REDIAL PROJECT

National Synthesis Report – Poland

(Draft)

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

by Barbara Ewa Mikolajczyk

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

1) According to Article 394 sec. 1 and 2 of the Act on Foreigners of 12 December 2013 (AF) '*a foreigner in the case of whom there are circumstances that justify issuing a decision on imposing the return obligation on him/her or a foreigner who fails to comply with the obligations set out in such a decision may be apprehended /detained by the Polish Border Guard or the Police for a period not longer than 48 hours*.' But according to Article 395. 1. '*Any matters pertaining to foreigner's detention and not provided for herein shall be governed by the provisions of the Act of 6 June 1997 – the Code of Criminal Procedure*'. (CCP)

It means that if this kind of detention (apprehension) is applied by the Police or the Border Guard up to 48 hours, according to Article 246. § 1 of the Code of Criminal Procedure of 1997, a detained person has the right to lodge an interlocutory appeal to the court. In this appeal the detained person may request an examination of the grounds and legality of his detention and the correctness thereof .

2) Detention longer than 48 hours is possible if the Polish Border Guard requests a court of law to place a foreigner in a guarded centre or in a detention centre (arrest) for foreigners (Article 394 sec.3 of the Act on Foreigners).

A criminal chamber of a common court of the first instance (district court – sąd rejonowy) decides on such a measure. Such a court considers all criminal cases. There are not any 'immigration courts' in Poland.

3) Additionally, Articles 87-89c of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Act on Protection of Foreigners) regulate the issues of apprehension and placement in a guarded centre or applying arrest for foreigners towards persons applying for granting a refugee status/granting international protection.

In 2015, 256 of 12325 foreigners applying for the refugee status/international protection were apprehended and placed in guarded centres or arrests for foreigners – mainly due to lack of documents, illegal crossing of a border, realization of transfer within the Dublin procedure. (source: the Head of the Office for Foreigners, on the use in 2015 of the *Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland* (Journal of Laws of 2003 no. 128, item 1176 as amended). on the performance of obligations of the Republic of Poland resulting from *the Geneva Convention relating to status of refugees* and the *New York Protocol on a refugee status*. Warsaw March 2016.)

'Detention' in the Polish law relating to foreigners means:

a) Apprehension (up to 48 hours)

b) Placing in a guarded centre for foreigners (ośrodek strzeżony) or

c) Placing in a rigorous detention centre/ arrest for foreigners/ pre-removal centres (areszt dla cudzoziemców) when there is a risk that the foreigner will not comply with the rules in force in a guarded centre. (Article 399 of the Act on Foreigners)

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

In case of apprehension applied by the Police or the Border Guard up to 48 hours – a district court is competent to consider an appeal. If a foreigner is placed in a guarded centre or in a detention centre by a district court, his appeal against order issued by a district court is considered by a court of higher instance – regional court. It refers also to orders on prolongation of detention. A foreigner may appeal to the regional court against a decision on prolongation.

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

The judicial review is performed upon foreigner's request, but it should be remembered that in case of detention longer than 48 hours, the decision is taken exclusively by a court.

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.

Answer is the same as in Q2, but it should be mentioned that a complaint against detention/apprehension up to 48 hours may be lodged immediately to the protocol or within 7 days to a relevant district court. Appeal against the district court's order on placing in a detention or in a guarded centre, should be lodged also within 7 days to the court of a higher instance (always via a given district court).

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)

Issuing a decision in the first instance on placing in a guarded or a detention centre, the district court should consider all the circumstances of a case. The Border Guard provides a very precise request for detention. According to NGOs' reports, enormous majority of the courts' orders accede to these requests (more than 90%). Courts usually rely on the Border Guard's arguments.

(see: T. Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 82)

Relevant provisions:

Article 400 of the Act on Foreigners states that a ruling on detention of foreigners in a guarded centre or in a detention centre for foreigners shall not be issued if:

'1) it could pose threat to the life or health of a foreigner; 2) the foreigner's physical and psychological condition could justify a presumption that a foreigner has experienced violence.

Article 401.

1. A court of law, having heard a foreigner, shall issue a ruling to place him/her in a guarded centre or in a detention centre for foreigners.

2. The ruling referred to in paragraph 1 shall be issued upon the request of a Polish Border Guard body by a district court with jurisdiction over the place of stay of a foreigner.'

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

YES

It should arise from the general rule:

Article 7 of the CCP states that: 'The agencies responsible for the proceedings shall make a decision on the basis of their own conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning and personal experience'.

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

No difference

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 and 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?)

