REDIAL PROJECT

National Synthesis Report – Lithuania

(Draft)

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

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

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

1. Article 15 RD: detention

a. Competent authorities ordering and reviewing pre-removal detention

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

YES/NO

If yes: please elaborate further on:

- The type of jurisdiction concerned (civil, administrative, criminal, else?)

Detention order issued by the police or another law enforcement authority is subject to judicial control following the expiration of 48 hours (Aliens' Law, Article 114 (1) and (2)[1]). Detention is authorised by the regional courts of general competence. Appeal against regional court decision falls under the jurisdiction of Supreme Administrative Court of Lithuania. Immigration detention cases are examined under administrative jurisdiction (Aliens' Law, Article 116 (2), 117 (1)).

- The scope/extent of its competence (*e.g.* hearing immigration/detention cases only or not)

Regional courts are hearing all types of cases, while Supreme Administrative Court's competence is to hear administrative cases, among them immigration detention cases. Thus they are not

[1] The Law on the Legal Status of Aliens of the Republic of Lithuania No IX-2206 of 29 April 2004. *The Register of Legal Acts.* 2014, No 2014-19923 (further – Aliens' Law).

specifically hearing immigration or detention cases only.

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

Is it the same authority regardless of the length of the detention and/or the issuance of an explicit renewal order? Or does the judicial authority concerned control the lawfulness of detention only when a detention order is renewed?

YES/NO

The answer requires clarification, because detention is both ordered (beyond initial 48 hours) and reviewed by the regional courts, thus it is the same authority. However, control is exercised not only at renewal of detention order, but also at initial period when first court decision on detention is being taken.

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

Detention decisions are reviewed on the basis of initiative of detention institution or the person concerned, but not by the court automatically. There is no period established for a review of detention in the law, it only states that upon the disappearance of grounds for detention the person detained is entitled to, whereas the detention institution should immediately apply to the regional court with a request for review (Article 118 (1) of the Aliens' Law).

Q4. Does your national legislation provide for one or two levels of jurisdiction and under which modalities? (*E.g. a first review by an administrative authority followed by an administrative court and/or a civil or criminal court?)* In any case, please elaborate further on the type of jurisdiction(s) involved, remedies available, the deadlines for appeal(s) set by law etc.

Review of detention involves one level of jurisdiction and is focused in regional courts, which need to examine the case within 10 days from receipt of request for review of detention (Article 118 (2) of the Aliens' Law). However, there is an appeal against this review available by the Supreme Administrative Court. The later shall examine the appeal within 10 days from receipt of appeal (Article 117 (2) of the Aliens' Law).

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)

Courts' control is full at both instances.

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

YES/NO

The judge controls ex officio all elements of lawfulness and this discretion of the court has been confirmed by the jurisprudence of the Supreme Administrative Court.

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

First instance courts of general competence control the lawfulness of detention, they perform periodic review, while second instance (Supreme Administrative Court) hears appeals against detention decisions or decisions to assign alternatives to detention. First instance deadlines are very short, while at appeal instance it takes much longer time. Thus very detailed examination within first instance is constrained by the pressing deadlines, differently from the appeals' instance, which has more time to investigate evidences, hear the person, etc. There are situations in the first instance where the person is not brought to the hearing or the lawyer meets the person in the court room for the first time, thus naturally, the examination is much more superficial if compared with appeal instance. These are practical differences.

b. Judicial Interactions with European and national Courts

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

YES/ NO

If yes:

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

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

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

YES/NO

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

Supreme Administrative Court in administrative case No. N-858-90/2014 (judgment of 15 September 2014) decided on the calculation of the start of the time period for detention and reflected on Kadzoev judgment of CJEU. The Court felt obliged to pronounce on the relevance of this decision for the case, since both parties to the proceedings had invoked it. However, in the opinion of the Court, this judgment was not relevant, as Lithuanian legislator did not establish separate time periods for detention of asylum seekers and persons who do not ask for asylum (para. 21). The Court held that: a) the period of detention shall start from the moment of factual detention; b) the time limits for detention do not differentiate between the proceedings taking place in their respect. It also referred to Kadzoev judgment in another case (No. A-3078-822/2016, judgment of 23 February 2016) with regard to maximum time limits allowed in the Directive. The case concerned repeated detention of the person beyond the maximum of 18 months allowed by the Directive following his release. The Court did not authorise repeated detention and considered that calculation of the period anew would be unlawful.

