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Judicial scrutiny of return detention in the Member States: clarifying the concept of ‘risk of absconding’

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EU definition of the *Risk of absconding*



Article 15 RD: 2 exhaustive grounds for pre-removal detention:

risk of absconding

avoiding/hampering return/removal process;

Art. 3(7) RD definition - Risk of absconding

‘risk of absconding’ means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond.

- Identical definition in Dublin III Regulation and Reception Conditions Directive
- Abstract EU definition - 2 general requirements: ‘objective criteria’ + ‘defined by law’
- Member States essentially retain the freedom to determine the objective criteria





EU definition of the *Risk of absconding*



CJEU set standards:

- EU terms which constitute derogation from a principle should be strictly interpreted (*Zh. and O*, para. 42);
- Respect of FRs (*Gaydarov, El Dridi*)
- 'scope cannot be determined unilaterally by each MS without any control by the institutions of the EU (*Zh and O*, para 48)
- Genuine and present risk (*Zh and O*, para.50)
- Consideration should go beyond the mere fact of an illegal stay (*Mahdi*, para.40)
- Principle of proportionality should be ensured (*El Dridi*, para. 41)
- Any assessment relating to the risk of the person concerned absconding must be based on a individual examination of that person's case (*Sagor*, para. 41, *Mahdi*, para. 70)
- No automatic prolongation based on lack of identity documents (*Mahdi*, para. 72)





Mapping out issues in the implementation of *Risk of absconding*



1. 'defined by law' - variety of types of domestic implementing acts

- ❑ **no law**; Objective criteria set in administrative/judicial practice: **CZ, EL, MT**;
- ❑ **only administrative acts**: **BE** (*explanatory memorandum*); **HU** (government decree)
- ❑ **replaced 'risk of absconding' with broader concepts ('non-appearance')**; objective criteria developed in jurisprudence/administrative practice (**AT/ES**)

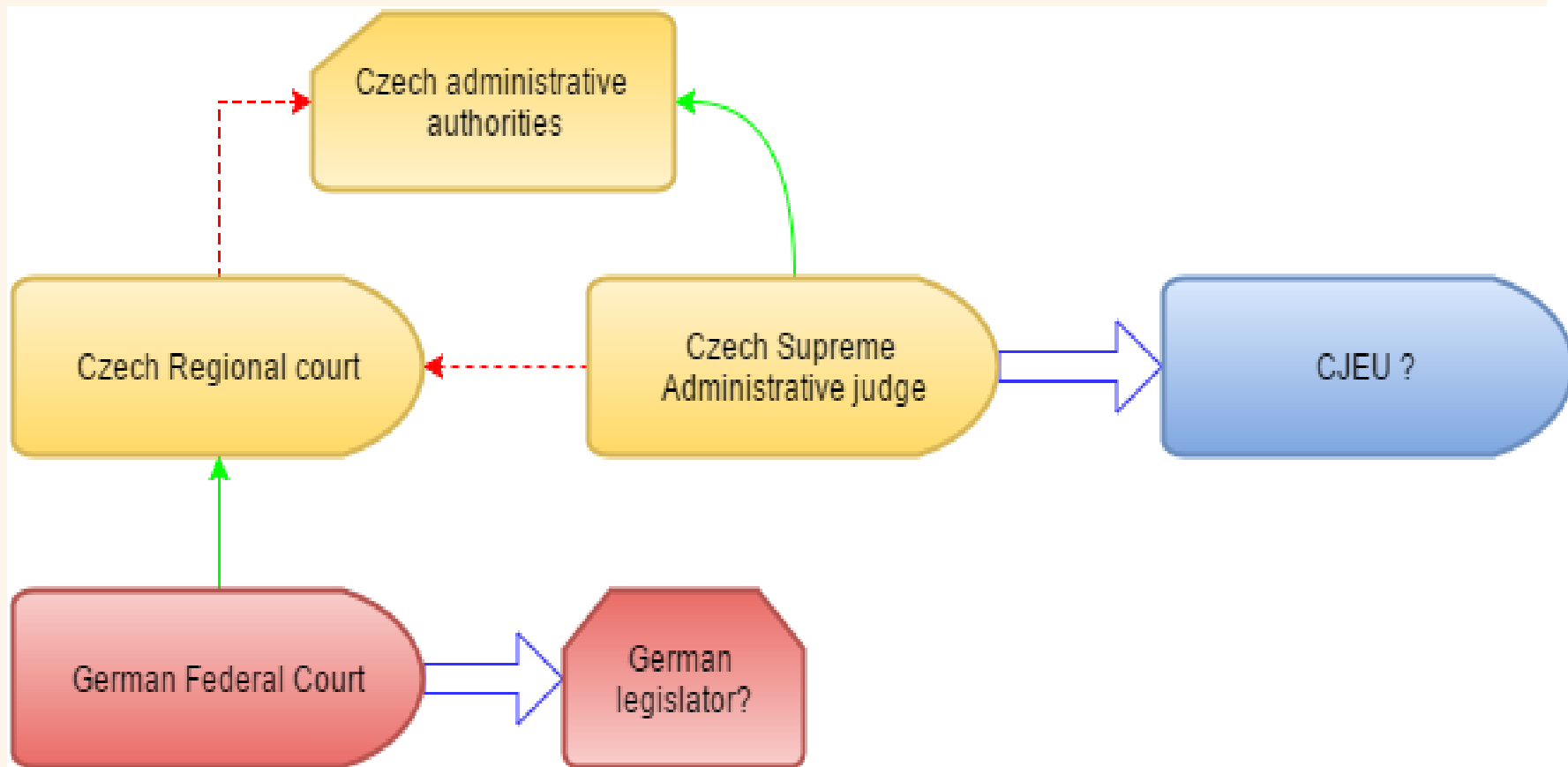




Contribution of judicial dialogue to clarifying the notion of 'law'



How to interpret the notion of "law" – is administrative practice sufficient?





