate validating the pre-removal detention on the validity of the very expulsion order, there has been an evolution over time.

Until 2013, there was a consolidated orientation according to which the judge was required to verify the existence and effectiveness of the expulsion order, but not its validity.

To this purpose it is worth mentioning decision no. 27331 of 5 December 2013. The Court stated that on immigration matters, the judge validating the foreigner's temporary detention is only competent to check (based on what results from the proceeding acts) the existence and effectiveness of the expulsion decree (as well as the conditions of legality of the detention measure), while a duty to officiously inquire on the validity of the expulsion measure should be excluded. According to the Supreme Court this solution is consistent with the principles of effectiveness of protection delivered by the ECJ and set in the EU directives, since the national system guarantees a double and complete protection to the person to be expelled. In fact the concerned person is entitled to an appeal proceedings which entails a full judicial review on the expulsion, and an officious (but immediate) review of the conditions of legality of the restrictive measure affecting personal freedom.

This orientation was overturn in 2014. In the validation of the measure that decides on detention of foreigners into a center for identification and expulsion, the national court, even if it has no power to examine the legality of the measure according to national law, is nevertheless obliged to identify, even incidentally, its manifest illegality in line with Article 5 of the European Convention on Human Rights.

The Supreme Court has pointed out that this is a conventionally-oriented reading of Legislative decree no. 286/98.

The case concerned an Ukrainian citizen in respect of whom a decree of detention in the CIE had been adopted. The decree had been validated by the Justice of the peace but, among other grounds

of appeal, she argued that failure to control the legality of the expulsion measure would be contrary to the European Convention. The Supreme Court took the opportunity to point out that, when validating the decree on detention, the magistrate must ascertain the manifest illegality of the expulsion order, albeit incidentally. This determination is required under Article 5 of the European Convention as interpreted by the Strasbourg Court. Therefore, the Supreme Court observed that, although Article 14 of the Consolidated Text excludes the power to censure the legitimacy of the deportation order when validating detention, in order to overcome the contrast with the ECHR, the magistrate should carry out an interpretation conventionally – and therefore constitutionally – oriented. The ECHR already requires the judge to carry out an assessment on the aspects of manifest illegality, to be identified in accordance with the jurisprudence of the Strasbourg Court. The internal rules, therefore, should be read in these terms, bearing in mind that it is for the applicant to prove that the principle has not been respected.

(Supreme Court, order no. 12609 filed on 5 June 2014).

By decision no.17407/2014 (filed on 30 July 2014), the Supreme Court issued a ruling on the long-awaited and important case of Ms. Alma Shalabayeva, the wife of an opponent of the regime in Kazakhstan, who had obtained political asylum in the UK and was the subject of an international arrest warrant issued by the authorities of her country. Precisely in order to carry out this action the Italian police raided at night in an apartment near Rome founding inside the opponent's wife and his daughter. Within a few hours they were notified the immediate expulsion order and issued orders of detention at the Centre for Identification and Expulsion of Ponte Galeria (Rome), this measure was validated by the competent Justice of the Peace, and finally it was quickly found an air carrier and Ms. Shalabayeva was returned together with her daughter.

The case caused a stir controversy in the media and strong domestic and international critics. The expulsion order was based on the assumption of the illegal entry of the woman. As to the validation of the detention in the CIE, it was decisive the fact of holding a false diplomatic passport issued by the Central African Republic, because in the name of Alma Ayan and not Shalabayeva. The explanation submitted by Ms. Shalabayeva that she had, used a different surname to protect herself from political enemies of her husband was not deemed to be a valid justification.

In the lawsuit filed by Ms. Shalabayeva against her removal, meanwhile expelled to Kazakhstan, it appeared that she was in possession of two permits of stay issued by countries of the Schengen area so that the competent administrative authorities revoked the expulsion order and the appellate court declared the dispute terminated, without ruling on the applicant's request to declare the illegality of her original expulsion. Ms. Shalabayeva had also appealed to the Supreme Court against the decision of validation of detention that had restricted her personal freedom.

With a first ground of appeal, the Supreme Court was asked to annul the contested decision because it was issued in violation of Articles 7 and 15 of Directive 115/2008/EC and based solely (including the denial of a deadline for voluntary return) on an incorrect element (the falsity of diplomatic passports), as it would have been easy to ascertain with a minimum investigation.