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

YES/NO

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

Supreme Administrative Court in administrative case No. N[858]-90/2014 decided on the calculation of the start of the time period for detention and referred to ECHR (Art. 5) concerning: a) restrictive interpretation of the legal acts related to detention grounds; b) legal precision of the national law (ECtHR judgment in H. L. v. United Kingdom). In another case (No. A-3078-822/2016, judgment of 23 February 2016, concerning repeated detention of the person beyond the maximum of 18 months allowed by the Directive following his release) the same Court applied Article 41 of the EU Charter. It considered that the circumstance that documents from the embassy of the person are not received for more than a year may not be a basis for repeated detention of the foreigner upon expiration of the maximum of 18 months period.

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

YES/NO

If yes: please elaborate further on this issue

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

YES/NO

If yes: please elaborate further on this issue

c. National case-law: major trends

Q1. Is detention under the Return Directive considered to be a measure impeding – depriving – of freedom of movement and/or the right to liberty? Have the Highest Courts from your Member State already opined on this issue?

Detention is generally considered a measure restricting the right to liberty (Supreme Administrative Court decisions in administrative cases, e.g.: No. N[858]-90/2014 (judgment of 15 September 2014); No. A-3078-822/2016 (judgment of 23 February 2016). However, in some cases the same Court is referring to detention as restriction of the freedom of movement (*e.g.*, No. A-3219-858/2015 (judgment of 22 July 2015), No. A-3078-822/2016 (judgment of 23 February 2016)). The Court practice does not seem to be consistent on this point.

Q2. Do national courts controlling the lawfulness of the **detention** in your Member State also control the lawfulness of the very **return** decision? E.g. Have there been decisions striking down detention measures due to the unlawfulness of the return decision?

YES/NO

Q3. Do national courts reviewing the lawfulness of the detention order also assess whether a **reasonable prospect of removal** exist? (*E.g.* even from the outset when controlling the initial detention order, see *Kadzoev* para. 63-68)

***YES*/NO**

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

- *lack of due diligence;*
- *lack of resources (human and material);*
- *lack of transport capacities;*
- *conduct of the Member State of potential return (e.g. an embassy in a given MS refuses generally the cooperation in cases of forced return and accepts only voluntary returns or it does not confirm the nationality of the person concerned (Cf. ECtHR, Tabesh), lack of cooperation of third-countries' embassies.*

With regard to lack of cooperation from the embassy in issuing return certificate for more than a year, the Supreme Administrative Court held that this cannot be a ground to again detain the foreigner (administrative case No. A-3078-822/2016 (judgment of 23 February 2016)).

- *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:

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

No, the Supreme Administrative Court seems to assess the practical possibility (e.g., with regard to lack of return documents, administrative case No. A-3078-822/2016 (judgment of 23 February 2016).

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

The courts require documents to be available and if there is no prospect to get them in the near future, it considers detention unreasonable (e.g., administrative case No. A-3078-822/2016 (judgment of 23 February 2016), or when the absence of documents from the embassy is the only reason for extension of detention period, such extension would not be proportionate and necessary (No. A-3219-858/2015 (judgment of 22 July 2015)).

Q4. How do national courts controlling the lawfulness of pre-removal detention in your country assess the notion of **'avoiding or hampering the preparation of return or the removal process'?** Please provide some concrete examples based on the case law collected.