Mapping out issues in the implementation of *Risk of absconding*



2. Variety of national lists of 'objective criteria'

Approx. **28 objective criteria** used by the MSs to def. risk of absconding (see RERDIAL Report)

- ❑ MSs with long list of objective criteria ; *any single crit. triggers the risk (IT)*

Div. in subst. and non-substs (NE, SL)

- ❑ Open ended domestic definition (FI)

- ❑ Problematic obj. criteria (prohibited by RD and CJEU) still in use

Illegal residence (e.g. FR, SK, SN)

Illegal entry (EE, FR, RO)

Lack of identity documents (BG, ES, RO)

Refusal of VD (BG, RO, SE, FR)

Asylum application during pre-removal detention (if made with the intention of hampering the removal process) (FI, RO, SK, HU- Dublin)

A criminal record or suspicion of having committed a crime (BE, EE, HU, SK)





National courts clarifying the permitted obj. crit.



Def of RA based on **objective criteria alone is not sufficient**

Art. 3(7) + rec. 6 RD: necessity of individual assessment

Rejecting automatic application of (problematic) objective criteria:

- ❑ **Swedish Supreme Migration Court:** ≠ refusal of VD; on the basis of this logic, the detention order become the main rather than the last resort measure.
- ❑ **LT SAC** ≠ on mere absence of established identity and lack of documents +the proportionality of such a measure
- ❑ **Sofia Administrative Court:** ≠ to confirm pre-removal detention solely based on the lack of identity documents (further individual assessment) ~ (impact of *Mahdi* PR, para. 72)
- ❑ **Regional Court of Bratislava** ≠ not taking into consideration lack of residence permit; criminal record; individual assessment required even if solid objective criteria
- ❑ ***Recent legislative change in FR (Law 274/2016):*** eliminating mandatory application of objective criteria without individual assessment (HOWEVER still no legal obligation of individual assessment)





Mapping out issues in the implementation of *Risk of absconding*



3. Varied configuration of judicial competences to review pre-removal detention

RULE: Admin not specialized; EXC: **NE, SE**; or administrative chamber in
supreme courts (**AT, BG**)

- **Criminal judge (BE, ES), FR** from 1st of November 2016; **PL** (chambers in cases of apprehension)
- **Civil judge (DE)**
- **General courts (HU, FI, LT)**
- **Justice of the Peace (IT)**

RULE: possibility to appeal before diff court, EXC: **FI, HU**





Mapping out issues in the implementation of *Risk of absconding*



3. Varied scope of judicial scrutiny over pre-removal detention

Powers of civil, criminal and administrative courts

Civil and criminal judges/courts	Administrative judges/courts
Decide: Order pre-removal detention	Only control: authorise or not the measure
All aspects of fact and law of the case	Generally only manifest errors of appreciation committed by the administration ≠ necessity of detention
Full assessment of the proportionality of the measure	Adoption of concrete alternative measures is generally under the ambit of the administration
Generally not competent to review legality of the connected returned related measures	





Extending the scope and intensity of judicial control



Criminal judges (FR legislation in force since Nov 2016, amended after A.M. and other v France, req. n° 56324/13): been conferred the control of legality of the administrative detention

Impact of the CJEU in Mahdi (c-146/14, see particularly para. 40)

- ❑ **BG:** dis-applying nat. legislation limiting judicial review of prolongation of detention to a closed hearing (Art. 47 EU Charter, Arts. 5(4) 13 ECHR);
- ❑ **NE:** eliminating the artificial procedural separateness of the legality control of return related decision and pre-removal detention (*Dutch Council of State on the basis also of Art. 5(4) ECHR and Art. 15(2) RD*);
- ❑ **IT:** legality control of both pre-removal detention and the connecting return related measure (at least as regards manifest errors of assessment and principle of non-refoulement) (ICC).

More than manifest errors of appreciation (FR, CZ: concrete steps taken by the administration, progress, etc.)

Alternative measures under the competences of administrative courts (**BE +NE+IT**)





Conclusions



Cases of empowerment of national courts:

- ❑ Assessing all aspects of facts and law in cases of pre-removal detention both in first orders or prolongation of detention; (impact of *Mahdi*);
- ❑ Carrying out a proportionality test of the administrative detentions;
- ❑ Establishing themselves alternative measures;
- ❑ Eliminating the domestic procedural limitation on separate judicial control for the pre-removal detention from judicial control of other related return measures.

Outcomes possible due to:

- ❑ Use of the principles of individual assessment (recital 6 RD + *Zh. O*) and proportionality (*El Dridi*, para. 41) together with the principle of primacy of EU law EU Charter and ECHR;
- ❑ Judicial interaction techniques, such as: the preliminary reference, disapplication of national law, conform interpretation.

