

CM2501

MEIJERS COMMITTEE'S SPECIFIC CONSIDERATIONS CONCERNING THE PROVISIONS ON DETENTION AND ACCESS TO JUDICIAL REMEDIES IN THE RETURN DIRECTIVE IN ADDITION TO OUR EARLIER COMMENT CM2409

February 2025

In addition to our comment CM2409 addressing the preparation of the recast Return Directive 2008/115/EC, the Meijers Committee submits some specific considerations related to detention and access to judicial remedies. We reiterate the need for harmonized procedural guarantees in the recast, particularly regarding the purpose, justification and duration of detention, as well as the right to judicial review in this context. We emphasize the necessity of maintaining the protection of the right to liberty in line with the Article 5 of the ECHR, Article 6 of the CFR, and related case law. Maintaining the existing framework of Article 15 of the Return Directive 2008/115/EC ensures continuity and avoids costly legal procedures that could hinder the effective return of third-country nationals.

 **Meijers
Committee**

CM2501 Meijers Committee's specific considerations concerning the provisions on detention and access to judicial remedies in the Return Directive in addition to our earlier comment CM 2409¹

In addition to our comment addressing the preparation of the recast Return Directive 2008/115/EC, the Meijers Committee submits some specific considerations related to detention and access to judicial remedies. In our comment of December 2024, we already emphasized the need for the harmonization of procedural guarantees.² This need for harmonization of rules also concerns the right of regular judicial review of the (continuing) necessity of detention and standards for the conditions of detention. Below we provide further specifications of such necessary safeguards based on the right to liberty as protected in Article 5 European Convention on Human Rights (ECHR) and 6 of the Charter for Fundamental Rights (CFR). Generally, the Meijers Committee recommends maintaining the text of the current Article 15 of the Return Directive to ensure the protection of the right to liberty of persons, also in accordance with the definition of necessary safeguards by the European Court of Human Rights (ECtHR) and the interpretation by the Court of Justice EU (CJEU) of the right to liberty within the context of the current Return Directive.³ This would create continuity and certainty, as national authorities work reasonably well with the current text and case-law of the CJEU. Amendment would lead to more (expensive) procedures, which would hamper the effective return of illegally staying third-country nationals and as such the principle of effectiveness (*effet utile*) of EU law.

1 Purpose and justification of detention

The Meijers Committee emphasizes that Article 5 ECHR and Article 6 CFR require national authorities to always consider whether removal is a realistic prospect and assess whether detention with a view to removal is from the outset, or continues to be, justified.⁴ This means that within the context of return procedures, any deprivation of liberty will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not pursued with due diligence, the detention will cease to be permissible.⁵ Similarly, detention ceases to be lawful when, for example, it appears unlikely that the person concerned will be admitted to a third country.⁶ In that case, the reasonable prospect of removal no (longer) exists. Thus, as is also provided in Article 15 (4) of the Return Directive, even where the applicable law includes longer detention periods, as soon as the material justification of detention ceases to exist, the detention should be considered unlawful and the third-country national must be released immediately.

A related and important criterion that follows from Article 5 ECHR and the ECtHR's case-law is that, to avoid being considered as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith. This means that the measure of detention must be closely connected to the ground of detention relied on by the authorities; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.⁷

¹ [CM2409 Meijers Committee comment on the recast of the EU Return Directive.](#)

² The need for harmonization can be explained by the fragmentation of return systems and the wish to establish mutual recognition of return decisions, see e.g., COM(2023)45 final; COM(2024)589 final 2024/0326 (NLE).

³ See in the annex on page 4 the current text of 15 Return Directive. As expressly laid down in art. 1 of the current Return Directive 2008/115/EC, the directive sets out 'common standards (...) in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations'.

⁴ ECtHR *Al Husin v. Bosnia and Herzegovina* (no. 2), 2019, § 98.

⁵ ECtHR *Khlaifia and Others v. Italy* [GC], 2016, § 90.

⁶ CJEU *Kadzoev*, C-357/09 PPU, 2009, pt 66.

⁷ ECtHR *A. and Others v. the United Kingdom*, 2009, § 164.

With regard to the detention of children, more stringent criteria apply.⁸ This means for example that the deprivation of liberty must be necessary to fulfil the aim pursued, namely to secure the family's removal and the national authorities must have actually verified that no other measure involving a lesser restriction of their freedom could be put in place.⁹

When a realistic prospect of removal exists, authorities should assess alternative measures and resort to detention only if such alternatives are considered as not adequate to achieve the result pursued. In other words, detention is an exceptional measure of last resort, a principle reaffirmed by the CJEU.¹⁰ Indeed, removal should be carried out using a gradation of measures which ranges from the measures in which the person concerned enjoys much liberty, such as granting a period for his voluntary departure, to measures restricting liberty the most, such as detention in a specialized facility.¹¹ The principle of *ultimum remedium* is to be observed in all stages of the detention process.

We recommend maintaining all these principles – currently safeguarded in the Return Directive 2008/115/EC and underlined in European case law related to Article 5 ECHR and Article 6 CFR – in the recast legislation.

2 Purpose and duration of detention

Article 5 § 1(f) ECHR does not require States to establish a maximum period of detention pending deportation or automatic judicial review of immigration detention. The case-law demonstrates that compliance with time-limits under domestic law or the existence of automatic judicial review will not in themselves guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) ECHR.¹² However, as underlined by the ECtHR where fixed time-limits exist, a failure to comply with them can be relevant to the question of lawfulness of the detention: as detention exceeding the period permitted by domestic law is unlikely to be considered to be 'in accordance with the law'.¹³ In Article 15 (5) it is provided that Member States must set a limited period of detention which may not exceed six months. Only in the case of lack of cooperation by the third-country national or delays in obtaining the necessary documentation from third countries this period may be extended by another 12 months.