The Supreme Administrative Court has considered such circumstances, as: a) previous departure from Lithuania and return from another EU Member State under Dublin procedure; b) lack of

established identity; c) non-cooperation with the authorities in establishing the identity or conducting other actions; d) non-compliance with the rules on accommodation in the Foreigners' Registration Centre, etc. One of the main concerns is that the courts usually look into person's possibility to support himself, the courts apply the presumption that they will try to escape.

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

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

***YES*/NO**

For instance, in administrative case No. A-3219-858/2015 (judgment of 22 July 2015) the Supreme Administrative Court considered the absence of circumstances proving 'risk of absconding', like: cooperation with the authorities in determining identity, compliance with the order on temporary accommodation in the Foreigners' Registration Centre, no absence from the Centre recorded, no intention to depart from Lithuania or hiding in other ways. Thus the existence of these circumstances could be considered as evidences of 'risk of absconding'. The Court has clearly rejected reliance on mere absence of established identity and lack of documents as a basis for detention without having considered the proportionality of such a measure.

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

***YES*/NO**

If yes:

- Which ones?

As a result of transposition of the Directive, a list of circumstances for determining when a foreigner will hamper or avoid the return procedure or when a risk of absconding exists was introduced in Lithuania (as of 1 March 2015) (Art. 113 (5) of the Aliens' Law).

Article 113 (5) of the Aliens' Law provides for the following list of circumstances, which are considered when deciding if the foreigner may abscond:

1) The foreigner does not have a document confirming his identity and is not cooperating in establishing identity or nationality (refuses to provide information about himself/herself, submits misleading information, etc.);

2) does not have a residence in the Republic of Lithuania or does not stay (live) at the residence indicated;

3) does not have family, social, economic or other relations in the country;

4) does not have financial means to maintain himself/herself in the Republic of Lithuania;

5) Did not comply with an obligation to depart from the Republic of Lithuania, voluntary return decision within the deadline established or extended;

6) Does not comply with alternative measure to detention assigned by the court decision;

7) A foreigner who was accommodated in the Foreigners Registration Centre without restrictions on the freedom of movement, violated the order on temporary absence from the Centre;

8) Aiming to avoid criminal responsibility for irregular state border crossing, submitted application for asylum during the period of pre-trial investigation;

9) foreigner's presence in the Republic of Lithuania may pose a threat to public order;

10) does not cooperate with competent authorities during the examination of claim for asylum.

- 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?

Judges analyse individual situation of the applicant in the framework of abovementioned circumstances.

- 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 evidence of that.

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/*NO*

Other grounds of detention are applicable to foreigners, but they are not specifically related to return procedures.

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

***YES/*NO**

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

A choice of alternative measures to detention in Lithuania (Article 115 (2) of the Aliens' Law):

1. Requiring that TCN regularly at the fixed time reports at the appropriate territorial police agency
2. Requiring that TCN communicates his whereabouts at the fixed time by communication means to the appropriate territorial police agency
3. Entrusting the care of the TCN, pending the resolution of the issue of his detention, to a citizen of Lithuania or a TCN legally resident in Lithuania who has relationship with TCN, provided that the person undertakes to take care of and to support the TCN
4. Accommodating the TCN at the Foreigners' Registration Centre without subjecting him to restriction of freedom of movement (applicable to asylum seekers only).

The list of alternatives is exhaustive in the law.

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

YES/NO *(the answer is yes and no)*

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

Lithuanian legislation does not explicitly provide for the obligation to examine alternatives first, but establishes such measures in the Aliens' Law. The case law also confirms that 'detention is an ultima ratio measure and may be applicable only in the cases where the aims determined by the legislation cannot be achieved by other methods' (Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{575}-52/2013 of 15 May 2013). Thus even when the authorities do not ask for alternative, the courts consider that the issue of granting or refusal to grant an alternative measure belongs to the discretion of the court, and they may examine it without such a request (Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{143}-3565/2008 of 21 July 2008).

