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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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→ collected and analysed with the help of judges hearing return cases (making it possible to get access to decisions unpublished in journals), based on pre-fixed Questionnaire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](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)

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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)

• 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?

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