With a second plea it was alleged the infringement of the principle of *non-refoulement*, pursuant to art. 22 of the Geneva Convention on the Status of Refugees, art. 5 of Directive 2008/115/EC in relation to failure to take account of the special situation represented by the risk of political persecution in the country of origin. The Supreme Court has upheld the first ground of appeal. The decision is interesting in two respects. First it was stated the applicant's interest to a ruling on the validity of detention, despite the revocation of the act of expulsion, because it involved a judgment on the illegality of the original removal, which in the affirmative implied the right to compensation for an unjust restriction of her personal liberty.

Secondly, the Supreme Court, in accordance with the above mentioned other recent decision n. no. 12609/2014, surpassed the previous interpretation (order no. 27331/2013) which did not allow the judge validating detention to assess the illegality of the expulsion (subject to any separate opposition), and limited their power to verify the existence and effectiveness of the same.

Referring to the case law of the ECHR in cases involving Italy (*Hokic and Hrustic v. Italy*, app. no. 3449 2009, and in subsequent *Seferovic v. Italy* (app. no. 12921 2004) and a previous decision (until then neglected) of the Italian Constitutional Court (judgment no. 105/2001), which required a more effective control and understanding of the lawfulness of the expulsion in the context of the validation of the detention, the Supreme Court considered that at least in cases of manifest illegality of the expulsion, the judge who validated detention should intervene.

The rapidity with which the Shalabayeva case had been dealt, even with the denial of the right to seek asylum, showed how the national system and dual protection system (concerning the expulsion order on the one hand and validation of detention on the other) until then practiced did not provide sufficient guarantees. At least in the cases of more manifest unlawfulness, the Supreme Court has deemed more appropriate a system that allows an immediate check on the legality of the expulsion in its review of the detention order.

In this leading case, the measure of validation has been quashed since it was retained the original illegality of the measure of expulsion.

The principle appears now well established. In its decision no. 24415 of 30 November 2015, the Supreme Court reiterated that, in light of an interpretation of art. 14 Single Text on Immigration in relation to art. 5, para. 1, ECHR (which allows the detention of a person for the purpose of expulsion, provided that the procedure is regular), the magistrate, in the context of the validation of pre-removal detention, has a duty to detect incidentally the manifest unlawfulness of the expulsion order, which may also consist in the circumstance that the alien cannot be expelled under the cases set by Law.

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)

The principle of reasonable prospect of removal had not been expressly implemented in the national legislation of transposition (either for initial detention, nor for subsequent renewals) before the Law no. 161/2014 adopted at the end of 2014. Following the entry into force of these amendments, for the first renewal of 30 days, the Justice of the peace must check whether it is impossible to immediately expel the alien because of serious difficulties related to ascertaining his/her identity or acquiring travel documents. After this term, one of more renewals up to a maximum of an additional 30 days can only be asked if concrete evidences have been shown to support the likely identification or if it is necessary in order to arrange for removal. The criterion of reasonable prospect of removal has thus been introduced in relation to renewal of detention.

Under the previous rules, detention (and renewal) orders had not normally dealt with this point and the Justice of the Peace did not generally extend control over it.

More attention seems to be brought to this issue since 2015 (after the entry into force of Law no. 161/2014).

In this respect, reference can be made to the Supreme Court's decision no. 19201/2015, concerning the appeal against the validation of a pre-removal detention delivered by the competent justice of the peace of Rome.

The appellant (a Macedonian citizen) complained the absolute lack of motivation on the issue raised by the defense at the hearing of validation, i.e. absence of reasonable prospects of removal pursuant to art. 15, par. 4 of Directive 2008/115/EC, claiming that the concerned person was a de facto stateless.

The Supreme Court considered such ground founded. It quashed the decision and condemned the administration to pay court costs.

In the captioned case the principle was applied to first validation of detention (and not to its possible extension).

The principle was applied directly because of the absence of a reasonable prospect of removal from the beginning and on this point the judge had omitted motivation.

Conduct of the Member State of potential return

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

In most cases, judicial decisions make reference to a generic lack of transport means or to the lack of collaboration of the State of potential return.

