REDIAL PROJECT

National Synthesis Report – Slovakia

(Draft)

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

by Martin Skamla

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)*

NO

If yes: please elaborate further on:

- The type of jurisdiction concerned (civil, administrative, criminal, else?)
- The scope/extent of its competence (*e.g.* hearing immigration/detention cases only or not)

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

The court.

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, it is the same authority.

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

The review is preformed upon applicant's 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?)*

First review is performed by a regional court. The applicant has to lodge the complaint to the court within seven days form the delivery of the decision regarding detention.

The complaint regarding an on-going detention can be lodged any time during the detention. If such a complaint was already dismissed in the past, a new complaint can be lodged after 30 days have lapsed from the day, when the previous court decision became effective.

After that, a cassation complaint to the Supreme Court is possible, and it has to be lodged within seven days form the delivery of the court decision.

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 courts with regard to legal elements assess, whether the administrative decision was from the legal point of view correct or not. As regards the factual elements, the courts assess, whether the finding of the facts on which the decision was based is in line or contradiction with the content of documents, or whether the finding of the facts is sufficient for the judgment of the matter.

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

YES, the judge controls *ex officio* all elements of lawfulness of the detention irrespective of the arguments of the parties (since 1 July 2016, when the new Administrative Court Code came into force).

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

The second level of is a cassation complaint, and the reasons for it are limited to following:

- there is no jurisdiction on the matter concerned in administrative justice,
- the one who appeared in the proceedings as a party, did not have a procedural personality,
- the party to the proceedings did not have the capacity to act independently before a regional court fully and a legal representative or a procedural guardian did not act on his/her behalf,
- the valid and effective decision has already been made on the same matter, or an earlier proceeding was initiated in the same matter,

- the excluded judge or wrongly composed regional court decided on the matter,

- wrong procedure prevented the party to the proceedings from executing his/her procedural rights to such extent that there was an infringement of the right to a fair trial,

- decided on the basis of an error in legal assessment,

- departed from established practice of the cassation court,

- did not respect the binding legal opinion, pronounced the annulment decision on a cassation complaint, or

- the submission was unlawfully refused.

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, the Supreme Court referred in its decision to the CJEU decision in the case C-534/11 – Arslan.

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?

YES, the courts refer to the ECHR, with regard to the right to liberty and security, in particular effectiveness and usefulness of the detention.

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?

There is no particular opinion of the courts on this issue, but the courts are dealing with it as a deprivation of liberty, e.g. elaborating on whether all the conditions of article 5 of the ECHR for the detention are fulfilled (although in one judgement the Supreme court mentioned that the detention can constitute a restriction or a deprivation of liberty).

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 court are the same, but there are different administrative procedures for detention and for return, and the courts do not decide about them at the same time (administrative procedure on the return preceding the court procedure is substantially longer).

In the case-law provided, there was no decision striking down detention measures due to the unlawfulness of the return decision.

The judge is not able to go into details of the reasons for return decision, and assess whether the reasons are justified by the law. The fact that there is a return decision (enforceable, although not final) has to be accepted, and the judge can only examine, whether it is possible to return the person concerned under the circumstances of the case. The courts with this regard stated that the administrative authority is obliged to take into consideration possible obstacles of expulsion, and assess them in order to see, whether the expulsion is at least potentially possible. In cases, where it is clear at the time, when the administrative authority decides about the detention, that it will not be possible to execute expulsion, detention will not be justified (Supreme Court judgment 1 Sza 7/2012).

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

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

- 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: Lack of cooperation from the embassy of the country of origin of the detained person is a relevant factor for assuming that there is no reasonable prospect of removal (9 Sp 33/2013).

- 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): If the detained person does not cooperate, and his/her cooperation is indispensable for the issuance of relevant documentation by the Member State of return, the courts consider the detention lawful (Supreme Court judgment 10 Sza 1/2012).

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

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

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'?**

In one case available, the Supreme Court affirmed in its judgement (10 Sza 1/2012) the decision of the Regional Court in Trnava, where the Regional Court considered the behaviour of the detained foreigner as hampering preparation of return process. The foreigner concerned did not cooperate with the police and several times refused to fill in a form necessary for starting of the process for obtaining travel documents for the foreigner.