It is impossible to provide the relevant information because there is not any general database with the common courts' judgements and orders (contrary to administrative courts). In practice only NGOs monitor selected jurisprudence.

The NGOs indicate as a good practice just one order issued by the Regional Court in Przemyśl of 23 May 2016. The Court considering the foreigner's appeal against extension of his detention due to his complaint to administrative court, referred to *Kadzoev* and *El Dridi* cases.

However, it should be stressed, that this court's order is really unique.

(Source: Helsińska Fundacja Praw Człowieka http://beta.hfhr.pl/wp-content/uploads/2016/05/SO-Przemysl.pdf)

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

YES/NO

Analysis of the available cases does not provide the full picture of the jurisprudence in this area, but it can be assumed, that the courts do not refer to the ECHR or to the EU Charter. (Even the order which is mentioned above)

If yes: in which cases and for what purpose? (*E.g.* the right to liberty and security, the right to be heard 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 15 RD?

YES and NO

If yes: please elaborate further on this issue

Just one case can be identified – it is the mentioned above order of the Regional Court in Przemyśl of May 2016. The Court took into account a foreigner's appeal, stating that Article 403.5 of the Act on Foreigners is incompatible with Article 15. 6 of the Directive.

The Court invoking jurisprudence of the TJEU and the Polish Supreme Court relating to supremacy of the EU law, the provisions of the Polish Constitution, Article 288 of TFEU, as well as *Kadzoev* and *El Dridi* judgements, refused to apply Article 403.5 as inconsistent with the EU law.

(*Article 403. 1. A court of law, in its ruling ordering to place a foreigner in a guarded centre or in a detention centre for foreigners, shall indicate the period of stay in a guarded centre or in a detention centre for foreigners, but not more than 3 months. […] 5. If a foreigner has filed a complaint to the administrative court against the decision on imposing the return obligation with a request to stay the execution thereof, the period of stay in a guarded centre or in a detention centre for foreigners may be extended to 18 months, yet the court referred to in paragraph 7 may issue a decision on the case for a period of 6 months*.)

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?

It is considered as deprivation of liberty. **YES**

In some cases it has been even found that judges identified this kind of detention with the pre – trial detention. (see: T. Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 82)

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

Not directly. The Supreme Court in its judgement of 19 April 2016 quashed the judgement of the Appeal Court acting as a disciplinary court and submitted for further examination the case of a judge who failed to issue an order addressed to the administration of a guarded centre on termination of foreigners detention.

In this case a regional court quashed the decision of a district court on prolongation of the foreigners' detention in a guarded centre, but due to the lack of a relevant order, a foreigner spent 3 months in detention without any legal basis. A foreigner received the relevant compensation, but the Minister of Justice and the National Council of the Judiciary of Poland submitted a claim in the disciplinary procedure against the mentioned judge. The Supreme Court stated, among others, that the situation of the foreigner placed in a guarded centre had been similar to a person in a pre-trial detention, so the judge should have submitted the similar order to the Border Guard supervising the guarded centre. In the criminal procedure such orders are addressed to the management of pre-trial detentions. (Supreme Court, DOCKET NUMBER SNO 5/16)

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

NO

The control over decisions on return is in competence of administrative courts. Decisions on detention are controlled by common courts (criminal chambers).

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

The court issues a decision on placing a foreigner in a guarded facility if: there is a probability that a decision on imposing the return obligation on a foreigner will be issued without a specified period for voluntary return (Article 398.1 (1). A judge should consider the steps taken by the Border Guard (e.g. initiation of the return procedure).

Detention which is applied due to other reasons should be recognized as arbitrary. (P. Dąbrowski, *Ustawa o cudzoziemcach. Komentarz (ed. J. Chlebny)*, CH Beck 2015, art. 398.)

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?

A judge is free in assessment of evidences, so all the circumstances may be taken into consideration. The AF does not itemize them. The relevant reports do not indicates that courts takes into account such premises. The courts usually follows the Border Guards' arguments. (see: T. Sieniow,

Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu. Instytut na Rzecz Państwa i Prawa, 2016, p. 82)

However, the mentioned order of the Regional Court in Przemyśl of 23 May 2016 considering appeal against the prolongation of the detention, indicates that the fact that a foreigner submitted a complaint to the administrative court against the decision obliging him to return, cannot be a reason for prolongation of detention.

Unfortunately, since there is lack of a complete database, it is impossible to answer to this question.

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.

As it was mentioned above, lack of a relevant and complete database causes that it is impossible to provide an adequate answer to this question.

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

In practice a judge checks if in a given case the situation described in Article 315 of AF took place. See Q6

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?

- 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?