Although there is no obligation to assess each available alternative to detention to justify their effectiveness or the lack thereof, there has been practice in the courts that sometimes another alternative was assigned by the court instead of the one requested by the authorities.

Q10. How do national courts control whether the administrative authorities lawfully considered alternative measures before ordering detention measures? Is the review limited to manifest error of appreciation? Can they perform a wider control, including substituting their own discretion to that of decision-making authority based on the necessity of respecting the principle of proportionality? (ECJ, *Arslan, El Dridi*)

Even when the authorities do not ask for alternative, the courts consider that the issue of granting or refusal to grant an alternative measure belongs to the discretion of the court, and they may examine it without such a request (Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{143}-3565/2008 of 21 July 2008).

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).

No specific elements of proportionality test are evident from the case law. The Supreme Administrative Court considered that detention would not be proportionate given that no circumstances confirming non-cooperation of the applicant, risk of absconding or non-compliance with the order on accommodation are established (administrative case No. A-3219-858/2015, judgment of 22 July 2015). In another case the same Court considered detention as not proportionate on the basis that the applicant needs to take care for pregnant wife who is vulnerable and detention of vulnerable persons shall be in exceptional circumstances, which were not established in this case (administrative case No. A-3855-822/2016, judgment of 18 May 2016).

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.)

Lithuania implemented the requirement of the Directive to terminate detention when the circumstances laid down in Article 15(1) cease to exist. Termination of detention is possible on two grounds (Article 119 of the Aliens' Law): a) when grounds for detention disappear; and b) when

detention period expires. In any of these situations the TCN shall be released without delay, but the disappearance of grounds should be confirmed by the court's decision (Article 118 (3) of the Aliens' Law). Previously, the legislation in Lithuania did not require detention to last as short as possible, and to release the TCN if it is found out that no reasonable likelihood to remove him exists due to legal or other reasons. As of 1 March 2015, the Aliens' Law was supplemented to provide that detention of the foreigner should last for as short period as possible and not longer than it is necessary to take a decision to return to a foreign country, expel from Lithuania, etc. (Article 114 (6)). Also, if for legal and other objective reasons there is no reasonable probability to expel the foreigner from Lithuania, institution, responsible for detained foreigner, shall immediately apply to the court asking to reconsider detention decision (Article 118 (1^{1})). Currently, detention of TCNs is fixed at a period up to 6 months (Article 114 (5)). In line with the Directive, the period may be extended for 12 months when the TCN does not cooperate in removal procedures, or the documents necessary for removal are not received. Although the period was established as part of transposition of the Directive, this detention period is applicable for all detention grounds. Therefore, if the TCN was initially detained on other grounds, the total duration of detention may not exceed the period laid down in the law. For instance, the Supreme Administrative Court of Lithuania ruled (in administrative case No. 858-90/2014, judgment of 15 September 2014): 'Human freedom is a fundamental value of a democratic state, an innate human right […]. Because of this reason the legal norms related with grounds for detention of a person have to be interpreted strictly. <...> the detention periods laid down in Art. 114 (4) of the law must include not only the duration of detention imposed or extended by the court decision, but also the duration of detention applied by a decision of an official of the police or other law enforcement authority (up to 48 hours […]). <...> the maximum period of detention of six months […] may be applicable to a TCN <...> also in the case where he has submitted an application for granting asylum. Under the applicable regulation, this period of 6 months may be extended for a period not exceeding 12 months only in the case where procedures in relation to removal of a TCN are pending, and/or a decision to remove him has been adopted […], as the grounds for extending detention […] are specifically related with the aim to remove the third-country national'.

Detention starts from factual date of detention (Supreme Administrative Court in administrative case No. N^{858}-90/2014, judgment of 15 September 2014) and initially may be sanctioned by the police or other law enforcement bodies for a period of up to 48 hours (Article 114 (1) of the Aliens' Law).

Q12. How do national courts control the **'due diligence'** of the competent authorities when carrying out the removal process? Do they perform a full or a limited control to manifest error of assessment?

