

## Prolonging detention under the Return Directive in Poland

**Date:**

Friday, October 9, 2015

**Introduction**

Article 15 of [Directive 2008/115/EC](#) [1] on the returns of irregular migrants has been subject to numerous preliminary references before the Court of Justice of the European Union (CJEU). Interpretative guidance has been given by the CJEU on how the period of pre-removal detention should be calculated as well as the grounds for extending detention under the Directive and the judicial control of a decision leading to the extension of detention. Of particular interest for the purposes of this article is how the rules governing the possible extension of detention have been interpreted in the Polish legislative setting, given that these extended periods can only be justified on a limited number of grounds. This article will assess whether Poland has complied with these relevant rules and whether they are correctly enforcing EU as well as human rights law with regards to pre-removal detention.

**Transposition of the Return Directive in Poland**

The [Return Directive](#) [1] was transposed into Polish national legislation by the amending 2003 Law on Foreigners in 2012 ([Law from 27 April 2012 amending the Law on Foreigners and the Law on Promotion of Employment and Institutions of the Labour Market](#) [2]). However, this transposition ? although already delayed ? was not complete. It introduced necessary changes regarding voluntary return, entry bans and detention (e.g. definition of the risk of absconding), but still kept the existing idea of return and detention policy (e.g. by keeping two types of return decisions). The full transposition, which influenced the shape of the return and detention policy more significantly, came into force on 1 May 2014, with the adoption of the [new 2013 Law on Foreigners](#) [3].

One of the introduced changes was separating the detention of irregular migrants and the detention of asylum seekers by establishing two separate deadlines. Until 1 May 2014, the period of stay in a detention centre could not exceed one year (Article 106 section 2 of the 2003 Law on Foreigners). If a person was subject to detention several times with regard to one return decision, detention periods summed up and still could not have exceeded this deadline (Judgement of the Supreme Court I KZP 36/07 from 27.09.2007). From 1 May 2014 the maximum detention period for asylum seekers is 6 months (Article 89 section 5 of the 2003 Law on Protection). For failed asylum seekers and other migrants in return procedures it is 12 months, but detention can be prolonged for another 6 months if the person concerned submits a complaint to the administrative court against a return decision (Article 403 section 3-5 of the 2013 Law on Foreigners).

**Background of the legal amendments**

In 2012-2014 there were cases in which asylum seekers were returned to their country of origin without having the possibility to access the court. This problem mostly concerned asylum seekers placed in detention, who received a negative decision of the second instance administrative authority (the Refugee Board) on their asylum claim, which before 1 May 2014 was accompanied by a return order. The decision of the Refugee Board can be appealed to the administrative court, but is final and enforceable. The above mentioned loophole constituted a reason for the Dutch court in the Hague to withhold a transfer of an asylum seeker to Poland under the Dublin Regulation by applying an interim measure (ruling no [AWB 13/11314](#) [4] from 18 June 2013). The Court stated that the practice of deporting asylum seekers before the court examines their case is inconsistent with the article 47 of the [Charter of Fundamental Rights of the European Union](#) [5] and can lead to a violation of the principle of *non-refoulement*. Therefore the court found that the principle of trust can no longer be applied towards Poland.

In the Law on Foreigners which entered into force on 1 May 2014 asylum proceedings and return proceedings have been separated, which means that a return decision is no longer issued within the asylum procedure. Consequently, asylum seekers who have received a negative decision could no longer be immediately deported, nevertheless access to court before return was not fully guaranteed. The government eventually agreed to a solution proposed by some NGOs that involved a relative suspensive effect on all return decisions ? since it is a return decision which has an irreversible effect - in case of filing a complaint to the court. This has been accepted, but at the same time the maximum detention period was prolonged from 12 to 18 months - submitting a complaint to the court against a return decision has been made one of the legal conditions for prolonging the detention for 6 months.

### **Prolonging detention in case of an appeal in the light of the Return Directive and CJEU case law**

The exact wording of the disputed provision is as follows: ?In case a foreigner lodged a complaint to the administrative court against a return decision together with a request for suspension of its execution, the period of stay in a detention centre can be prolonged to 18 months and the [respective] court can issue one ruling prolonging the detention for 6 months.? (Article 403 section 5 of the 2013 Law on Foreigners).