- *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?*

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

No sufficient available case-law since 2015. In the past they had limited their assessment in this respect.

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'?**

Avoiding the preparation of return is not well defined in the legislation.

The rule refers to the fact that it is not possible to remove the foreigner due to their lack of cooperation.

The relevant law provisions make a general reference to the foreigner's lack of cooperation.

This may also include hampering the preparation of return, but no precise interpretation can be inferred from available case-law.

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

The notion of risk of absconding represents one of the critical points of the relevant rules. The relevant provision encompasses a broad notion of risk of absconding.

The case-law examined highlights the need that the reasons given to justify the risk of absconding contain an adequate assessment of the elements required by the law. However, the absence of the conditions concerning the risk of absconding does not appear clearly identified.

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

YES

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

YES

If yes:

- Which ones?

Pursuant to art. 13, para. 4, Consolidated Text, there is a risk of absconding **if at least one of** the following circumstances occurs (these circumstances are indicated in relation to voluntary enforcement of the expulsion, but are referred as the parameters also in relation to detention). It has to be noted, therefore, that every single circumstance can *per se* ground the risk of absconding.

The risk of absconding can be assumed if the concerned person:

(1) does not have valid passport or equivalent document;

(2) does not have adequate documents proving accommodation where he/she can be easily found;

(3) has previously made false declarations with respect to his or her identity;

(4) has breached reporting obligations during the voluntary departure period;

(5) has not left during that period or re-entered despite the ban on re-entry.

(6) breach of a measure alternative to detention.

This broad definition of the risk of absconding has raised criticism by scholars. In particular criticisms was pinned on the fact that the lack of passport (or other equivalent valid document) or the lack of documents showing that he/she does not have adequate accommodation where he/she can be easily found, are alone circumstances that ground the existence of a risk of absconding. Referring to this latter case, scholars have emphasized the need to interpret this requirement in broad terms, thus not requiring that the alien has an accommodation in his/her name, but also accepting that relatives or friends are available to host them.

- 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?

There is not a list of criteria on which to assess the existence of the risk of absconding in an individual case, but rather it is provided a list of circumstances that operate as a presumption of such a risk.

The assessment of the risk of absconding remains one of the most crucial aspects of the legislation in force. In most cases the Justices of the peace limit themselves to check whether one of the situations set by the law exist, without carrying out a deeper evaluation of the case. They use standards formulas or forms.

As noted by V. Militello, A. Spena, *Il traffico di migranti: Diritti, tutele, criminalizzazione*, Torino, 2015, who have carried out a research on the case-law of the justice of the peace of Bari: generally the lack of passport, especially when associated to previous non-compliance with orders of expulsion, is considered a sufficient clue of the foreigner's unreliability. When the latter is in possession of documents, the attention is focused on the lack of an accommodation or source of income. Previous criminal records are recalled in the cases of foreigners who have references in Italy (work, family, household).

These results are in line with the findings in the reports mentioned in the Contention report.

- 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?

No statistics are available.

If not:

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

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

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

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

YES

The reasons that justify the detention are set in the Law and precisely under art. 14, para. 1, of the Consolidated Text. They are related to:

- the need to provide relief to the foreigner;

- to carry out further investigations regarding their identity or nationality;

- to acquire travel documents or the availability of a suitable means of transport.

Please note that while the text previously in force of article. 14 para. 1 indicated exhaustively detention situations, today this measure can be placed in all the situations in which the competent authority considers that there are 'temporary situations which may impede return'. This paves the way to a broader margin of discretion. In essence, when the directive was implemented the cases of administrative detention were extended.

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?*

Deposit of (travel) documents: delivery of the passport or other equivalent document valid, to be returned upon departure.

Designated residence: obligation to stay in a place previously identified, where he/she can be easily found.

Regular reporting to the authorities: obligation to report, on established days and times, with a police office having territorial jurisdiction.

Does the administration consider additional alternatives?

No additional alternatives are considered

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

NO

It's only a faculty (the Questore 'can apply') for the administrative authority to adopt an alternative measure to detention. Being a mere faculty of the administration, subsidiary to the main option of detention, a particular motivation regarding the non-application of alternative measures is not requested.

