



EMN Ad-Hoc Query on Implementation of Directive 2008/115/EC

Requested by BG EMN NCP on 16th May 2017

Return

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Disclaimer:

The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

Background information:

Directive 2008/115 / EC was transposed into the Bulgarian legislation. Thus if a TCN is established to reside illegally on the territory of the country, as an extreme measure he is accommodated in a special detention home until the return procedures are completed. However, the accommodation is terminated if the TCN applies for international protection.

A rule has recently been introduced in Bulgarian law providing that "the accommodation in special homes for the temporary accommodation of foreigners is not terminated when there are serious grounds for supposing that the TCN has applied for international protection only for the purpose of delaying or hindering the execution of Imposed coercive administrative measure. The continuation of accommodation is subject to appeal. "There is still no practice in this respect, so we would like to learn the practice of other Member States.

Questions

1. Is the detention of a TCN, accommodated for the purpose of return under Directive 2008/115/EC, envisaged not to be terminated after he has filed an application for protection, which is suspected of merely seeking to delay or hinder the implementation of the return?
2. If such a possibility is envisaged, is there an explicit act of detention issued on this ground and who is the official/authority that issues it?
3. When reviewing the detention of a foreigner, within the meaning of Art. 15, paragraph 3 of Directive 2008/115 / EC, when the initial 6 months of detention expire, do the administrative authorities issue an explicit act to extend the period of detention, or is the continuation done only by the judicial authorities?

Responses

	Country	Wider Dissemination	Response
	Austria	Yes	<ol style="list-style-type: none"> 1. In case a third-country national files an asylum application while being in detention pending removal, detention may be continued if there are grounds for assuming that the application seeks to delay or hinder the implementation of a return decision (Art. 76 para 6 Aliens Police Act). 2. If this is the case, this is recorded by the Federal Office for Immigration and Asylum in a note for the file. The third-country national concerned has to be informed about the content of the note in a language he/she understands (Art. 76 para 6 in conjunction with Art. 12 para 1 Federal Office for Immigration and Asylum Procedures Act). 3. The proportionality of the detention has to be examined ex officio at least every four weeks by the Federal Office for Immigration and Asylum, unless a complaint has already been filed with the Federal Administrative

			<p>Court (Art. 80 para 6 Aliens Police Act). After four months of continuous detention pending removal, the Federal Administrative Court has to decide ex officio every four weeks on the proportionality of the detention (Art. 22a para 4 Federal Office for Immigration and Asylum Procedures Act).</p>
	Belgium	Yes	<p>1. Yes. Article 74/6, § 1bis 12° of the Belgian Immigration Act of 15.12.1980 states that an illegally staying person who files an asylum application in order to postpone or prevent his imminent removal can be detained. And this in order to guarantee his removal. As long as the asylum application is pending at the Belgian Immigration Office or the Office of the Commissioner General for Refugees and Stateless Persons (or if there is an appeal with suspensive effect against a negative asylum decision) he won't be removed against his will. He will of course be released immediately if he should be granted refugee status or subsidiary protection. Because the illegally staying person is detained, the asylum application will get a priority treatment.</p> <p>2. Yes. A decision of containment in a designated place (annex 39bis) is notified to the foreigner. This decision is inter alia based on article 74/6, § 1bis. The initial decision to detain the foreigner for a period of two months can be taken by the Minister or his delegate (that is to say the Belgian Immigration Office). If the foreigner's application is rejected, the Minister or his delegate can prolong the detention for a two-month period (subject to specific conditions). After one extension, the decision to prolong the detention can only be taken by the Minister. After five months, the foreigner has to be released. However, if public order and national security reasons can be invoked, the decision to detain can be prolonged by one-month periods (not exceeding a total of 8 months of detention).</p> <p>3. An explicit act is issued. The illegally staying person has the right to appeal against his detention every month and every time a new decision of containment is issued. When the detention is prolonged with a 5th, 6th, 7th or 8th month, a decision to extend the detention by one month is drafted and notified. Then the Secretary of State asks the Court to confirm the legality of the decision to extend the detention. Sources : • Belgian Immigration Office (Appeal Unit) • Belgian Immigration Act of 15.12.1980 • Office of the Commissioner General for Refugees and Stateless Persons (website)</p>
	Bulgaria	Yes	<p>1. In Bulgaria, the provisions of Article 44 (12) of the Foreign Nationals Act provide that involuntary accommodation in the Special home shall not be terminated if the TCN has filed a subsequent application for protection, for which there is reasons to assume that it is intended merely to delay or hinder the enforcement of the return decision.</p>

