

Transnational Training Workshop

Effective Justice, International Protection and Fundamental Rights in Asylum and Migration

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**Protecting
fundamental rights
in the event of
pre-removal detention**

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Introduction

Focus of presentation: Detention of 3rd country nationals according to the provisions of the **Return Directive (2008/115/EC)**.

The right to liberty and security is a human right guaranteed under:

- Article 6 of the Charter of Fundamental Rights of the EU.
- Article 5 of the European Convention on Human Rights (ECHR).

Court of Justice of the EU - Case “N” (CJEU, C-601/15 PP, 15 February 2016)

The gravity of interference with this right caused by detention requires that *“limitations must only apply when it is strictly necessary”*.

The logo for FRI CoRe Judicial Training Project is located in a white circle on the right side of the slide. It consists of the text 'FRI CoRe' in a bold, sans-serif font, with 'FRI' in white and 'CoRe' in orange. Below it, 'Judicial Training Project' is written in a smaller, white, sans-serif font.

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Key Recitals of the Return Directive (2008/115/EC)

Recital 6: Decisions should be adopted on a case-by-case basis, according to objective criteria, meaning that consideration should go beyond the mere fact of an illegal stay.

Recital 9: The Return Directive only applies to 3rd country nationals staying illegally in Member States, excluding asylum seekers.

Court of Justice of the EU - Case “Arslan” (CJEU, C-534/11, 30 May 2013)

The Procedures Directive does not preclude an asylum seeker who applied for international protection **while in detention** under the Return Directive from being kept in detention.

Court of Justice of the EU - Case “M and others” (CJEU, C-673/19, 24 February 2021)

The detention and forced transfer of a refugee residing illegally on a Member State to another State which granted him/her asylum is not governed by the Directive.

Recital 16: The use of detention for the purpose of removal should be limited. It is also subject to the principle of proportionality.

Specifically, detention is justified only to prepare and carry out the removal process, when less coercive measures would not be sufficient.

Court of Justice of the EU - Case “El Dridi” (CJEU, C-61/11 PPU, 28 April 2011)

Removal should be carried out using a gradation of measures based on an individual assessment. The authorities should start from the least coercive measure possible, namely voluntary return, and only when each measure has proven ineffective, move to more restrictive ones. Detention is the last measure.

Recital 24: Member States are obliged to ensure the dignity of persons in return procedures, according to Article 1 of the EU Charter.



Synthesis Report for the European Migration Network Focused Study, European Commission [2014]

Table 13: Alternatives to detention in (Member) States

Alternatives to detention	Member States
Reporting obligations (e.g. reporting to the policy or immigration authorities at regular intervals)	AT, BE, BG, CY, CZ ¹⁶⁶ , DE, EE, ES, FI, FR, HR, HU, IE, LT, LV, NL, PL, PT, SE, SI, SK ¹⁶⁷ , UK, NO
Residence requirements (e.g. residing at a particular address)	AT, BE, CZ ¹⁶⁸ , DE, EE, ES, FI, FR, HR, HU, IE, LU, NL, PL, PT, SI, UK, NO
Obligation to surrender a passport or a travel document	CY, DE, EE, ES, FI, FR, HR, HU, IE, LV, NL, PL, SE, UK, NO
Release on bail (with or without sureties)	AT, BE ¹⁶⁹ , CZ ¹⁷⁰ , DE, FI, HR, HU, IE, NL, PL, PT, SK, UK
Electronic monitoring (e.g. tagging)	FR ¹⁷¹ , IE, PT, UK
Guarantor requirements	DE, HR, LT, UK
Release to care worker or under a care plan	DE, UK

Articles on detection of the Return Directive (2008/115/EC)

Article 4 (4): When implementing the Return Directive, Member States shall respect the principle of non-refoulement (under Article 19(2) of the EU Charter).

Article 15 (1) : Member States can detain 3rd country nationals in order to prepare their return and carry out the removal process, in 2 cases:

- A. when there is a risk of absconding or
- B. when the 3rd country national avoids the preparation of removal process.

Court of Justice of the EU - Case “Kadzoev” (CJEU, C-357/09 PPU, 30 November 2009)

Detention ceases to be justified when there is no reasonable prospect of removal.

Similarly: ECHR, Mikolenko v. Estonia, no. 10664/05, 8 October 2009, paragraph 68.



Article 15 (5, 6): Limited period of detention, which may not exceed **6 months**.
Extension for additional **12 months**, due to:

- (a) a lack of cooperation by the migrant concerned or
- (b) delays in obtaining the necessary documentation from third countries.

Court of Justice of the EU - Case “FMS and others” (CJEU, C-924/19 PPU and C-925/19 PPU, 14 May 2020)

Detention for the sole reason that a 3rd country national is subject to a return decision and is unable to provide for his/her needs is precluded. Such detention cannot take place without adopting a reasoned decision. Also, a judicial review of the lawfulness of the administrative decision must be allowed.

Article 16: Migrants are not detained in prison accommodations, unless they cannot be hosted in specialised detention facilities. Particular attention shall be paid to vulnerable groups.

Article 17: Detention of minors and families with minors is a last resort and it is applied for the shortest period of time. The best interests of the child (Article 24(2) of the EU Charter) shall be a primary consideration.



Conclusions

1. **Grounds for detention must be exhaustively listed** in national legislation and defined in a clear manner.
2. **Necessity and proportionality.**
3. **Vulnerable groups must only be detained as a last resort.** Their vulnerability must be considered before ordering their detention to ensure that it will not severely impact their physical/mental health.



Thank you!

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