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.*

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)

Since the application of an alternative to measure is only a faculty, there is not a rigorous scrutiny of the Questore's assessment. This latter does not have to motivate why an alternative measure has not been applied, a motivation being only requested in case an alternative measure is applied.

The Justice of the peace cannot substitute his/her own discretion to that of the Questore.

Q11. How is the requirement **'as short as possible'** interpreted by national courts in your Member State?

Judicial control on the requirement that detention is as short as possible is very limited, since the time limit is fixed by the law and the judge cannot order a shorter period.

Control will therefore be limited to assess that the conditions for validating pre-removal detention are present.

Are time-periods fixed by national law or is the length of detention (necessary for removing the TCN) determined in each particular case?

Time-periods are fixed by national law. In 2014 the maximum period of detention was set at 90 days (30 days for those who have already been held in prison for whatever reasons for 90 days). Therefore the current formula is 30+30+ an additional maximum up to 30 days.

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 duration of initial detention is 30 days. It starts from the date of 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?

In general terms, there are not many decisions regarding the lack of due diligence.

It deserves special mention in this regard the decision of the Justice of the Peace of Bologna no. 40295 of 4 May 2012.

The case concerned a second request of renewal (after expiry of the first 30 days, the Questore had requested the judge to further renew the detention). The Justice of the Peace refused to extend the detention period due to absence of due diligence showed by the competent authorities in carrying out the activity of identification of the foreign citizen. In this case, the magistrate held that the lack of due diligence was demonstrated by the fact that the demand to the Consulate, in order to identify the detained person, was only reiterated after submitting the request of renewal.

The decision no. 40205/2012 issued by the Justice of the Peace of Bologna relates to an interesting case (because in practice quite rare) of denial of the request for an extension of detention motivated by an obvious lack of diligence in the sense that, after an initial period of 60 days, the new identification request to the Consulate had been submitted by the Police after (albeit in the same day) the instance of extension of the detention.

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

YES

The decision issued by the Court of Rome on 10 April 2014 no. 5107/2014 specifically applies the principles set in the case Arslan. The foreign national who came from Nigeria was rescued at sea while trying to reach the Italian territory without a travel document or visa. He was immediately issued a return decision based on Art. 10(2)(b) of the Consolidated Text on Immigration and was subsequently detained in an Identification and Expulsion Centre. He had claimed for international protection at the very moment of the entry. As a consequence of the asylum application, based on Art. 20 (2)(d), d.lgs. n° 25/2008 of transposition of Directive 2005/85/EC, he should not have been detained in an Identification and Expulsion Centre, but in a 'CARA' (Accommodation Centres for asylum seekers). In spite of the above circumstances, the Justice of the Peace had validated his detention.

As an effect of the asylum application, the competence to decide on the extension of detention passed, however, to the Civil Court instead of the Justice of Peace. As the decision demonstrates, **the change of judge permitted a deeper control on the lawfulness of the continuing detention**. The Judge harboured doubts as to whether the extension of the detention in the CIE would be compatible with the principles established by the Court of Justice in the *Arslan* Case of 30 May 2013 and in particular, as to how to harmonize Arts. 15 and 2(1) of Directive 2008/115/EC with Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status and Directive 2003/9/EC on minimum standards for the reception of asylum seekers.

The Judge decided that Art. 28 D.lgs. no. 25/2008 should be interpreted in light of Art. 11 and 117, para. 1) of the Constitution (concerning respect of obligations arising from the European order) and in accordance with EU law, as interpreted in the *Arslan* case and dismissed the request to extend detention. The decision was based on two arguments: 1) the application for international protection had not been made after the detention order, but at the moment of entry and consequently, it could not be considered as made only to delay the enforcement of the return decision; 2) the request of renewal submitted by the Questore lacked any motivation as to whether the conditions provided for by the Court of Justice in the *Arslan* case were integrated. A motivation in a case like this was especially needed since the person concerned came from a country, like Nigeria, affected by a

situation of conflict and generalized violence.

With regard to the detention of asylum seekers, some changes introduced by Legislative Decree of 18 August 2015, n. 142 which implemented the directives 2013/33/EU and 2013/32/EU must be reminded.