			<p>2. In Bulgaria, the Director of the Migration Directorate-MoI issues an explicit order for compulsory accommodation.</p> <p>3. In Bulgaria, the authorities for administrative control of foreigners issue an order for continuation of the detention at the expiration of the initial 6 months of detention, which order they send to the Court for judging.</p>
	Croatia	Yes	<p>1. The Law on Foreigners, 2011, regulates the entry, stay and exit of third country nationals from Croatia. The EU Returns Directive has been transposed into Croatian legislation and provides for the detention of non-citizens. Immigration detention is also provided in the country's asylum legislation, the Law on International and Temporary Protection (LITP), 2015. The Law on Foreigners provides for "preliminary" and "regular" detention. According to article 124(1) authorities may place a non-citizen in "preliminary" detention to ensure his/her presence during the expulsion determination process if he is deemed to pose a threat to national security or has been convicted of a criminal offence. Under the Law on Foreigners (article 124(3)) "preliminary" detention can last up to three months. "Regular" detention can be ordered for six months (article 125(3)). Where a person expresses the intention to apply for international protection from the detention centre, after having been detained on the basis of one of the immigration detention grounds as specified by the Law on Foreigners, he/she must either be released and transferred to an open centre or must be served with a new restriction of freedom of movement order on one of the grounds for asylum detention as specified by LITP. Release or restriction of movement on the basis of one of the asylum grounds is decided by the Asylum Department after the interview is conducted.</p> <p>2. Detention prior to removal is ordered by police (The Foreigners Act, article 127(1), while the Interior Ministry or police can order detention of asylum seekers (LITP, article 54(11)).</p> <p>3. Detention may be then extended by 12 months if the third country national : 1) refuses to provide personal or other information and documents required for removal (forced return) or provided false information; 2) prevents or stalls the removal (forced return) in some other way; (3) an extension of detention can be made if there is a reasonable expectation that competent bodies of another state will provide necessary travel and other documents required for deportation during this period (article 126). Detention is extended by administrative authorities (detention centre), but it is immediately submitted to the judicial body for control.</p>
	Cyprus	Yes	<p>1. According to current practice, if a TCN applies for international protection after he/she is arrested for purposes of return and placed in detention (based on the issuing of detention and expulsion orders against him/her), the expulsion order is suspended, but he/she continues to be held for 30 days, until the asylum</p>

