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REDIAL PROJECT

National Synthesis Report – Portugal

(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

If yes: please elaborate further on:

- The type of jurisdiction concerned: criminal courts
- The scope/extent of its competence: Criminal courts decide whether to apply the measure of detention for expulsion purposes

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

The criminal courts.

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 for the first question

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

The law does not provide for automatic re-examination of detention (perhaps because the maximum period for detention is 60 days). The re-examination is possible by request.

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 law provides two levels of jurisdiction (decision of criminal courts and appeal).

In any case, please elaborate further on the type of jurisdiction(s) involved, remedies available, the deadlines for appeal(s) set by law etc.

The jurisdiction involved is the common courts (not the administrative ones). The deadline for the appeal is 30 days. It is an urgent procedure but it is very difficult to decide it within 60 days, which is the maximum period of detention (that means there are no appeals).

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 criminal courts have full control of the legal and factual elements but only to decide about the legality of the detention.

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

YES

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

Nowadays there are no differences because the 2nd instance can also control the facts and not only the law.

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

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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?

Usually they **don't** (decisions determining detention are rare).

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?)

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

Usually they **don't**.

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?

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?

NO

If yes: please elaborate further on this issue

c. National case-law: major trends

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

YES

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?

NO. The competence for the return decision belongs to the administrative authorities and the appeal to the administrative courts. The criminal court cannot decide about the unlawfulness of the return decision for detention purposes

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)

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;*
- *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 decisions about this issue.

Please provide some concrete examples based on the case law collected.

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 mere fact of an illegal stay or entry? (ECJ, *Achughbabian*)

YES

There is a broad interpretation of this concept in these cases. It is sufficient that the illegal alien does not have a habitual residence.

Nowadays the detention is not a problem because the detention centres have good conditions and the maximum period is 60 days. And there are few decision ordering the detention even if there is the risk of absconding (usually prefer to decide the weekly presentation to the police).

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

NO

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? 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?

See information above.

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?

NO

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?

Presentation to the police

Bail

Obligation to remain in housing

Prohibition of contacts

Imposition of conducts (for instance to remain in a certain territorial area)

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

YES

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.

The law does not impose that. The detention decision can be taken directly. But usually the detention is a very rare decision.

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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*)

Usually courts consider alternative measures. Detention is *ultima ratio*.

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).

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 maximum period is defined by law and it is 60 days

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

It starts in the date of actual placement in detention.

The authorities have 48 hours to take the illegal alien to a criminal judge.

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 no information

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.

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

NO

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)

It is not possible to extend the period of 60 days.

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 (according to the law there is no other remedy to illegal detention; but there are no decisions on this issue)

Please elaborate further on possible differences whether ‘unlawfulness’ results from procedural flaws or substantial grounds. Please also indicate what are the most often cited grounds for

deciding the unlawfulness of detention decision, and for striking down detention measures.

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

YES but only based on new grounds

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

The detainee has the right to a lawyer paid by the State (he can have his own lawyer if he prefers, but that one is not paid by the State)

2. Article 16 RD: conditions of detention

a. National jurisprudence: major trends

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

YES. The facilities are only for illegal foreigners.

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*)

Nowadays that situation is not possible (prison)

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)

National law provide all aspect mentioned in articles 16 and 17 of the directive

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? There are no decisions

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

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

Only by individual application

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

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

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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

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?

There are no decisions

In this regard, please mention whether Article 24 of the EU Charter is cited by national courts and if a direct legal effect is recognised to this Article?

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

NO

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

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?

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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.?

NO. The major change was the implementation of the detention centres (before the detention was in prison and that was very problematic)

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.

There are no special aspects related to that issue.