Article 315 sec. 3 explains what means '*The likelihood that a foreigner will escape'*. Four situations are indicated:

- *'When a foreigner declared unwillingness to fulfil his/her obligations arising from the receipt of the decision on imposing the return obligation;*

- *He/she has no documents certifying his/her identity;*

- *He/she has crossed or attempted to cross the border in breach of legal regulations;*

- *He/she entered the territory of the Republic of Poland in the duration of his/he inclusion in register of foreigners whose stay within the territory of the Republic of Poland is undesirable or in the Schengen Information System for the purpose of refusing entry'.*

It is not a closed catalogue, these situations are indicated 'in particular'.

Judges usually rely on evidences collected by the Border Guard.

In the Commentary to the Act on Foreigners, we can read that this provision is imprecise (P. Dąbrowski, *Ustawa o cudzoziemcach. Komentarz (ed. J. Chlebny)*, CH Beck 2015, art. 315.)

Lack of a complete database and statistics makes it impossible to identify the tendencies in the jurisprudence.

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 Act on Foreigners contains also premises connected with the contents of decisions. Article 398 states that:

'A foreigner shall be placed in a guarded facility if: 1) there is a probability that a decision on imposing the return obligation on a foreigner will be issued without a specified period for voluntary return, or 2) a decision on imposing the return obligation on a foreigner has been issued without a specified period for voluntary return, or 3) a foreigner has not voluntarily left the territory of the Republic of Poland within the period specified in the decision on imposing the return obligation, and immediate forced execution of the decision is not possible […]'

The report of the Halina Nieć Legal Aid Centre shows that a foreigner's difficult financial situation not allowing him/her to cover costs of living and return to a country of origin is also an argument for courts to take a decision on detention. (It is assumed that foreigners without relevant financial sources will not be able to return on their own, so the decision ordering them to leave Poland in a prescribed time cannot be executed. Therefore, they should wait for the organized return in detention.) Authors of the report stress that meeting the needs of a foreigner is very important, but it should not be at the expense of deprivation of his/her liberty (M. Przybylska, A. Ralcewicz, *Monitoring powrotów przymusowych obywateli państw trzecich do krajów pochodzenia.* Centrum Pomocy Prawnej im. Haliny Nieć, Kraków Lipiec 2014 – czerwiec 2015).

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? Does the administration consider additional alternatives?*

- reporting at specified intervals to the Polish Border Guard authority indicated in the ruling,

- lodging a security deposit specified in the ruling, no lower than twice the amount of the minimum wage stipulated by minimum wage law,

- surrounding his/her travel document for custody to the body indicated in the ruling,

- residing at the place indicated in the ruling (Art. 398. 3)

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

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.*

There is no such a provision obliging authorities to consider alternative measures first. That is why the Border Guard's decisions and courts' orders on alternative measures are in minority.

The construction of Article 398.2 suggests rather that alternative measures are exceptions to the rule.

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)

According to Article 398. 3 of the Act on Foreigner, the Polish Border Guard authority may issue the decision on alternative measures. This ruling may be appealed against to the relevant district court. The court shall examine such an appeal within 7 days.

A decision on application of alternative measures may be also taken by a court of law at the moment, when, upon request of the Border Guard, a court decides on placing a foreigner (or not) in a detention centre.

'*Article 401. 1. A court of law, having heard a foreigner, shall issue a ruling to place him/her in a guarded centre or in a detention centre for foreigners. 2. The ruling referred to in paragraph 1 shall be issued upon the request of a Polish Border Guard body by a district court with jurisdiction over the place of stay of a foreigner*.'

In both situations a judge should take into consideration all circumstances of a given case. The newest report dedicated to detention and its alternatives shows that the courts' practice in this area is not unified. Moreover, analyzing grounds for judgements, it is usually impossible to establish, if a judge took into consideration the alternative measures and what criteria he/she took into account. (see: T. Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 84).

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.)

This situation is regulated in Articles 403 and 404 of the Act on Foreigners.

The general rule is that a foreigner shall be placed in a guarded centre or in a detention centre for foreigners for the shortest possible period. A court issues the order on placing a foreigner in a guarded centre or a detention centre for period no longer that 3 months. (The courts usually decide on 3 month detention). This period may be extended for a fixed period of time.

According to Article 404 duration of detention is counted according to the Code of Criminal Procedure (Article 265 CCP), so from the day of foreigner's apprehension by the Border Guard or the Police.

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.

No relating judgement is available.