			<p>application is examined. If the application is not examined within 30 days, he/she is released. If the application is rejected, detention continues and the expulsion order is reactivated. If the TCN appeals at first instance to the Reviewing Authority for Refugees, then the expulsion order is again suspended and detention is continued for another 15 days. If the appeal is rejected, the expulsion order is reactivated and detention continues. If the appeal is not examined within 15 days he/she is released. If the TCN appeals the asylum application rejection to the Administrative Court, then the detention and expulsion orders are revoked and he/she is released immediately.</p> <p>2. All detention orders are issued by the Director of the Civil Registry and Migration Department; there are no special orders issued specifically for the cases of asylum seekers.</p> <p>3. When the Director of the Civil Registry and Migration Department reviews the possible extension of the initial 6-month detention period for a TCN, after he/she examines all the details of the TCN's case and the actions taken for his/her removal, he/she issues an act of a 6-month extension, provided that repatriation was not made possible exclusively due to the TCN's lack of cooperation. The TCN is informed with a letter explained and/or translated to him/her. At the same time, the duration of detention is subject to a Habeas Corpus application, according to the relevant provisions of the Constitution of the Republic of Cyprus.</p>
	<p>Czech Republic</p>	<p>Yes</p>	<p>1. CZ remark: CZ does not fully catch whether „accommodation for the purpose of return in the detention home“ means actually „detention“...we consider this as detention and our answers reflect this. The foreigner stays detained in the same detention facility – with the exception of families and vulnerable persons that are transferred to an open asylum facility. In case of other foreigners who stay detained in the same facility, CZ only issues a new detention decision under the Asylum Act.</p> <p>2. Yes, the Czech legislation lays down that there has to be a new detention issued as the person jumps off the Aliens Act and jumped into the Asylum Act. There is a special detention ground on delaying/hindering the implementation of return. See also CJEU ruling Arslan that touches this topic. The new decision on detention is issued by the Ministry of the Interior who is also a determining authority in the asylum procedure. The original detention under the Aliens Act is issued by the Police.</p> <p>3. The courts are only reviewing bodies. All prolongations are made by the administrative authorities. The detention period under Aliens Act is 180+365 days (as allowed by the Return Directive), the detention period under the Asylum Act is only 120 days without a possibility for further prolongation.</p>

	Estonia	Yes	<p>1. In Estonia the legal grounds for detention of a TCN for the purposes of return are stipulated in the Obligation to Leave and Prohibition to Entry Act (OLPEA). On the other hand the legal grounds for detention of a TCN who is an applicant for international protection, are stipulated in the Act of Granting International Protection to Aliens (AGIPA). In case a TCN lodges an application for international protection while being detained in return procedure or in the course of expulsion, the Police and Border Guard Board or the Estonian Internal Security Service may detain him or her for 48 hours as of the lodging of the application for international protection and during that time apply for the permission from the administrative court to detain the applicant for international protection for up to two months. An applicant for international protection can only be detained if the basis for the detention of the applicant for international protection provided for in AGIPA occur. Hence, the detention under the legal grounds of the OLPEA is terminated, the return procedure is suspended until the application for international protection is being assessed and a new decision on detention based on legal grounds stipulated in AGIPA should be made.</p> <p>2. If it is necessary to detain an applicant for international protection, on the basis provided for in AGIPA for longer than 48 hours, the Police and Border Guard Board or the Estonian Internal Security Service shall apply to the administrative court for the permission to detain the applicant for international protection and place him or her into the detention centre for up to two months. The detention of the applicant for international protection and the extension of the term thereof shall be decided by the administrative court pursuant to the provisions of the Code of Administrative Court Procedure on deciding the grant of permission for administrative act.</p> <p>3. The detention and the extension of the term thereof shall be decided by the administrative court pursuant to the provisions of the Code of Administrative Court Procedure on deciding the grant of permission for administrative act. The extension of detention is determined by the court in a court ruling.</p>
	Finland	Yes	<p>1. According to the Finnish Aliens' Act an alien may be held in detention if there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision. The detention may continue under the previous decision. There is no need for a new decision on detention under such circumstances. However the District Court of the place of detention shall, upon the request of the detainee, rehear the matter concerning the detention no later than two weeks after the latest decision under which the District Court ordered continuation of the detention. The court shall be presented with a statement on the requirements for detention and order a detained alien to be released where no grounds for detention have been established. An initial decision on holding an alien in detention shall be made by the Police or the Border Guard. The Police/Border Guard shall, no later than the day after</p>

