REDIAL PROJECT

National Synthesis Report – Malta

(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, but only after seven working days from the start of detention.

If yes: please elaborate further:

The Principal Immigration Officer (PIO) may order the detention of a person for any one of six reasons listed in Regulation 6 of Subsidiary Legislation 420.06. When a third country national is so detained, the Immigration Appeals Board must conduct a review of the lawfulness of detention after seven working days from the start of detention would have elapsed. This initial period prior to the first review of detention may be extended by a further seven working days if the circumstances of the case justify this delay.

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

The Immigration Appeals Board and the Principal Immigration Officer.

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?

It is automatic. According to Regulation 6 of Subsidiary Legislation 420.06, the first review of lawfulness of detention is to take place after seven working days from the start of detention and then at intervals of two months. However, whenever the Immigration Appeals Board rules that detention is no longer lawful, the TCN is released immediately. The PIO may also release a TCN from detention without the authorisation of the Immigration Appeals Board should he no longer deem it necessary for the TCN to be detained.

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?)*

The decision of the administrative authority (in this case, the PIO) may be appealed before the Immigration Appeals Board. The decision of this Board may also be appealed from to the Court of Appeal (Inferior Jurisdiction), but only on a point of law. In Malta, this is a court of civil jurisdiction.

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

The Immigration Appeals Board has full control over legal and factual elements of the case.

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

The Chairperson of the Immigration Appeals Board controls all elements of the lawfulness of detention together with the other Board members.

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

Not applicable.

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

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?

NO. The reason is that there are not so many cases on detention and in any case, the relevant Maltese law only came into effect a year ago.

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

NO

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

NO

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

NO

c. National case-law: major trends

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

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

NO

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, the Immigration Appeals Board determines the lawfulness of detention. The return decision is issued by the Principal Immigration Officer. An appeal from this decision may be filed before the Immigration Appeals Board. If the appeal is successful and the return decision is quashed, then detention ceases immediately. However, detention can also cease during the pendency of the proceedings owing to its not being necessary. However, if the appeal is unsuccessful, the return decision is confirmed and the appellant is detained pending removal. Each case is judged on its own merits.

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)

Unknown, since no such case has had to have such an aspect assessed. however, if it had to arise, all aspects and circumstances would be assessed.

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

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

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

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

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

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'?**

There are no examples since the law is particularly new and no such cases have arisen.

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)*

This depends on the evidence presented in the case and needless to say, each case is very different.

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

There is no such definition.

If yes:

- Which ones?

- Even if provided by law, how individual situation and circumstances are taken into consideration by the judge when establishing whether there is a risk of absconding?

- Do statistics or previous experience with the same group of people speak clearly in favour of detention, without the need of an individual assessment being performed?

If not:

- Can the criterion of a risk of absconding still be invoked as a ground of detention?

YES

- How do the courts interpret this notion?

This depends on the particular circumstances of the case. in one particular case, an appellant was in possession of an airline ticket to rome, so there definitely was a risk of absconding.

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

It depends on the evidence produced.

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

NO

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?

The following are the six grounds for detention allowed by Maltese law:

(a) in order to determine or verify his identity or nationality;

(b) in order to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant;

(c) in order to decide, in the context of a procedure, in terms of the Immigration Act, on the applicant's right to enter Maltese territory;

(d) when the applicant is subject to a return procedure under the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, in order to prepare the return or carry out the removal process, and the Principal Immigration Officer can substantiate, on the basis of objective criteria, including that the applicant already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so require; or

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

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

YES

The PIO is always obliged to search for alternatives to detention and may release a TCN from detention and instead apply the alternative measures should he deem it more suitable to do so. At each periodic hearing, the Immigration Appeals Board also assesses whether continued detention is necessary and whether alternatives to detention may be more suitable. Alternatives to detention include:

- Reporting at a police station within specified timeframes (on particular days at a particular

time of the day);

- To reside at an assigned place;
- To deposit or surrender certain documents;
- To place a one-time guarantee or surety with the PIO.

Should the TCN breach any non-detention condition/s imposed, the PIO may cease the alternatives to detention and opt to detain the TCN.

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

YES

See previous answer.

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*)

In its judgments and interim decrees, the Board often orders the Principal Immigration Officer to consider alternative measures to detention and often suggests alternative measures to detention itself. The proportionality of detention depends on the suitability of any alternatives to detention and on the particular circumstances of the case.

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?

The length of detention is determined in each particular case.

What is the duration of initial detention in your Member State? When does it start according to your national legislation? (E.g. date of the apprehension, date of the order, date of the actual placement in detention etc.)

The duration of initial detention is of seven working days, after which the Immigration Appeals Board must make its first assessment as to whether the detention is lawful or not.

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?

There is ongoing communication between the Immigration Appeals Board and the Principal Immigration Officer. The latter always explains to the Board in detail the measures he would have taken.

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.

No such case to date.

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

YES. People already detained are given priority by the authority responsible for examining the asylum application.

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 absolute maximum period of detention is nine months.

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, the TCN is immediately released. Release from detention is the only remedy provided by the applicable legislation. However, should the TCN believe that his human rights have been violated, he is free to file a court case before the competent court asking it to declare that his human rights have been breached and asking for compensation.

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

Detention is deemed unlawful when an alternative method (such as residence in an open centre) is deemed more suitable.

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

YES, but only if a sufficient reason at law exists.

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

Free legal aid is provided upon request.

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?

The law provides for specific facilities which <u>may not</u> be used for persons already sentenced. The law also contains specific safeguards in relation to the condition of these facilities and which categories of persons may and may not be in the same facility.

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, in all circumstances.

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

The law caters for all these material conditions and safeguards. In fact, should they have a complaint, they may lodge a complaint with the Immigration Appeals Board. So far, no complaint has been lodged with the Board.

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?

NO

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 such circumstance has arisen in Malta.

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

Only if an individual application is received by the Board. However, no such application has ever been received.

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

To date, the Immigration Appeals Board has had no reason to do so.

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

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

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

NO

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

NO

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

NO

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

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?

No such case has arisen which necessitated reference to the abovementioned articles.

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 such case has arisen which necessitated reference to the abovementioned articles. However, in general, Maltese courts are always bound to give the best interests of the child paramount consideration in all cases before them.

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?

Not applicable.

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

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?

The law states that insofar as possible, family unity is to be maintained. There is no case law on the matter so far.

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

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.?

NO

Q2. Had the implementation of the Return Directive brought any changes in adjudicating the issues relating to lawfulness of immigration detention, alternatives to detention, access to national courts, effective legal/judicial remedies and legal aid etc.?

YES. New legislation had to be enacted and current law had to be amended.

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.

No such major issues remaining.