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

Courts perform full control. The Supreme Administrative Court has quashed the decision of first instance court on the basis that the vulnerability of the applicant was not established while assigning detention and without having assessed the necessity of applying the most restrictive measure to the vulnerable person (administrative case No. A-3855-822/2016, judgment of 18 May 2016).

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

Yes, this period is calculated within the maximum 18 months period allowed by the Directive and is taken into account as confirmed by the judgments of the Supreme Administrative Court (e.g., in administrative case No. N^{858}-90/2014, judgment of 15 September 2014, where reliance on Kadzoev judgment was rejected, since the national legislator has opted not to differentiate the deadlines for asylum and immigration detention).

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).

Detention of TCNs is fixed at a period up to 6 months. In line with the Directive, the period may be extended for 12 months when the TCN does not cooperate in removal procedures, or the documents necessary for removal are not received (Article 114 (5) of the Aliens' Law). The courts proceed with a new assessment of the grounds justifying detention once controlling detention.

Q15. In your Member State, when Judges declare the detention unlawful, does it lead to immediate release of the applicant? Is release from detention the only remedy provided by the law for unlawful detention?

***YES*/NO**

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

Once detention is declared unlawful by the court decision the foreigner is released from detention immediately. The same applies if the time limit for detention has expired (Art. 119 (1) and (2) of the Aliens' Law). Apart from release from detention, the foreigners may claim compensation for unlawful detention based on the Law for Compensation of Damage Caused by Illegal Activities of State Institutions and Representation of State and Government of the Republic of Lithuania (No. IX-895 of 21 May 2002).

Based on courts' practice, among the grounds of deciding the unlawfulness of detention decision are failure of necessity, proportionality requirements, no circumstances of risk of absconding or non-cooperation are established, lack of considerations with regard to vulnerability of the applicant, application of alternative measures when detention grounds are not applicable and others, lack of clear prospective of return possibility. The court have decided both on procedural flaws (e.g., the applicant was not called to the hearing) and substantial grounds (e.g., no circumstances proving the risk of absconding were established, thus no ground of detention; no special circumstances that would justify detention of vulnerable persons established).

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

YES/*NO*

If maximum detention period of 18 months has been reached, the applicant cannot be re-detained under immigration laws. This is clearly confirmed by the court practice. For example, the Supreme Administrative Court in administrative case No. A-3078-822/2016 (judgment of 23 February 2016) reasoned that considering the expiration of the maximum 18 months detention period neither the decision of the Migration Department nor any other circumstances of the case justified the extension of the detention period or repeated detention of the appellant calculating the allowed period of 18 months anew.

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

The requirements of the Directive on access to legal representatives are partially implemented in the legislation. The Aliens' Law requires that detained asylum seeker shall be informed about the grounds for detention, the order of appeal against detention decision and the possibility to obtain free legal aid. This information shall be provided without delay in writing and in the language that is

understandable to him/her (Art. 114 (3)). Also, when the institutions apply to the court with request to detain the TCN or assign an alternative measure, the TCN has a right to state guaranteed legal aid during hearing in the court (Art. 116 (1) of the Aliens' Law). According to NGO reports, in practice, lawyers sometimes faced difficulties while trying to meet the represented TCNs in the FRC when they or their assistants were not allowed to the Centre. The problem with legal assistance in return detention cases is that state-guaranteed lawyers are only called to the court, they do not have a possibility to prepare the case before the court hearing and their services are not paid after the hearing finishes (e.g., if they would like to explain the decision to the person and possibilities of appeal). They can be called during the appeal's hearing, but time for preparation of appeal is not covered by the state. Therefore, in practice, it results sometimes in just formal presence of the lawyer in the court hearing.

2. Article 16 RD: conditions of detention

a. National jurisprudence: major trends

Q1. Does your national legislation provide for the use of specific detention facilities? (as foreseen as a general rule by the Return Directive – ECJ, Bero, Bouzalmate) Who are the persons detained in such facilities?