			<p>the alien was placed in detention, notify the District Court of the municipality where the alien is held in detention. The District Court shall hear a matter concerning the detention no later than four days from the date when the alien was placed in detention. Since then the matter shall, upon the request of the detainee, be reheard by the District Court every two weeks.</p> <p>2. See nr 1. A new act of detention shall not be issued under such circumstances, but the matter shall, upon the request of the detainee, be reheard by the District Court.</p> <p>3. The continuation of detention is always done by the judicial authorities (the District Court of the place of detention), not by the administrative authorities. The matter shall, upon the request of the detainee, be reheard by the District Court every two weeks or earlier, if there are specific grounds for that. The detention may exceed the initial six months, if the detainee is not cooperating with the return or the third country does not issue the necessary documents, which delays the return. Maximum length for detention is twelve months.</p>
	Hungary	Yes	<p>1. TCNs usually use asylum applications (during return procedures) to delay or hinder the return. If there are final court decisions that the TCNs do not have the right to stay in the territory of the member state (Hungary), they will be returned without any delay. If a TCN's application is accepted by the asylum authority, his/her returning is likely hindered. If the application is refused by the asylum authority, it is only delaying his/her returning.</p> <p>2. Detention (after immigration or before expulsion) can be ordered by the Police or the Immigration and Asylum Office in order to avoid the disappearance of the people mentioned in point 1. Detention for asylum seekers is also possible to order by the Immigration and Asylum Office.</p> <p>3. Before the 6 months of detention expire, the competent authority sends an official request to the competent court to prolong the detention. The request has to contain all relevant information about the case, for example why the prolongation of the detention is needed, likely what will happen in his case etc. The court investigates the circumstances and makes his decision about prolonging the detention or not.</p>
	Ireland	Yes	<p>1. Ireland does not participate in the Return Directive. In addition, in Ireland, there are no general powers of detention in relation to the return procedure. There are limited powers of detention whereby holders of deportation orders may be liable to arrest and detention if they do not comply with the terms of the deportation order (under section 5 of the Immigration Act 1999).</p>

			<p>2. .</p> <p>3. .</p>
	Italy	Yes	<p>1. Yes, the detention keeps being in place. Indeed, the Legislative Decree 142/2015 foresees that a TCN that is detained in a detention center with the aim to being repatriated remains in the detention center even if he/she applies for international protection when there are serious grounds for supposing that he/she applied only for the purpose of delaying or hindering the return implementation .</p> <p>2. The Legislative Decree 142/2015 foresees that the police commissioner issues an act for the extension of the detention. When the TCN applies for international protection and he/she is already detained in a detention center, the ordinary deadline for the detention is suspended and the acts is transmitted to the Court that issues the validation of the detention for a further maximum period of 60 days to allow the exam of the apply.</p> <p>3. Art. 15 paragraph 3 of the directive has not been implemented in the Italian legislation. Indeed, a reviewing of the detention on request of the TCN with the aim to reduce the duration of the detention.</p>
	Latvia	Yes	<p>1. In Latvia, the provisions of the Immigration Law defines the grounds for detention of a foreigner with regard to whom a removal procedure is applicable. If the third-country national during the organization of his/her return procedure applies for asylum, the removal procedure will be suspended until the application is assessed and final decision in asylum case is taken. Asylum application submitted will be assessed in any case. In case when the returnee applies for asylum, the grounds for his/her detention as an asylum seeker, will be immediately assessed upon the Asylum Law provisions. Since the third-country national applied for asylum he/she can not be detained as a removable person.</p> <p>2. An official of the State Border Guard depending on the status of the person is entitled to take a decision on detention of a third-country national for the removal purpose upon the provisions defined in the Immigration Law or to take a decision on detention of asylum seeker upon the provisions of Asylum Law.</p> <p>3. Prolongation of detention of a third-country national who is a subject of removal procedure is carried out by Court on ex-officio basis. The State Border Guard may take a decision on detention of a foreigner with the purpose of removal for the time period not exceeding 10 days. Court takes a decision on prolongation of detention of a foreigner for the time period of up to 2 months. The Court may decide to extend the detention repeatedly (in each 2 months), but the total time period of detention may not exceed six months. A judge may</p>