Such decree reaffirms the principle that the applicant cannot be held solely for the purpose of examining the application for protection, but using some power to apply the retention of the asylum seeker allowed by EU Directive 2013/33, the detention is set out under certain circumstances. In such cases the detention may be ordered by Questore, but only after an individual evaluation (with written reasoned statement and translated into an understandable language). In general, detention is linked to situations of potential abuse of the asylum from those who might be considered a threat to public order or state security or who may exert new crimes or who could use the power to apply for asylum as a last resort to avoid being effectively removed from the territory of the State.

Among these cases, an applicant who is in a CIE pending execution of a removal order, remains in the center when there are reasonable grounds to believe that the application for international protection was submitted for the sole purpose of delaying or preventing the execution of expulsion.

In all cases in which it is possible to detain asylum seekers the total duration of detention periods to which they may be subjected appears much higher than the maximum period of detention allowed in respect of other foreigners expelled and detained in other circumstances. As mentioned above, length of detention was reduced to 30 days, extendable twice for no more than three months by the Law of 30 October 2014, n. 161.

Differently, the maximum duration of detention for the purpose of examining the application for international protection is set at a maximum total period of 12 months. In cases where the detention of the alien is already in progress at the time of submitting the application, the Questore must ask the court (in this case it is the court and not the justice of the peace that has jurisdiction) for the extension for a further 60 days to allow the examination of the application. That period can then be extended for as long as the person concerned is allowed to remain in the country as a result of judicial review filed and in any case up to a maximum total term of 12 months.

In any case, the detention cannot be extended beyond the time necessary to evaluate the request with an accelerated procedure and delays in carrying out the administrative procedures preordained to the examination of the application do not justify the extension of detention.

The 12-month period sets a maximum term: the restrictive measure is maintained only as long as there are the reasons that have determined it and is subject to validation and periodic review by the Court.

In case of rejection of the application and/or judicial remedy, the applicant remains in detention if the conditions remain in accordance with articles. 13 and 14 of the Single Text on Immigration and for the maximum term provided therein (no more than 3 months).

Albeit limited only to certain categories of asylum seekers (and therefore no rule of general application) it arouses concerns on the disproportion between the maximum duration of the ordinary detention of expelling foreigners (3 months) and the maximum length of the asylum seekers' detention falling into the above categories (12 months).

In 2015, persons under pre-removal detention in a CIE who have applied for asylum have been 1,356 of the total 5,242 persons passed through in those facilities, representing approximately 25%. See *Rapporto sui centri di identificazione ed espulsione in Italia,* drafted by the Senate extraordinary commission for the protection and promotion of human rights, published in February 2016.

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 circumstances grounding the extension of detention are different from those which ground initial detention.

This point was substantially amended by Law no. 161/2014. For the first renewal of 30 days the Justice of the peace must check whether it is impossible to immediately expel the alien because of serious difficulties related to ascertaining his/her identity or acquiring travel documents.

After this term, one of more renewals up to a maximum of an additional 30 days can only be asked if concrete facts have been shown to support the probable identification or if it is necessary in order to arrange for removal.

Regarding the foreigner held in prison for whatever reason, the direction of the structure shall have to require the Questore information concerning the identity and nationality of the same. In these cases the Questore will start the identification procedure involving the competent diplomatic authorities.

The relevant Consolidated Text provisions do not provide for the foreigner's mandatory presence. This point was specifically addressed by the Supreme Court in its decision of 24 February 2010. Applying a Constitution-oriented interpretation (article 3 on the principle of equality and article 24 on the right of the defence), the Supreme Court has extended the right to be personally heard with the assistance of a lawyer to the phase of the decision concerning the extension of the detention, and not only to its initial validation hearing, since in both cases decisions on the conditions and limitations of personal freedom are adopted through council chamber procedures ('camera di consiglio') which provide for the same means of appeal to the Supreme Court for procedural and/or judgment errors.

With the same decision, the Supreme Court also clearly affirmed that renewal must be requested and validated (within 48 hours from the request) before the expiry of the period of detention authorized by the initial detention measure.

Q15. In your Member State, when Judges declare the detention unlawful, does it lead to immediate release of the applicant?

This leads to immediate release of the TCN concerned **irrespective** of the reasons (procedural or substantial) of unlawfulness.