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

According to Article 403.3 and 403.4, the period of stay in detention must not exceed 12 months (each subsequent ruling of the court in their case shall be issued for a period not longer than 3 months*)*, but this period shall not include the period of stay of a foreigner in a guarded centre or in a detention centre for foreigners in connection with the application for refugee status submitted by him/her. Generally, a foreigner may spend 18 months in 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)

These circumstances are itemised in Article 403:

1) '*there are reasonable grounds to believe that the period of execution of the decision on imposing the return obligation on a foreigner will be extended,*
2) *a foreigner for whom a decision on imposing the return obligation has been issued does not co-operate with a Polish Border Guard authority in the execution of the decision,*
3) *execution of the decision on imposing the return obligation on a foreigner is temporarily impossible due to delays in obtaining documents from third parties necessary for this purpose'*

A judge should consider all the circumstances, especially he/she takes into account probability of removal.

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

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.

Such a decision is usually taken in consequence of the Border Guard's request to detain a foreigner or to extend the detention or foreigner's appeal against such orders. A foreigner should be released immediately. (see: example of a judge who failed to issue an order addressed to administration of a

guarded centre to release a foreigner – part 3 of this questionnaire).

Despite the limited number of available courts' rulings (especially courts' of higher instances), it may be assumed, that relatively often the detention is abolished due to state of health of a foreigner or in situation when it turns out that a foreigner is a victim of torture or violence.

The case referring to compensation for unlawful detention considered by the Supreme Court (judgement of 4 February 2015-DOCKET NUMBER III KK 33/14) shows, that courts have no doubts, that a victim (here a woman) of violence should not be detained. In this case, the period of detention covered by compensation turned out problematic. The question was if she should receive money for the period of detention from the moment of submitting an application for international protection, or from the moment, when she revealed information that she had been a victim of violence.

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

YES but within certain time limits.

Taking into account the case considered by the Regional Court in Białystok (judgement of 30 May 2014 DOCKET NUMBER III Ko 168/14) the re-detention is possible for example due to lack of valid documents.

In this case a foreigner spent almost one year in detention (2006/2007). Detention was interrupted because a foreigner was arrested and moved to the pre-trial custody. In 2014 he was apprehended again due to lack of valid documents and lack of sources to cover his stay in Poland. Upon request of the Border Guard, 7 March 2014 the district court issued the order on detention of the foreigner, but on 13 March 2014, the Border Guard submitted the request to release him because the total period of his detention exceeded 12 months (detention in 2006/2007 and few days in March 2014). He was immediately released on 13 March 2014. A foreigner submitted a claim to the court for unlawful detention and he demanded redress and compensation. The Regional Court in Białystok confirmed that the foreigner's detention from 9 to 13 March 2013 was unlawful. The Court adjudged a small redress for this foreigner but not compensation.

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

It may be stated that there are two regimes of providing free legal information and aid. If a foreigner is in procedure for international protection or a foreigner is a person against whom proceedings are pending on depriving him/her a refugee status or subsidiary protection, she or he shall be entitled to free legal information in the first instance.

1) According to the Act on Protection of Foreigners, free legal information consists of informing the foreigner of the existing legal provisions relating to the granting of international protection, withdrawing refugee status or subsidiary protection and provisions governing proceedings before public administration bodies regarding cases within their jurisdiction, taking into account the specific situation of those persons. A foreigner and applicant towards whom a decision depriving him/her of refugee status or subsidiary protection was issued, and who acts without a lawyer is entitled to free legal assistance. (Foreigner's income is also taken into account).

2) In case of other foreigners who are in a guarded centre or in a detention centre, the access to legal aid and information is regulated by the Act on Foreigners. The regulation is much more modest. The main provision is Article 415. '1. A foreigner placed in a guarded centre or in detention centre for foreigners shall have the right: 1) to get in touch with the Polish state authorities, as well as the diplomatic mission or consular office of a foreign country; 2) to get in touch with NGOs or international organisations involved in the provision of assistance to foreigners, including legal aid.'

In practice mainly NGOs provide legal assistance, but not on a regular basis. Their assistance depends on financial means and the EU projects. NGOs have to ask for the consent of a manager of the detention centre to meet with a specific foreigner. Lawyers, family members and friends, or NGOs can meet with a detainee during visiting hours. There are no limitations concerning the frequency of such visits. It is also noted that NGOs who want to meet with more than one or with unspecified asylum seekers, monitor conditions in a detention centre must ask in writing for permission to visit a detention centre. The Commander of the Regional Unit of the Border Guard may issue such a consent. Than visits are not limited to visiting hours. It is reported, that NGOs organisations do not face problems in accessing the centres. Information from the Helsinki Foundation for Human Rights (HFHR).