			take a decision on extension of detention for the time period not exceeding additional 12 months, if the foreigner refuses to co-operate or delays the receipt of the necessary documents from third countries.
	Lithuania	Yes	<p>1. In the article 118 the Law on the Legal Status of Aliens is provided that upon the disappearance of grounds for an alien's detention, the decisions that are connected to alien's detention must be reconsidered. If alien, who is detained in order to prevent him from entering the Republic of Lithuania without a permit or has unlawfully entered the Republic of Lithuania or illegally stays in it, submits an application for asylum, State Border Guard Service refer to a district court with a request to release alien from detention or to repeatedly review the decision to detain the asylum seeker for the Grounds for Detention in the Republic of Lithuania Law on the Legal Status of Aliens stated in Article 113.</p> <p>2. Grounds for Detention of an Alien are provided in the Republic of Lithuania Law on the Legal Status of Aliens 113 article. An alien shall be detained for a period exceeding 48 hours by a decision of the court. In decision it has to be specified on what grounds the alien is detained.</p> <p>3. In the Article 114 of the Republic of Lithuania Law on the Legal Status of Aliens the terms of Detention of an Alien are set. An alien may be detained by the police or any other law enforcement institution officer for a period not exceeding 48 hours. An alien shall be detained for a period exceeding 48 hours only by a decision of the court. An alien may not be detained for a period in excess of six months, with the exception of the cases when he does not cooperate in the process of his expulsion from the Republic of Lithuania (refuses to provide his personal data, provides false information, etc.) or when the documents required for the expulsion of such an alien from the State's territory are not received. In such cases, the period of detention may be extended for an additional period not exceeding 12 months.</p>
	Luxembourg	Yes	<p>1. 1) article 22 (2) e) of the Law of 18 December 2015 on international protection and temporary protection, which allows the placement in detention in case there are reasonable motives to presume that the international protection application was introduced in order to delay or hinder the removal order to be carried out ; or 2) article 22 (2) b) which allows to place the applicant in detention in order to determine the elements on which the international protection application is based (that could not have been obtained if the applicant is not in detention, especially when there is a risk of absconding).</p>

			<p>2. Article 22 (3) establishes that the detention order is issued by a written decision of the Minister in charge of Asylum upon an analysis of the file and taking into consideration if there is no other less coercive alternative possible.</p> <p>3. 3. If the detention is issued because the applicant filed an international protection application in order to hinder or delay the execution of a removal order, the detention can be ordered for a maximum period of 3 months and can be extended up to a maximum period of 12 months. After that delay expires the individual has to be freed in accordance with article 22 (4) paragraph 1. The detention of an irregular migrant is ordered under article 120 of the amended law of 29 August 2008 on freedom of movement and immigration for a month by a written decision of the Minister in charge of Immigration and can be extended five times (one month each) up to a maximum duration of 6 months (article 120 (3)) in order to execute the removal order. After the 6-month period the third-country national has to be freed.</p>
	<p>Netherlands</p>	<p>Yes</p>	<p>1. Yes. The Netherlands has implemented article 8 (1) (d) of Directive 2013/33/EU in national legislation. Article 59b (1) (c) of de Dutch Alien Act states that an applicant for international protection may be detained: 1) when he or she is already detained subject to a return procedure under Directive 2008/115/EC in order to prepare the return and/or carry out the removal process, 2) and the authority's can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, 3) that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;</p> <p>2. Yes. A new decision on detention will be issued by the administrative authority (e.g. Alien police department, border police, caseworker of de Immigration office or a caseworker of the Repatriation and Departure Service). Detention of asylum seekers is only possible if less coercive measures can't be applied effectively. However, when the application for international protection is made merely in order to delay or frustrate the enforcement of the return decision, the balance of interests will fall into the disadvantage of the applicant.</p> <p>3. According to article 59(6) the Dutch Aliens Act the initial decision of detention can be extended up tot 12 months when 1) lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries. A (explicit) decision to extend is made by a caseworker of the Repatriation and Departure Service and can be appealed in court (for judicial review) by the third-country national concerned within four weeks (28 days).</p>

