

European  
Commission

OPEN Summary of EMN Ad-Hoc Query No 37.

AHQ on Detention of third country nationals under the Returns Directive, the Reception Conditions Directive and the Dublin Regulation

Launched by EMN NCP Netherlands

*The European Migration Network (EMN) is co-ordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway.*



## KEY POINTS TO NOTE

The Dutch court has referred a preliminary question to the European Court of Justice (ECJ) concerning the application of the grounds for detention set out in the Reception Conditions Directive, the Return Directive, and the Dublin Regulation. The Netherlands has therefore launched an ad-hoc query on the application of the above-mentioned legislation.

- ★ The majority of the Member States have implemented the detention grounds set out in Article 8 of the Reception Directive, Article 15 of the Return Directive, and Article 28 of the Dublin Regulation as three separate legal grounds for detention.
- ★ **HU, RS, ES**, did not implement the three grounds for detention as separate grounds for detention.
- ★ It is possible that the legal ground for detention changes. E.g. a person in an irregular situation is detained and in order to avoid deportation he or she applies for asylum. In **BE, BG, CY, CZ, EE, DE, HU, HR, IT, LV, LT, LU, MT, NL, PL, PT, RS, SK, SI, ES**, a new detention decision has to be issued if the legal ground changes.
- ★ If a new detention decision is issued, it is possible to continue detention in Member States **AT, BE, CY, CZ, FI, HR, IT, LU, MT, NL, RS, SE**.
- ★ There is a possibility that a procedural irregularity may have occurred when the first decision to detain was taken. In **AT, BE, CY, CZ, FI, HR, LU, MT, NL, RS, SK, SE**, such a procedural irregularity does not affect the second detention decision.
- ★ In **IT**, a procedural irregularity in the first detention decision affects the second decision.
- ★ In **BG, EE, FR, DE, HU, LV, LT, PT, SK, SI**, the detention cannot be continued on the basis of a new detention ground. Therefore, the question whether a procedural irregularity in the first detention decision affects the second detention decision is not relevant.

## BACKGROUND INFORMATION

The Netherlands has implemented the Reception Directive, the Return Directive, and the Dublin Regulation. These Directives and the Regulation provide for three grounds for detention. According to Article 8 of the Reception Conditions Directive, an applicant for international protection can only be detained under the conditions set out in this Article. Article 15 of the Return Directive provides for a ground for detention in cases of return procedures. Article 28 of the Dublin Regulation provides for detention for transfer purposes.

The Netherlands has referred a preliminary question to the ECJ concerning these grounds for detention. The Dutch court did so following a case in which the first extension of the detention under Article 28 of the Dublin Regulation had taken too long. After this first detention, a new legal basis for a second detention arose due to a rejected take charge request. As a result, the Secretary of State issued a new detention decision on the basis of Article 15 of the Return Directive. The question has been raised whether the procedural irregularity in the first detention decision affects the second detention decision. The preliminary question referred by the Netherlands is whether there is an obligation of immediate release if the detention was unlawful at any time during the detention measure.

## MAIN FINDINGS

1. *Are the three detention measures, (detention based on article 8 of the Reception Conditions Directive, detention based on article 15 of the Return Directive and detention based on article 28 of the Dublin Regulation) implemented as three separate grounds for detention in national law?*

Twenty Member States have implemented the three detention grounds as three separate detention grounds. The Netherlands has also introduced three separate grounds for detention; detention for the purpose of removal, detention pending the asylum procedure, and detention for the purpose of effectuating an application under the Dublin Regulation.

**HU, RS, ES**, did not implement the three detention grounds as separate detention grounds.

- ★ **Hu** has two detention measures in place. The first is asylum detention, which is used during the asylum procedure and is also applied for Dublin cases. The second is the Aliens policing detention, which is used for return-based detention.
- ★ **RS** does not apply the Dublin Regulation as it is not a member of the EU.
- ★ **ES** only implemented the grounds for detention as set out in the Return Directive.

2. *Does your national law require you to issue a new detention decision when the legal basis for the detention changes?*

In the majority of the Member States, a new detention order must be issued if the legal basis for the detention ground changes. In the Netherlands, when the legal status of the applicant changes, there is an obligation to terminate the first detention decision and issue a new detention order based on the appropriate ground for detention.