No statistics are available in relation to the reasons for which detention is not validated.

Is release from detention the only remedy provided by the law for unlawful detention?

The Supreme Court stated that in case of unlawful detention the foreigner can claim compensation for the material deprivation of personal liberty, non-justified by the existence of legal conditions (See case Shalabayeva of July 2014, above)

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.

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

YES

This point is not specifically regulated by the Law. Under the previous rules, it could happen that a person was re-detained. After the amendments brought by Law no. 161/2014, which has reduced the maximum period of detention and subjected its extension to stricter requirements it can be assumed that this can happen more rarely, but no data are available in this regard.

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

According to Article 24 of the Constitution of the Italian Republic, everyone can take legal action to protect their legitimate rights and interests. Defense is inviolable at every stage and level of the proceedings. Indigent are assured, through appropriate institutions, the means for action and defense in each jurisdiction.

The concerned person is granted legal aid at state expenses and, if he/she is devoid of a defender, is assisted by a lawyer appointed by the court and, if necessary, by an interpreter. So, while the public defender (*difensore d'ufficio*) has the function of ensuring the right to technical defense to anyone who has not appointed a defense lawyer, legal aid is applied both to the detainee's trust lawyer and *difensore d'ufficio*.

Not all lawyers are able to defend those who have been admitted to legal aid; only the lawyers registered in the register of legal aid defenders, held by the competent Councils of the Order, can be appointed.

In principle, legal aid applies to everyone, both Italian and foreigner, EU and non-EU citizen, in criminal, civil, administrative, accounting and tax matters in all levels of courts (specific rules may, however, apply in relation to certain categories of proceedings). As a general principle under Italian law, only those who find themselves in well-off conditions can be admitted to legal aid (if the applicant lives alone, the amount of his/her income must not exceed 10,766.33 €; this amount is increased in case he/she has family members living with him/her). The requirement must be proven by the applicant with certification or self-declaration.

As far as foreigners in case of pre-removal detention proceedings are concerned, the regulations applicable are different from the general principles insofar as they are granted legal aid at state expenses, without considering the income requirements.

Please note, however, that even if the law adequately protects the rights of the defense, the modalities with which both defense and legal counsels operate in practice raise criticisms and concerns about the effectiveness of such right to defense.

More in details defenders complain about the difficulty of adequate representation, including the absence of interpreters. Often, the public defenders are appointed on the morning of the hearing and have never seen their client before. In the absence of an interpreter of the lawyer (which is quite unlikely, given the different nationalities and languages spoken), the latter can only briefly confer with their client that morning. The current legal system only provides for interpreters during the validation and extension hearings, whereas professional interpreting service for client interviews is not guaranteed.

This affects the possibility to adequately prepare and study the case and to understand the complexities of their client's stories.

As a general remark, also in the event the concerned person has appointed a legal counsel of his/her choice, the very small advance with which the dates and times of validation hearings are notified, combined with the impossibility of a prior confrontation with the client, make extremely difficult to prepare the defense for the counsel. It should also be taken into account that lawyers who provide free legal aid may not be particularly qualified.

As it has been pointed out, validation and extension hearings are absolutely crucial because they are the forums where Questura's representative claims for the validation or extension of detention and consequently the detainee's lawyer should have all of the individual information and time necessary to adequately explain the detainees' side of the case.

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

The identification and expulsion centers are detention facilities for foreigners in a condition of irregularity, in view of their expulsion.

At present there are six CIEs(Bari, Brindisi, Caltanissetta, Crotone, Rome, Turin), with 720 places available. The CIE of Brindisi and Crotone were reopened, after a few years being closed, in September 2015. Some CIEs in 2015 have been converted into hotspots.

From January to December 2015 in a total 5,242 people were detained in a CIE, of which 2,746 were actually repatriated. This means that 52% of the total detainees has been returned in their country. The average stay in the CIE in 2015 was 25.5 days.

(See Rapporto sui centri di identificazione ed espulsione in Italia, drafted by the Senate extraordinary commission for the protection and promotion of human rights, published in February 2016)

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*)

N/A

Irregular third-country nationals are not detained in prisons in view of their expulsion.