YES*/*NO

Please elaborate further, including the practice in your Member State

Lithuania uses a specialised centre for detention of foreigners, called the Foreigners' Registration Centre (FRC), located 40 kilometres away from the capital Vilnius. Thus generally it corresponds to the requirement of the Directive that detention shall take place in specialised detention facilities.

The Centre hosts three groups of foreigners:

a) detained TCN who are irregularly in the country;

b) detained asylum seekers;

c) asylum seekers who are accommodated in the Centre without restriction of the freedom of movement.

This institution is subordinate to the State Border Guard Service of the Ministry of the Interior. The FRC has two regimes: for detained foreigners and accommodated asylum seekers. The detention regime involves the restriction on the freedom of movement contained to a closed area of the centre. The detention building is similar to a dormitory, which is being locked and guarded, staff wears uniforms and carries arms. Mobile phones are forbidden and disciplinary measures (including related to isolation for up to 24 hours) can be imposed for failure to observe the order in the Centre (Order on Accommodation in the FRC, points 24.4, 26).

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

YES/*NO*

There is no clear answer to this question. There have been rather few cases when foreigners were placed in regular prisons and in those cases they were not separated from ordinary prisoners. Usually they are accommodated in the Foreigners' Registration Centre, specifically used for detention and accommodation of TCNs.

Q3. Which material conditions and particular safeguards are ensured during the detention period? (*e.g.* vulnerable people, hygiene and health care, clothing, external contacts with family members, visits from legal representatives, access to information, education, activities etc. – *Suso Musa v. Malta*, Appl. 42337/12, 23 July 2013; *Ahmed v. Malta*, Appl. 55352/12, 23 July 2013; *Popov v. France*, Appl. 39472/07 39474/07, 19 January 2012)

How is it applied in practice? Do issues concerning the correct implementation of Article 16 RD and respect of human rights have arisen in practice?

Parliamentary Ombudsmen reported about the implementation of requirements of material detention conditions in the FRC in 2014 in response to complaints received from the detained TCNs, highlighting that housing conditions in the FRC were unsatisfactory, the requirements of hygiene norms were not met, and although TCNs were provided with clean bedding and personal hygiene products, the conditions for taking care of hygiene were not good. As the Ombudsmen report states, the premises suffered from insufficient heating, the windows were not airtight, the residential premises of TCNs and other premises were not cleaned and were untidy, and the premises of the second floor were not inspected at all because of particularly bad smell (Report of Ombudsmen of the Seimas, points 9-11). In addition, it was established that the FRC does not comply with the requirements of the minimal space for one person,[2] in the condominium for TCNs (which during the inspection accommodated 95 persons), some persons had 3.8, 2.1, 2 or 1.5 sq. m. per person, which is not in line even with national legal requirements (Report of Ombudsmen of the Seimas, point 10).

Among the positive developments, on 31 January 2014, amendments of the Procedure for Accommodation in the FRC were adopted to state that if a person accommodated in the centre refuses eating a certain foodstuff, this product should be replaced by another one (other ones) in compliance with the approved physiological nutritional standards. However, the report of the Ombudsmen states that the FRC does not ensure catering in accordance with cultural and/or religious beliefs and dietary nutrition, while the conditions for preparing food in the condominium of detained TCNs are unsatisfactory. In addition, detained TCNs do not have possibilities to carry out their devotions.

Housing conditions of detained TCNs have been recently improved under a project financed by the European Return Fund. In addition, the Ombudsmen concludes that the FRC has insufficient means for the protection of safety. The condominium of detained TCNs does not have an electronic safety system, which would help to respond promptly to security issues. Persons who are in conflict, i.e., of conflicting nations, religions, homosexuals and the people who are intolerant to them, as well as single women and single men, families with children, mentally traumatized persons or the ones who use intoxicants are accommodated side by side, which may cause conflict situations. Meanwhile, although there is an official on duty, it is not always possible to ensure operative resolution of a situation (Report of Ombudsmen of the Seimas, point 5).

