

Judicial control over detention in Europe and in Hungary (CONTENTION project)

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"The Implementation of the Return Directive: challenges and good practices from the perspective of the Central and Eastern European countries"

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Dr Tamás MOLNÁR Ph.D.

*Former member of the COM Return Directive Contact Committee (2009-2015)
Chief international law advisor, Prime Minister's Office, Deputy State Secretariat for Hungarian Minorities and Diaspora (Hungary)*

I. Project outline

- CONTENTION = **Control of Detention**
- Co-funded by the EU in the framework of the [European Return Fund](#), implemented by the [Migration Policy Centre](#) at the Robert Schuman Centre for Advanced Studies, EUI – in partnership with the [Odysseus Network](#) (ULB)
- One-year project (2014)
- [12 Member States](#) (AT, BE, BG, CZ, FR, DE, HU, IT, NL, SK, SI, UK)
- Methodology: analysis of the national jurisprudence on the pre-removal detention of TCNs → collected and analysed with the help of judges hearing return cases (making it possible to get access to decisions unpublished in journals), based on pre-fixed Questionnaire
- Period of reference: from 2008 (before the adoption of the Directive) until 2014 so as to evaluate the impact of the Directive

II. Objectives of the project

- To inform, analyse and compare **judicial control of pre-removal detention according to the EU Return Directive (2008/115/EC)** with a view to:
 - improving the judicial control
 - identifying and exchanging best practices among legal experts and practitioners
- To launch the first basis for **European networking among national judges** hearing return cases
- To create a **database of relevant national case-law** (with EN summaries) (<http://contention.eu>)

III. Three key questions asked within CONTENTION

1) How do national courts hearing return/detention cases interpret such difficult (and new for many judges) concepts for appreciation from the Return Directive as:

- **Proportionality** in terms of the use of pre-removal detention, i.e. effective application of less coercive measures
- **Necessity of a detention order:**
 - “Necessary to ensure **successful removal**”/A reasonable **prospect of removal**
 - “Risk of **absconding**” (plus “**objective** criteria” for assessing it)
 - Particular conduct of the TCN (**avoiding/hampering** removal).

III. Three key questions asked within CONTENTION

- **Necessity of the extension of detention:**
 - Continuing risk of **absconding**
 - A **lack of cooperation** by the TCN concerned
 - **Delays with the documents** due to the third country concerned
 - **Proportionality of the length of detention:** handling the 6/18 months rule
 - As **short** a period as possible
 - Existence of a **reasonable (real) prospect** of removal
 - Conduct of the TCN and the third country concerned
 - Removal arrangements **in progress** and executed with **due diligence**.
- 2) How **profound** is the judicial review?
- 3) What has been the **impact** of the **Return Directive?** (before & after implementation into national law)

IV. Judicial control over detention in the Directive

- **Article 15(2)-(3)** RD require “speedy judicial review of lawfulness” of detention + in case of prolonged detention periods, “reviews shall be subject to the supervision of a judicial authority”
- Which control has to be exercised by “national” judge for implementation of EU law?
- Control of legality: RD aims at **limiting administrative discretion** with notions like “risk of absconding”, “due diligence”, “reasonable prospect of removal”

IV. Judicial control over detention in the Directive

- **Necessity of initial detention:**
 - Purposes = preparation of the return OR carrying out the removal process
 - There is a risk of absconding (based on objective criteria)
 - TCN avoids the preparation of return or the removal process
 - TCN hampers the preparation of return or the removal process
 - A reasonable (real) prospect of removal exists
- **Proportionality of detention:** less coercive measures (alternatives to detention) can be applied effectively in a specific case (individual, case-by-case evaluation)

IV. Judicial control over detention in the Directive

- **Proportionality of the length of detention:**
 - As short a period as possible
 - A reasonable (real) prospect of removal
 - Conduct of the TCN concerned
 - Cooperation of the third country concerned
 - Removal arrangements in progress
- **Necessity of the extension of detention beyond 6 months:**
 - Continuing risk of absconding
 - A lack of cooperation by the TCN
 - Delays in obtaining the necessary documentation from third countries
 - New assessment of a risk of absconding & ATD
 - Removal arrangements executed with due diligence

V. Main findings

- Judicial control of initial detention: most MS by an **administrative judge** (exceptions: BE, HU = criminal judge, DE = civil judge, IT = justice of peace) → administrative judges are generally **not specialised** in immigration law
- **Appealing** the first instance judicial decision: in most MS (with the exception of HU, SI, UK)
- Detention can be controlled by a judge at **any time or several times** and not only upon its renewal in several MS (except IT, HU)
- In half of the MS covered, the **administrative authority** shall review, *ex officio*, the measure of detention and there is afterwards a possibility for the TCN to ask for a **judicial review** of this decision

V. Main findings

- **Control of facts** is, in theory, considered as being full and not limited to a manifest error of assessment (except IT)
- The control is almost the same regarding the **legal elements** → immigration detention does not appear to be considered as a special field and seems to be treated like other issues of administrative law (NL – respecting the discretionary power, only if manifest error)
- Principle of **proportionality** seems to be generally applied by all jurisdictions, albeit in different ways
- In most of the Member States: the judge examining the legality of detention **does not control** the legality of the return decision beyond acknowledging its existence

VI. Example of Hungary

- The immigration authority (Office of Immigration and Nationality) may order immigration detention for **72 hours** → may be extended by local courts until the TCN's removal, for **maximum 60 days at a time** (overall length: **up to 6 + 6 months**).
- The **immigration authority** shall file its request for an extension of the detention beyond the 72 hour time limit at the **local court** within **24 hours** from the time when ordered.
- Another type of immigration detention under Hungarian law = "detention for the preparation of removal" → it may be ordered in order to secure the smooth carrying out of the immigration proceedings; **1)** if the TCN's identity or the legal grounds of his/her residence is not conclusively established, or **2)** if the return of the TCN under the bilateral readmission agreement to another EU MS is in process.
- Its initial length is also **72 hours**, which may be extended by the court of jurisdiction (local court), but only once, **maximum up to the 30th day**.
- Against the order of the court on renewal (extension), **no further legal review** is applicable (there is no second level of jurisdiction)

VI. Example of Hungary

- Besides the decisions on the renewal, the **court does not control independently** the lawfulness of the detention (between two eventual renewals, there is no *ex officio* or any other whatsoever judicial control on lawfulness)
- The local courts in charge of the renewal of the detention are **not obliged to examine the lawfulness of the return decision**
- **Statistics = 2011: 5325** cases relating to the judicial review of detention → in all of the cases, the immigration authority initiated the upholding/ prolongation of the detention → only in only **3 cases** the TCN was released
- **2012:** a **Case-law Analysing Working Group in Migration Affairs** had been set up by the **Supreme Court** → **report on the judicial practice related to immigration cases** (published in September 2013)

Due to the almost 100% conformity with the authorities' requests, the report established that the judicial control of immigration detention is not effective
- Extension of detention **beyond 6 months:** it was applied in a relatively few cases by the courts in 2011, and then there was a slight increase in 2012



Thank you for your kind attention!

Questions?

Dr. Tamás MOLNÁR
tamas.molnar@me.gov.hu