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)*

In the case law collected, risk of absconding is considered to be present, when the person concerned already once fled the country.

The Supreme Court in its judgment 1 Sza 3/2014 affirmed a decision of the police on detention of a foreigner, because of risk of absconding. The risk of absconding was reasoned by the fact that the foreigner concerned, after he crossed the border illegally, did not report himself to the authorities and did not justify his illegal entry, on a contrary, he tried to abscond, and hide himself from the police guards.

Similarly, the Regional Court in Bratislava in its judgment 9 Sp 99/2013 affirmed a decision of the police on detention of a foreigner, because of risk of absconding. When doing so, aside from the grounds mentioned specifically in the Foreigners Act (no residence permit in the country and a reasonable possibility that he will be exposed to entry prohibition for a period of more than three years), the police, and subsequently the court, took into consideration the nature of criminal offences committed in the past, the fact that the foreigner concerned left the asylum facility in breach of the law, and the fact that he went to another country after applying for asylum.

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

Following definition of risk of absconding can be found in the Act o Residence of Foreigners:

The risk of absconding of the third country national shall mean the condition when it can be anticipated, based on the reasonable apprehension or direct threat, that the third country national will escape or hide especially if it is impossible to identify him/her immediately, if he/she has no residence permit pursuant to this Act or if there is a threat of entry prohibition for a period of more than three years.

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, following:

- execution of decision on administrative expulsion or decision on criminal punishment of expulsion,

- readmission, if the foreigner concerned crossed the border illegally, or is staying illegally in the country.

- to ascertain or verify his/her identity or nationality,

- when detained foreigner applied for asylum, and there is reasonable suspicion that he/she applied for asylum in order to delay or frustrate his/her administrative expulsion,

- if it is necessary duo to a threat to national security or public order, or

- for the purposes of his/her transfer or preparation thereof under the Schengen regulation, if there is a significant risk of him/her escaping.

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

YES, reporting residence and giving warranty deposit.

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

There is no explicit obligation in the Act on Residence of Foreigners to consider alternative measures before resorting to detention. However, as the option is there, the administrative body deciding on detention should consider alternatives to detention, when deciding on detention (but no case law was collected with this regard).

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*)

As from 1 July 2016, when the completely new Administrative Court Code came into force, the courts can issue a decision ordering an alternative to detention instead of detention (this was not possible before). No case law is available under the new regime so far.

According to the pre 2016 case law, detention is possible only, if other sufficient but less coercive measures cannot be applied effectively in a specific case (e.g. judgments of the Supreme Court 1 Sza 5/2012, 1 Sza 7/2012). In a case, where the Supreme Court went into more details with this respect, the Supreme Court decided (judgment 10 Sza 8/2013) that the detention is justified, and alternatives to it should not be imposed, if there are doubts about the nationality of the foreigner, and he does not have any identification documents, has no financial means, and no family ties in Slovakia.

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.)

The law provides for the maximum period for detention, which is six months. The period for detention in a particular case is determined individually. The detention starts by the date, when the order is issued.

There is no case law available under the new regime. Under the old regime, the courts stated that it is not sufficient for the administrative authority to determine the length of the detention with the reference to anticipated time for obtaining a travel document. The administrative authority should state more precisely the envisaged procedures to be taken with regard to effective execution of the administrative expulsion (Trnava Regional Court judgment 44 Sp 29/2012).

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?

As regards due diligence, the courts stated that the detention cannot be arbitrary. It is limited by fulfillment of its purpose, i.e. expulsion of a foreigner, while the procedure must be executed with due diligence (Decision of the Constitutional Court II. US 264/09-81).

No case law is available, where courts 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*)

According to the Act on Foreigners, the total time of detention of an asylum seeker must not exceed six months. An exception to this is a case, where detention of an asylum seeker for the purpose of his/her return is based on the grounds of public order or public safety – in such case, the asylum seeker can be detained for maximum 18 months.

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)

- A lack of cooperation by the third-Member State national concerned,
- Delays in obtaining the necessary documentation from the third countries,
- An asylum seeker can be detained beyond 6 months, if it is necessary on the grounds of public order or public safety.