Comparing this provision with the corresponding provision of the Return Directive leads to a conclusion that these two are not compatible. The only legal conditions for prolonging the detention for the period exceeding the maximum of 6 months for another 12 months are: the lack of cooperation of a third country national and delays in obtaining necessary documentation from third countries (Article 15 (5) and (6) of the Return Directive). Exercising in practice the right to an effective remedy is surely not one of them, which has been made clear by the Court of Justice of the European Union in the case [C-357/09 Kadzoev](#) [6] One of the questions referred to the Grand Chamber in this case was whether a period of detention pending judicial review of the return decision must be included in the maximum detention period. The Court noted first of all that a procedure for judicial review of the return decision was not one of the grounds for extending the period of detention laid down in the Return Directive (par. 52 of the judgement C-357/09 Kadzoev). Indeed, the Court went on to surmise that time spent within detention pending judicial review of a return decision must be taken into account when calculating the maximum duration of detention allowed for in Articles 15(5) and (6) of the Return Directive.

The Court of Justice of the European Union also left no doubt as to whether article 15 of the Return Directive could have a direct effect. In the case [C-61/11 El Dridi](#) [7] the Court stated that according to settled case law, where a Member State fails to transpose a Directive by the end of the period prescribed or fails to transpose the Directive correctly, the provisions of that Directive

which appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State. That is true of Articles 15 and 16 of Directive 2008/115, which are unconditional and sufficiently precise, so that no other specific elements are required for them to be implemented by the Member States (par. 46 and 47 of the judgement C-61/11 El Dridi).

If national law is incompatible with EU law, the national court has an obligation to apply EU law. This fundamental rule of supremacy of EU law over national law has been formulated by the Court of Justice in the case [C-6/64 Costa v ENEL](#) [8]. This means that the aforementioned provision of Article 403(5) of the 2013 Law of Foreigners should not be applied in any case.

Such an approach would also be in line with the available jurisprudence of the European Court of Human Rights, which held that for the detention to be justifiable under Article 5(1) of the [European Convention on Human Rights](#) [9] the return procedure has to be in progress and continuing detention after suspending the return procedure because of appeal unequivocally renders detention devoid of any legal ground (par. 67 of the judgement [Asalya v. Turkey](#) [10], application no [43875/09](#) [11]).

## Conclusion

Polish practice with regards to pre-removal detention of third country nationals and grounds of extended detention are clearly at a discord with EU and human rights law. In light of the explicit rulings given by the CJEU and ECtHR on Article 5(1) which allows for no compromises, it is highly disconcerting that Polish practice gives with one hand ((quasi) suspensive effect of a return decision) and takes with another (prolongation of pre-removal detention on judicial reviews grounds). Unfortunately the issue has not been successfully litigated before national courts in Poland notwithstanding that the matter seems ripe for contention.

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## Addendum

*Since publication of this blog the Regional Court in Przemysl has found the described domestic legal regulations to be in violation of the RD and refused to apply it in practice. The Court agreed with the amicus curiae presented by the HFHR in this case and confirmed that lodging an appeal to the court against a return decision does not fall under the strictly circumscribed provisions for prolongation of detention under the RD. The summary of the judgement is [here](#)[12].*

## Keywords:

Return

Détention

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## Links:

[1] <http://www.asylumlawdatabase.eu/en/content/en-directive-2008115ec-european-parliament-and-council-16-december-2008-common-standards-and>

[2] [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=92206](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=92206)

[3] <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20130001650>

- [4] <http://www.asylumlawdatabase.eu/en/content/netherlands-court-appeal-suspends-dublin-transfer-poland-awb-1311314-art-47-charter>
- [5] [http://www.asylumlawdatabase.eu/en/content/en-charter-fundamental-rights-european-union#toc\\_14](http://www.asylumlawdatabase.eu/en/content/en-charter-fundamental-rights-european-union#toc_14)
- [6] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-35709-ppu-said-shamilovich-kadzoev-huchbarov>
- [7] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-6111-ppu-el-dridi>
- [8] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006>
- [9] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [10] [http://hudoc.echr.coe.int/eng?i=001-142399&utm\\_source=Weekly+Legal+Update&utm\\_campaign=014f27bb20-WLU\\_18\\_04\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-014f27bb20-419648261#{"itemid":"001-142399"}](http://hudoc.echr.coe.int/eng?i=001-142399&utm_source=Weekly+Legal+Update&utm_campaign=014f27bb20-WLU_18_04_2014&utm_medium=email&utm_term=0_7176f0fc3d-014f27bb20-419648261#{)
- [11] [http://hudoc.echr.coe.int/eng#%7B%22appno%22:\[%2243875/09%22\]%7D](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2243875/09%22]%7D)
- [12] <http://www.asylumlawdatabase.eu/en/case-law/poland-ruling-regional-court-przemysl-23-may-2016-no-ii-kz-6916-quashing-ruling-district>