Generally, the Meijers Committee finds this maximum period of detention extensively long in view of the protection of the right to liberty of the person at stake, however we also emphasize that this power to extend the detention period may only be used where it is proven that the national authorities can prove to have used all their reasonable efforts. The general principle is that detention is a measure of last resort, applied after a careful and individual examination of each case. Therefore, as is constantly underlined by the ECtHR, for the decision whether detention is or continues to be justified, it must be considered whether there is a realistic prospect of return, independent of the existence of fixed time limits.¹⁴ This principle is also incorporated in Article 15 (4) of the Return Directive. As mentioned above, on the basis of the Return Directive, detention is only justified in preparation of the return procedure and only if there is a risk of absconding or if the person avoids or hampers the preparation of return

⁸ And more generally, vulnerable people. National authorities cannot automatically detain asylum seekers without prior individual assessment of their particular needs. ECtHR *Thimothawes v Belgium*, 2017, § 73; ECtHR *Mahamed Jama v Malta*, 2015, § 146. See also Art. 21 of Directive 2013/33 EU (Recast Reception Conditions Directive).

⁹ ECtHR *A.B. and Others v. France*, 2016, §§ 120 and 123.

¹⁰ CJEU *El Dridi*, C-61/11 PPU, 2011, pts 29-62; CJEU *Mahdi*, C-146/14 PPU, 2014, pt 61.

¹¹ CJEU *El Dridi*, C-61/11 PPU, 2011, pt 41

¹² ECtHR *J.N. v. the United Kingdom*, 2016, §§ 83-96.

¹³ ECtHR *Komissarov v. the Czech Republic*, 2022, §§ 50-52

¹⁴ ECtHR *Al Husin v. Bosnia and Herzegovina*, 2019, § 98.

or removal process. This means that as soon there is no (or no longer a) justification for the detention, the person should be released immediately, independent of applicable maximum time limits for detention.¹⁵ Furthermore, any reason for extending the detention period must be directly connected with the objective of detention within the framework of the Return Directive, which is preparation of the removal.¹⁶

3 Right to judicial review – speediness requirement

The right to judicial review of measures of deprivation of liberty is one of the core values of the Rule of Law. This obligation to ensure speedy judicial review is included in Articles 5(4) ECHR, 6 and 47 CFR and Articles 15 (2) and (3) of the current Return Directive.

In accordance with case-law by CJEU (*Mahdi*), national courts must be able to examine of each extension of detention, even if not requested explicitly by one of the parties: whether there is still preparation of return; the possibility of alternative, less coercive measures; the actual risk of absconding or obstruction of return. For this purpose a court be able to make an in-depth examination of all facts of the case on the basis of facts and evidence submitted before and pending the procedure.¹⁷

Furthermore, the CJEU has held that EU law on detention (including Return Directive, Reception Directive and Dublin Regulation) read together with Articles 6 and 47 CFR, demand that judicial authority examines whether legal requirements are fulfilled also when they are not submitted by the parties: including extension of detention.¹⁸

Concerning the speediness requirement: Article 5 ECHR, nor 6 CFR provide specific time limits, however, since the liberty of the individual is at stake, the ECtHR has emphasized that governments must ensure that the proceedings are conducted as quickly as possible.¹⁹ Therefore, the application of the criterion ‘speediness’ must be considered within the circumstances of the case, whether the first order of detention was issued by a court itself, or whether the measure of detention affects vulnerable persons, including children.²⁰

The Meijers Committee emphasizes that where an individual’s personal liberty is at stake, the ECtHR applies very strict standards concerning the State’s compliance with the requirement of speedy review of the lawfulness of detention.²¹ These standards must be observed in the recast-Return Directive.

¹⁵ CJEU *Kadzoev*, C-357/09 PPU, 2009, pt 71.

¹⁶ See CJEU in *Kadzoev*, pt 57: in which it made clear that considering the objective of detention (which is removal), the maximum detention periods in Articles 15(5) and (6) of Directive 2008/115 cannot be considered as suspended because of a judicial review procedure brought against the return decision. Therefore the period where a person is continued to be held in a detention facility during such procedure must be taken into account when calculating the period of detention for the purpose of removal.

¹⁷ CJEU *Mahdi* C-146/14 PPU, 2014, pts 56-62.

¹⁸ CJEU *C. B. X tegen Staatssecretaris J&V* C-704/20 and C-39/21, 2022, pts 84-94.

¹⁹ ECtHR *Khlaifia and Others v. Italy* [GC], 2016, § 131.

²⁰ ECtHR *Shcherbina v. Russia*, 2014, §§ 65-70; ECtHR *G.B. and Others v. Turkey*, 2019, §§ 167 and 186.

²¹ See, for example, ECtHR *Kadem v. Malta*, 2003, §§ 44-45, where the ECtHR considered a time-period of seventeen days in deciding on the lawfulness of the applicant’s detention to be excessive, and ECtHR *Mamedova v. Russia*, 2006, § 96, where the length of appeal proceedings lasting, inter alia, twenty-six days, was found to be in breach of the “speediness” requirement.

Annex: text of the current Article 15 of Directive 2008/115:

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'