The FRC is not adjusted to accommodation of vulnerable persons, since it is not a social institution and the environment is similar to a prison. Persons accommodated in the centre are ensured primary personal healthcare services and necessary healthcare assistance, the persons who were tortured or raped, minors, single mothers, elderly persons and other persons who need it are provided with psychological assistance (Points 18.4, 19.5, 19.8 and 32 of the Procedure for Accommodation in the FRC[3]).

Residents of the FRC shall be provided with ambulatory personal healthcare services, and when the services provided in the centre are insufficient, the person should be issued a referral and should be

[2] Order No V-836 of the Minister of Health of the Republic of Lithuania of 28 October 2005 'On the approval of a Lithuanian hygiene norm HN 61:2005 *The Foreigners Registration Centre. Hygiene Norms and Regulations*', point 27 determines the norm of *5 sq. m.*

[3] Order No 1V-132 of the Minister of the Interior of the Republic of Lithuania 'On approving the Description of the conditions and procedure for temporary accommodation of third-country nationals in the Foreigners Registration Centre' of 24 February 2016. The Register of Legal Acts. 2016-02-24, Nr. 3573.

taken by the FRC to healthcare institutions for consultations of professionals or inpatient treatment (Point 43 of the hygiene norm HN 61:2005, Order No V-836 of the Minister of Health of the Republic of Lithuania of 28 October 2005 On the approval of a Lithuanian hygiene norm HN 61:2005 'The Foreigners Registration Centre. Hygiene Norms and Regulations'). The report of the Ombudsmen indicates that primary ambulatory healthcare services are available to TCNs accommodated in the FRC: they are provided consultations of a family doctor, examinations are made, if necessary, treatment is prescribed and referrals to consultations of professionals are issued. During the daytime a family doctor's services are available, while at night, in the case of necessity, the guard of the centre calls an ambulance (Report of Ombudsmen of the Seimas, point 17).

Provisions regarding informing the TCNs detained in the FRC lay down that the persons accommodated in the FRC shall be familiarized with their rights, obligations and internal regulations of the centre in the language they can understand by confirming this by signature (Procedure for Accommodation in the FRC, para. 17). The wording of the regulations effective until 21 March 2014 also stated that this information is provided to TCNs systematically during the entire period of their stay in the centre, at least once per month, which was in compliance with Art. 16 (5) of the Directive. However, the Ombudsmen reports that in practice, the FRC does not properly ensure the right of individuals to receive information. During the inspection, neither the information boards of condominiums of asylum-seekers nor of detained TCNs contained information on internal regulations of the Centre, rights and obligations of TCNs (with translations to foreign languages). Also, in some floors information boards have not been found at all, and if they have been found, they contained minimal information, for instance, about general management in the Centre, about celebrations, training carried out in the FRC, obligatory maintenance schedule for the persons kept in the Centre (Report of Ombudsmen of the Seimas, para. 19).

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 practice in this respect.

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

The court assesses the lawfulness of the detention conditions only following the individual application.

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

Not to the knowledge of the author of this Report. However, indirectly this happened with vulnerable persons who are not detained, but are assigned alternative measures, because there is an understanding that detention conditions in the FRC are not acceptable for these persons.

b. Judicial Interactions with European and national Courts

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

YES/ *NO*

If yes:

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

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

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

YES/*NO*

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

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

YES/*NO*

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

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

YES/*NO*

If yes: please elaborate further on this issue

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

YES/*NO*

If yes: please elaborate further on this issue

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

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

***YES*/NO**

First of all, according to the legislation (Art. 114 (4) of the Aliens' Law), vulnerable persons can be detained only in exceptional circumstances and taking into account the best interests of the child and vulnerable persons.