	<p>Slovak Republic</p>	<p>Yes</p>	<ol style="list-style-type: none"> 1. In the Slovak Republic, if a third-country national detained for the purpose of return applies for international protection and it is suspected that his/her application was lodged in order to delay or hinder the administrative expulsion, his/her detention is not terminated. However, a new decision on his/her detention as an asylum seeker is issued based on a different legislative reason. 2. New decision on detention is issued by the respective Police department based on the reason in the national legislation which states “if he/she lodged an asylum application and there is a reasonable suspicion that he/she lodged the application in order to delay or hinder his/her administrative expulsion”. 3. Police departments issue a new decision about the prolongation of the detention period, not the courts. It is not possible to appeal the decision on detention, the decision on prolongation of detention or the decision on prolongation of the detention period (i.e. when longer than the maximum period of 6 months). It is possible to take legal actions against the decision though. The decisions are then reviewed by the courts.
	<p>Slovenia</p>	<p>Yes</p>	<ol style="list-style-type: none"> 1. In case of filing the application for international protection the return related detention is terminated. The rest of procedure is done by the national asylum authority. Even if there is suspicion of filing the application for the purpose of delaying the return, procedure remains the same. 2. If there are grounds to believe that the application has been filed for the purpose of delaying return or other form of procedural abuse, the applicant may be issued restriction of movement within the asylum institution for the time of asylum procedure. In case of negative decision the applicant is handed over to the Police, which conduct the return procedure. 3. The prolongation is done by the same, namely the competent authority.
	<p>Spain</p>	<p>Yes</p>	<ol style="list-style-type: none"> 1. Detention is continued while the asylum application is examined through the accelerated border procedure (aprox. 8 days). Afterwards, if the application is considered admissible, the applicant is released. 2. The judge’s detention decision is still valid, notwithstanding the need to inform about the asylum application. 3. The maximum detention period in Spain is 60 days. Thus, no extension is possible.

	Sweden	Yes	<p>1. In the given example there could be grounds for detention. However; according to the Swedish Alien's Act, chapter 10, section 1, a detention in this case requires that it has to be probable that a removal order will be issued and that there is a risk that the person will abscond, go into hiding, engages in criminal activities or that he/she in other ways tries to hamper the removal order to be carried out.</p> <p>2. Yes, there is always a written detention order issued, either by the Swedish Migration Agency or by the Swedish Police.</p> <p>3. It differs between the Swedish Migration Agency and the Swedish Police. The Swedish Migration Agency will only take a note that the detention order will remain and why, while the Swedish Police will issue a new detention order to prolong it.</p>
	Switzerland	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	United Kingdom	Yes	<p>1. Where an individual submits a claim for asylum whilst they are already in detention, their continued detention will be reviewed in line with Home Office detention policy. As with all detention decisions, factors arguing both for, and against, the person's continued detention must be taken into consideration. Depending on the circumstances of their individual case, the person's detention may, or may not, continue.</p> <p>2. At the point of their initial detention all detainees in the UK are served with written reasons for their detention. If any of those reasons for detention subsequently change whilst the person remains in detention (for example, as result of having submitted a claim for asylum) a new detention notice will be prepared and served. The Home Office is responsible for immigration detention decisions in the UK.</p> <p>3. The UK is not a party to the EU Returns Directive. All detained persons in the UK have their continued detention reviewed by the Home Office at least at monthly intervals to ensure that it remains lawful and in line with published Home Office detention policy. Such reviews must be authorised by Home Office officials of progressively higher levels of seniority the longer that someone has remained detained. Detention is also reviewed on an ad hoc basis where there is a change in the person's circumstances relevant to the decision to detain. In addition to these reviews of detention individuals may apply for release from detention on immigration bail. A duty to arrange automatic consideration of bail before the First-tier Tribunal at four months from the point of detention, or the last Tribunal consideration of bail, and every four months thereafter has also been included in the provisions of the Immigration Act 2016. These automatic bail referrals will</p>

			<p>ensure that individuals who do not make a bail application themselves, for whatever reason, will have independent judicial oversight of their ongoing detention. Individuals are may also challenge the lawfulness of their continued detention in the courts by means of Judicial Review or through a writ of Habeas Corpus.</p>
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