The obligation to make a new assessment of a risk of absconding while renewing the detention is not provided explicitly in the Foreigners Act, however, courts might require such assessment. The issue was brought to the courts, when the detained person complained that there was no assessment of a risk of absconding, and the court did not state that such assessment is not necessary, they stated that the administrative authority actually conducted the assessment (Supreme Court judgment 1 Sza 2/2013).

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?

Since 1 July 2016, when the new Administrative Court Code came into force, several basic outcomes of the court when deciding on detention decisions are possible (when quashing the decision of the detaining authority):

1. ordering of the release
2. changing detention to an alternative to detention and ordering of the release
3. returning the case back to detaining authorities in case of defects of the decision that can be discharged.

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

YES, until 30 June 2016, the detainee could be always re-detained, if the police was of the opinion that there are legal grounds for detention. Since the new Administrative Court Code came into force, we have no evidence about the practice of the authorities. However, the law was changed – in the past, the court always had to return the case back to the police for further action – now, the Administrative Court Code differentiates between two basic options – ordering of the release on one side, and returning the case back (in case of mainly formal mistakes) to the authorities.

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

The Centre for Legal Aid (hereinafter the Centre) provides free legal aid in the administrative proceedings before the court.

The Centre was established by Act No. 327/2005 Coll. on Provision of Legal Aid for People in Material Need (hereinafter the Act), and is a state budgetary organization founded by the Ministry of Justice of the Slovak Republic. With the aim to secure effective access to justice the Centre covers provision of legal aid for natural persons whose personal financial situation makes it impossible for them to bear the expenses of legal services in order to assert their rights.

According to the information provided by the Centre, an application for provision of legal submits the applicant in the prescribed written form. The Centre regularly, every two weeks, or more often if needed, visits the detention facilities. On the basis of agreements between the Centre and detention facilities, the detainees are immediately after their arrival informed about the possibility of provision of legal aid by the Centre. There are information brochures and application forms in the detention facilities, and in some detention facilities there is an e - mail communication through which the Centre on a weekly basis receives information on the number detained persons in the facility. If a detainee does not speak Slovak (or English, German), the Centre, when it receives such information from a staff member of the detention facility, provides an interpreter and fills in an application for legal aid with such person.

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, there are specific detention facilities - only foreigners detained under the Act on Residence of Foreigners are detained in these facilities. It is, however, not explicitly provided by the law.

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 up to date information with this regard.

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)

As regards vulnerable people, the Act on Residence on Foreigners stipulates that vulnerable persons are given a particular attention with regard to health care. The detention facility shall correspond to the purpose for which it was established, it shall meet hygienic standards and be equipped to prevent life threatening or health injuring situations. Detained applicant for asylum has right to communicate with his/her family members and legal advisors, and can be visited by them.

Access of family members and legal advisors may be restricted on grounds of endangering state security and public order, or by a decision of the Director of the detention facility, if the access of these persons to an applicant for asylum is not significantly restricted.

Detained foreigners under 18 have access to education guaranteed by the law after three months of the detention. They have also guaranteed access to leisure time activities including games and recreational activities that are appropriate to their age (from the first day of detention).

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)

The Act on Residence of Foreigners does not explicitly define the places of detention. It uses the word 'facility', however 'the facility' is defined as a place, where a foreigner is placed according to the detention decision. However, a number of material conditions for the 'facility' are provided in the Act on Residence of Foreigners.

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

The courts would be able do it only following an individual application.

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

No information about such judgments are available.

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

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?

No information available.

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

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

NO

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?

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.?

Before implementation of the Return Directive, administrative detention without a decision on expulsion or extradition was not legally possible. After the implementation, the courts confirmed in their decisions (Supreme Court judgements 1 Sza 2/2014, 1 Sza 3/2014) that detention is possible in certain cases even without issuance of decision on administrative expulsion, i.e. where foreigner is

detained for the purposes of the administrative expulsion procedure, but before the decision on administrative expulsion is issued (within 48 hours time limit), the foreigner concerned applies for asylum, and, as a consequence, the administrative expulsion procedure is interrupted.

The terms like 'a risk of absconding' and 'avoiding/hampering return' were introduced only with the implementation of the Return Directive.

Alternatives to detention were also introduced only with the implementation of the Return Directive.

Before implementation of the Return Directive, extension of detention was not possible.

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?

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.