Retrieved from: http://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/detention-conditions/conditions-detention-facilities#footnoteref18_zbtzoss

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

Foreigners in the return procedure are placed in guarded centres only for foreigners or in detention centres (if they do not follow the rules in a guarded centre) for foreigners.

In two detention centres only men are held and in another two only families with children who are at a school age are held. In the detention centre in Przemysl families with children (not at a school age) and single men are placed but they they are located in separated wings. In one of the centres, there is a separate part for unaccompanied irregular migrant children.

All the guarded centres are newly renovated, equipped with recreational facilities, a sport and recreation space. Foreigners have access to reading and leisure materials as well as to the internet. The guarded centre where families with children and unaccompanied children are placed is well-equipped with playground for children. Families are placed together in one room as far as possible . There are also boards which provide information (at least in Russian and/or English, but if necessary also in other languages) on the asylum applicants' rights and/or the rules of stay in the centre, meal times, contact details of NGOs, sometimes on access to the doctor and psychologist. Detention centres provide also rooms for religious practices. The Helsinki Foundation which monitored all the centres noticed that the rooms are quipped very modestly and that there is no separate space for other vulnerable persons.

See more: http://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/detention-conditions/conditions-detention-facilities#footnoteref18_zbtzoss

Please elaborate further, including the practice in your Member State

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*)

NO

As above. They are placed in special centres for foreigners.

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?

Generally, it should be stated that after 2013, all the guarded centres meet the requirement of the Directive. The problem of lack of facilities for vulnerable persons may be solved in practice by the management of a centre. The main problem seems to be education of children staying in guarded centres. Topics and activities offered to children do not meet the requirements of the general education curriculum at all. Usually some activities and lessons of Polish language are organised.

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)

It is not a case of Poland.

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

NO

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

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

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

They had no occasion to consider the cases referring conditions of detention.

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?

YES and NO

Courts issue orders on detention of minors and families with children. The Act on Foreigners allows to detain an unaccompanied minor, provided that he/she has reached the age of 15 years (Article 397. 3) On the other hand, the Act on Protection of Foreigners states that an accompanied minor applying for international protection cannot be placed in a guarded centre (Article 88a). So, the Polish legislation in this area is inconsequent.

The jurisprudence refers to placing in a guarded centre but not to conditions of detention. **(**Even in 2012 and 2013, when media and NGO-s very strongly interested in conditions in guarded and detention centres, courts did not considered any cases.)

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

Rather NOT, even if, it is in a very limited way and indirectly.

Some orders on placing (or refusal to place) family with children in a guarded centre referred to 'the best interest of a child', but judges did not indicate the CRC. For example, the order issued by a court in Słubice is very interesting. A judge decided to place a pregnant woman with 6 children in a guarded centre to provide her and her family better protection (order of 12 June 2014, DOCKET NUMBER II.1.Ko 1172/14).

In other case a court refused to place a family in a guarded centre invoking children's rights to education. (They attended public schools. In guarded centres educational possibilities are limited.) Sometimes, judges provide an argument that placing families with children in a guarded centre

meets the best interest of a child.

(see more: T Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 82).

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?

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?

As above. The courts rather concentrate on probability of removal, than on the rights of children a families. The EU Charter is not cited by courts.

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

Such cases have not been identified.

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?

NO

The guarded and detention centres are (as the Border Guard) in the structure of the Ministry of Interior. It is quite difficult to say, that there are any independent authorities controlling guarded centres on a regular basis.

Commissioner for Children's Rights and Commissioner for Human Rights may intervene in some cases. There were some cases of their intervention, especially in 2013.

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

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.?

There are not such a clarification in the available jurisprudence and in the NGO-s reports referring to it.

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.?

Transposition of the Directive introduced the possibility to apply the alternative measures. They are not apply often, but every year more and more frequently. It is the main change in the Polish law.

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 differences in these areas.

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.

In my opinion the main problem is that there is not an explicit obligation for the relevant authorities to consider alternative measures before considering detention. On the other hand, the effectiveness of removal in cases where the alternatives were applied is only 2,7% (T. Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 69).

Another problem is of general and systematic nature. Judges deciding on placing in a guarded centre or in detention centre are not specialists in immigration and asylum law. Moreover, administrative courts consider complaint against decisions on return and refusal of the international protection, but common courts (criminal chambers) decide on detention. It may be stated that the Polish law is inconsistent. Some authors suggest to create 'immigration courts' or to appoint 'immigration judges' competent to decide in all immigration matters. (T Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014-2015. Raport z monitoringu.* Instytut na Rzecz Państwa i Prawa, 2016, p. 83).