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)

On 20 October 2014, the Ministry of Interior adopted a regulation setting the criteria for the organization and management of CIEs (*Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall'articolo 14 del decreto legislativo 25 luglio 1998, 286 e successive modificazioni*). These criteria are intended to ensure uniform rules and accommodation conditions for the organization of CIEs and the provision of services within them. The regulation sets the standards for the linguistic and cultural assistance, health protection, freedom of correspondence and the right to receive visits. Also it lists the authorized persons who can access and how they can do it. In particular article 2 defines what are the rights of the person who is going to be held. much importance is given to the initial information that must be assured by the management entity with the assistance of a mediator, if needed. Rights and duties, as well as detention terms and rules of coexistence within the structure, shall be illustrated.

The regulation also contains the *Charter of rights and duties* of the detained foreigner. A copy of this document should be handed to each foreigner at the time of entry in the CIE. The Charter sets out, among others, the right of the detainee to be informed, to speak their own language or in another known language, freedom of worship, freedom of mailing and telephone correspondence.

The regulation does not specify the conditions of vulnerable persons in detail. It simply provides that the identification of an accommodation, where possible, according to the configuration of the structure, will have to consider asylum seekers, those with special reception needs and families. In

the latter case, if it cannot be set up an appropriate space, or ensured the unity of the family through transfer to another center, spouses are ensured the possibility of direct talks in a manner to be agreed with the responsible of the Center.

According to the Legislative Decree no. 142/2015 to foreigners detained in CIE pending removal is provided, by the manager, the information on the possibility to request international protection.

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?

The *Rapporto sui centri di identificazione ed espulsione in Italia*, drafted by the Senate extraordinary commission for the protection and promotion of human rights, published in February 2016 stresses that these interventions, however, have not solved all the critical issues of the management of detention facilities, nor they have ensured the respect of the standards defined at the central level, enabling the perpetration of strong inequalities in the management of the different structures.

It emphasizes especially some critical elements:

• The strong heterogeneity and promiscuity of the people within the CIEs causes tense situations: there are, for example, people who have long resided legally in Italy and have become irregular because they have not renewed the residence permit for various reasons , former prisoners who have been transferred to CIEs after serving their sentence and then awaiting identification or repatriation; or asylum seekers who have been able to formalize their application only after receiving the order of refusal of entry and expulsion.

• As for the health care of the detainees it is confirmed their difficulty to have access to medical assistance, since doctors are perceived as the custodian, thus resulting in lack of confidence on the part of the patient. Episodes of self-harm continue to be frequent as well as the number of people taking psychiatric drugs, without receiving appropriate mental health care, is high.

• It should be noted that people who cannot be expelled for various reasons still continue to be detained in CIEs. This is even more serious if an evaluation on such condition has already been done during an earlier detention

• One of the central issues to be resolved is how to speed up procedures of identification, given that the population that passes inside the CIEs is composed mostly by people who come from prison.

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. Under Italian law it is not possible to detain irregular migrants in other centres outside the procedure set under article 14 of the Single Text on Immigration.

This point has been clarified by the ECHR Court in *Khlaifia and other v. Italy*. Under para. 69 it stated that:

Italian law does not expressly provide for the confinement of migrants who, like the applicants, are placed in a CSPA. It is true that Article 14 of Legislative Decree no. 286 of 1998 (see paragraph 27 above) provides for a measure of confinement. But that type of confinement applies only when it is necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier. That was not the situation in the present case. Furthermore, the aliens to which such confinement is applicable are placed in a CIE by an administrative decision under the supervision of the Justice of the Peace. The applicants, however, were placed in a CSPA and no formal decision to hold them in confinement had been taken.

The Court concluded from the foregoing that the deprivation of liberty in question was devoid of legal basis.

Recent events related to the significant influx of migrants raise some critical issues regarding the management of hotspots. No legal provision is contained in the Italian legislation on detention in such centers, whose primarily objective should be identification, and then sorting, of migrants. To this purpose, in principle, here migrants should be detained 'for the shortest possible time' (see circular of the Ministry of the Interior of 8 January 2016).