There is no need for a new detention decision in **AT, FI, FR and ES** in specific cases.

- ★ **ES** has only implemented the grounds for detention as set out in the Return Directive. When the detention ground changes, in case a detainee applies for asylum, the applicant remains in detention while an accelerated admissibility procedure of eight days is applied. If the asylum application is admitted, the detention ends.
- ★ In **AT**, there is no need for a new detention decision if it can be assumed that a person made the application to delay the enforcement of an expulsion measure. The presumption of deliberate delay by the applicant is subject to conditions. The fulfilment of these conditions must be recorded in a file. Furthermore, in Dublin cases i.e. if the asylum application is made from an existing Dublin detention pending removal, there is no need to resort to the abovementioned procedure. The detention can continue. In other cases, where there is a change from Dublin to non-Dublin or from non-Dublin to Dublin, a new decision on detention has to be issued.
- ★ In **FI**, there is no need to issue a new detention decision. The new basis for detention is evaluated and considered when a decision is made to continue detention.
- ★ In **FR**, it can be decided that the asylum application is made for the sole purpose to prevent the enforcement of the removal decision. In this case, the asylum application is examined under the accelerated procedure. If the application is inadmissible/ rejected, the applicant remains in detention and is automatically returned to the return detention regime.

3. *It is possible in your Member State that detention based on one legal basis (e.g., asylum procedure) be continued by a detention based on a different legal basis?*

- ★ In the Member States **AT, BE, CY, CZ, FI, HR, IT, LU, MT, NL, SE**, the detention may continue when the legal basis for detention changes.
- ★ **RS** also indicated that it is possible to continue detention if the legal basis for detention changes. In practice, however, such cases do not occur due to the maximum length of stay in detention centres, and the deadline and usual timeline within the appeal and lawsuit proceedings. The maximum length of stay in detention centres is three months with the possibility of an extension of an additional three months
- ★ In **PL**, it is only possible to continue detention if the legal basis changes in the situation where the applicant has been placed in the return procedure and has applied for international protection while being detained in the detention centre.
- ★ In **BG, EE, FR, DE, HU, LV, LT, PT, SK and SI**, the detention cannot be continued when the legal basis changes.

- ★ In **LV**, the applicant must be released when the legal basis for detention changes. However, the person may be detained a second time under another relevant law.

4. *Does a procedural irregularity that affects the first detention decision would affect the second detention decision?*

A procedural irregularity may occur in the first decision to detain. If there is a new legal basis for a second detention decision and the detention continues, the question may arise whether the procedural irregularity in the first detention decision affects the second detention decision. This question is only relevant for those Member States that allow the continuation of detention.

- ★ A procedural irregularity in the first detention decision does not affect the second detention decision in **CY, CZ, FI, HR, LU, MT, NL, SK, SE**.
- ★ In **IT**, A procedural irregularity does affect the second detention.
- ★ In **AT**, a procedural irregularity in the first detention decision can be remedied by a new detention decision.
- ★ In **BE**, a procedural irregularity in the first detention decision does not affect the second detention decision. However, the applicant must be compensated.

**EMN NCPs PARTICIPATING** Responses from Austria (AT), Belgium (BE), Bulgaria (BG), Cyprus (CY), Croatia (HR), Czech Republic (CZ), Estonia (EE), Spain (ES), Finland (FI), France (FR), Germany (DE), Hungary (HU), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), Malta (MT), Netherlands (NL), Poland (PL), Portugal (PT), Serbia (RS), Slovakia (SK), Slovenia (SI), Sweden (SE), 24 in total.

**DISCLAIMER** The responses of the Member States regarding this ad-hoc query have been provided primarily for the purpose of information exchange among the EMN National Contact Points (NCPs) in the framework of the EMN. The contributing EMN NCPs have provided information that is to the best of their knowledge up-to-date, objective and reliable. However, the information provided in the present summary is produced under the exclusive responsibility of EMN Belgium and does not necessarily represent the official policy of an EMN NCPs' Member State. The responses are interpreted by EMN Belgium to write this summary.