Secondly, there is national jurisprudence concerning detention of vulnerable persons. For example, the Supreme Administrative Court has held that the establishment of objectively existing detention ground is not sufficient to consider detention lawful, exceptional circumstances need to be established in order to detain a vulnerable person (administrative case No. A-3855-822/2016, judgment of 18 May 2016).

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

YES/NO

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

The Supreme Administrative Court has referred in several cases to the ECHR as concerns the interests of children. Also, for example, in March 2015 the regional court in Švenčionys took a decision to allow accommodation of the former asylum seekers' family outside the detention regime of the FRC, because they had two minor children (aged 5 and 8 years) whose interests would be violated by detention in the detention building of the FRC.[4]

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?

The interests of children are taken into account in the case law while solving issues related to detention of children and their parents. For example, the District Court of Švenčionys Region in administrative case No. A-453-617/2012 (judgment of 15 May 2012) considered that: 'A third-country national has a minor son born on 28/02/2011 who may not be detained and must live with his mother'; 'a third-country national has 3 minor children who have to live with their mother. […] The spouse of the third-country national D. B. has declared his residence at (sensitive data), therefore the court is of the opinion that in this case it is possible and necessary to grant a measure alternative to detention' (administrative case No. A-624-617/2012, judgement of 27 April 2012).

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?

No, and it is unlikely that it would have direct effect.

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

YES/*NO*

If yes: please elaborate further on this issue

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

YES/*NO*

If yes: please elaborate further on this issue

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

YES/*NO*

[4] http://www.redcross.lt/lt/veikla/migracija-ir-zmogaus-teises/653-lietuvos-raudonasis-kryzius-vaiku-sulaikymas-uzsienieciu-registracijos-centre-pazeidzia-geriausius-vaiko-interesus

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

Courts in Lithuania do not supervise or control the detention places. Some monitoring of detention places is done by the Parliamentary Ombudsmen in the context of prevention of torture.

4. Article 18: Emergency situations

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

YES/*NO*

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

General remarks and transversal issues

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

The scope was clarified with regard to relationship with the asylum procedures. The Supreme Administrative Court in administrative case No. N-858-90/2014 (judgment of 15 September 2014) held that the time limits for detention shall be calculated from the initial detention, even if it was performed within the asylum procedure, thus no difference of procedures is relevant when time limits are calculated. The Court concluded that there are no different time limits depending on the status of the person: asylum seekers or non-asylum seekers (paras. 17, 21).

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.?

Lithuania (from 1 March 2015) introduced in the legislation the list of criteria to determine the risk of absconding or hampering return procedures. The time periods were introduced by virtue of transposition of the Directive. Lithuania introduced this requirement from 1 March 2015 and before that it was applied in the case law, which held that detention may be considered proportionate only if expulsion is executed during reasonable terms.

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?

Not with a clear evidence.

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.

Art. 15 (2) of the Directive is not fully implemented in the law due to lack of access to free legal aid. There a number of elements of periodic review of lawfulness of detention as required by the Directive, but it is not yet firmly established in legislation or practice. Although Lithuanian laws establish detention review procedure, it is conditioned with the disappearance of grounds for

detention and does not state the periods for review. Detention decisions are in practice reviewed every 3 months, as detention is often authorised for this period, but not by the court ex officio. While Lithuania in principle complies with the requirements of the Directive that TCNs detained for immigration purposes are kept separately from other detained persons, but the housing conditions in the FRC are unsatisfactory and do not ensure dignified and humane living, as minimal space requirements are not met, hygiene conditions are inappropriate, and there are no sufficient measures for safety. The treatment of vulnerable persons does not meet the standards of the Directive (Developing good practices: promoting compliance with the Return Directive in Latvia, Lithuania and Slovakia, Final Report, Riga, 2015, pp. 117-120). One of the main concerns is that the courts apply a sort of presumption that the foreigner will avoid the return procedure and will disappear if he/she does not have income or residence in Lithuania. As persons in return procedures do not satisfy these requirements in most of the cases, they are detained.