Actually some reports (see in particular the report 'hotspot in Italy' by Amnesty International) show that detention can last much longer (especially when foreigners refuse to be fingerprinted). Particularly where people are not identified as eligible for relocation, nor asylum seekers, they are dismissed from hotspot and receive a measure of deferred refusal ('respingimento differito') with the order to leave the country within 7 days.

This procedure, denounced by many NGOs, highlights critical issues as to the detention of people in a center, without the necessary and timely validation of the judge of the measure of restriction of personal freedom, as well as with regard to the removal order, in the absence of all the judicial safeguards provided for the expulsion.

It has in fact been developed a practice whereby people receive the notice of the Questore to leave the country within seven days. It is a controversial procedure (see report second package, p. 8) which deprives the alien with all the guarantees applicable to expulsion procedures, in compliance with the provisions of the Return Directive.

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

There are no specific rules such as for the prison system that indicate the authorities to turn to in case of violation of detention standards.

A right to complain is in fact provided for by art. 35 of the Law of 26 July 1975 no. 354, i.e. regulations on the penitentiary system.

The regulation entrusts judges with the task of supervising the organisation of prisons: it follows that they can receive and consider any communications – requests, complaints, suggestions and anything else – submitted by those who are detained

However, this legislation does not apply to CIEs.

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

NO

b. Judicial Interactions with European and national Courts

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

NO

If yes:

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

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

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

No relevant case-law available on this point

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

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

No relevant case-law available

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

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

NO

If yes: please elaborate further on this issue

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

NO

If yes: please elaborate further on this issue

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

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

NO

The Italian legislation provides that minors cannot be subject to expulsion (unless for reasons of public order and state security) and therefore they cannot be subject to the measure of pre-removal detention. In these centers minors are detained only in two circumstances: if they are accompanied by a parent or custodial, who are subject to these measures (and after manifestation of their consent) or when (especially for unaccompanied minors) are incorrectly identified and registered as adults on arrival.

The foreign minors arriving or on the Italian territory are often found without appropriate identification documents that clearly certify the age.

In these cases, the public security authorities use to ascertain their age though medical examinations.

The delays in the investigation process or the uncertainty of their results may, however, determine the detention of the foreign child in adult centers, or in the identification and expulsion centers.

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?

N/A

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.)

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?

No case-law available

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?

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

No case-law available

If yes: please elaborate further on this issue

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

No case-law available

If yes: please elaborate further on this issue

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

NO

If a minor is involved, the competence on the measures to be adopted is for the Juvenile Court.

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

No case-law available.

4. Article 18: Emergency situations

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

NO

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

General remarks and transversal issues

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

The Supreme Court has clarified the scope of application of pre-removal detention.

In its decision of 23/09/2015, no. 18748 it has pointed out that the detention of the alien, who cannot be removed forcibly, constitutes a measure of deprivation of personal freedom legally feasible only in the presence of supporting conditions provided for by law and according to a rigidly predetermined time modulation. In this framework, the administrative authority is, therefore, devoid of any discretion.

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.?

In general terms, Courts seem to have so far played a rather marginal role in bringing changes in the above issues.

The reasons are probably to be sought in a procedural mechanism which gives control over detention to the Justices of the peace, limiting the possibility of appeal only before the Supreme Court.

On one side the Justices of the peace have not, in general terms, in-depth legal knowledge of immigration law and operate in many cases on the basis of standards and formulas, treating numerous cases during the same hearing. Their impartiality and independence is criticized by operators and scholars.

On the other side the possibility of appeal to the Court of Cassation appears limited in practice, being prompted for a lawyer with special qualifications, and of little interest for the foreigner, since the appeal does not suspend the enforcement of the measure. The few rulings adopted by the Supreme Court in relation to the detention validation confirm the low use of this mechanism. Therefore, the Court of Cassation that well could help adjudicating in a significant way, so far has not played a decisive role in promoting the interpretation of national rules in the light of the directive.

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

NO

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.

Jurisdiction of Justices of the peace and consequent issues of effectiveness and impartiality of judicial control on pre-removal detention.

Prospective reversal of the principle set by the directive that sees detention as a residual measure (alternative measures not applied in practice)

Broad definition of the risk of absconding

The principle of reasonable prospect of removal has not been implemented in the national legislation of transposition for initial detention.

No specific legal provisions on the position of vulnerable people, families.