



European Migration Network

Ad-Hoc Query on procedures of control of administrative detention

Requested by FR EMN NCP on 15th December 2009

Compilation produced on 18th January 2010

Responses from [Austria](#), [Belgium](#), [Estonia](#), [Finland](#), [France](#), [Germany](#), [Latvia](#), [Lithuania](#), [Netherlands](#), [Portugal](#), [Slovak Republic](#), [Slovenia](#), [United Kingdom](#) (13 in Total)

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1. Background Information

The legal section of the French Ministry of Immigration, Integration, National identity and Co Development would like to know about the respective roles of the administrative and judicial authorities in detention of illegal foreigners in your State. More specifically, what control is brought about by the courts on administrative detention?

It would be very much appreciated if we could receive our answers **by 30th December**.



2. Responses¹

		Wider Dissemination?²	Q1. What judge is in charge of the control of administrative detention of illegal foreigners? Is he an administrative or a judicial judge? Do
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¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

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			<p>you make this distinction? Is the detention judge different from the judge in charge of deportation measures (formally, functionally, and organically)?</p> <p>Q2. Does the judge authorize a detention placing measure or does he supervise a detention placing that was decided by the administration?</p> <p>Q3. In that case, (if the judge supervises a detention placing that was decided by the administration) does he supervise detainee's conditions or procedure phases prior to detention in order to draw a conclusion on detention itself?</p> <p>Q4. If the need arises, what role does the public prosecutor play?</p>
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Belgium	Yes	<p>Q1. What judge is in charge of the control of administrative detention of illegal foreigners? Chambers (Chambre du Conseil) of the Criminal Court and Indictment Division (appeal) Is he an administrative or a judicial judge? Judicial judge Do you make this distinction? Yes Is the detention judge different from the judge in charge of deportation measures (formally, functionally, and organically)?</p> <p>Yes. Chambers of the Criminal Court examine whether the administrative detention measures are in accordance with the law, but does not have the competence to judge the appropriateness/opportunity of the detention measure. The ALC (Aliens Litigation Council; Conseil du contentieux des étrangers) examines the appropriateness of expulsion/deportation measures.</p> <p>Q2. Does the judge authorize a detention placing measure or does he supervise a detention placing that was decided by the administration? He supervises a detention placing that was decided by the administration. The alien, against whom a detention measure is taken, can appeal by filing an appeal to the Chambers (Chambre du Conseil) of the Criminal Court. The Chambers must decide within 5 working days after the appeal was lodged and after both parties (the alien or his lawyer on the one hand, the Minister, his deputy or lawyer on the other hand) and the public prosecutor (for advice) have been heard.</p> <p>Q3. In that case, (if the judge supervises a detention placing that was decided by the administration) does he supervise detainee's conditions or procedure phases prior to detention in order to draw a conclusion on detention itself? No. The Chambers of the Criminal Court examine whether the administrative detention measures are in accordance with the law, but do not have the competence to judge the appropriateness.</p> <p>Q4. If the need arises, what role does the public prosecutor play?</p>

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the [Compilation for Wider Dissemination](#) the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

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			The public prosecutor gives an advice or can lodge appeal against decisions of the Chamber.
	Bulgaria	Yes	
	Cyprus	Yes	
	Czech Republic	Yes	
	Denmark	Yes	
	Estonia	Yes	<p>Q1. According to the Obligation to Leave and Prohibition on Entry Act the judgments concerning the detention of persons to be expelled and extension of the term of detention is made by an administrative court pursuant to the procedure provided of the Code of Administrative Court Procedure. Placement in an expulsion centre and extension of the term of detention in the expulsion centre will be decided in a court session.</p> <p>Q2. The administrative court supervise all the detention and expulsion procedures: for example if the admitting country refuses to admit a person to be expelled or if other circumstances impeding the completion of expulsion become evident during the transportation to a border crossing point of the person to be expelled or at the border checkpoint, the person to be expelled will be detained by way of administrative procedure until the completion of his expulsion or until he's placed in an Expulsion Centre, but the person to be expelled can not be detained for longer than forty-eight hours. If expulsion cannot be carried out during the mentioned time the person to be expelled is accommodated until expulsion at the Expulsion Centre with the permission of an administrative judge but not longer than for two months. If during the term for detention the expulsion cannot be carried out at the Expulsion Centre, an administrative court shall extend the term for detention at the Expulsion Centre of the person to be expelled by up to two months until the carrying out of the expulsion or release of the alien.</p> <p>Q3.-4. The right to appeal against a judgment of an administrative court to a circuit court pursuant to appellate procedure if the administrative court has applied a provision of substantive law incorrectly, evaluated evidence incorrectly or materially violated a provision of court procedure. An appeal against a judgment of an administrative court on extradition of a person to a foreign state shall be filed with a circuit court within three days after the court judgment is pronounced or made public. The administrative judge does not supervise detainee's conditions.</p> <p>In Estonia, the public prosecutor does not play any role in this field.</p>
	Finland	Yes	<p>Q1. What judge is in charge of the control of administrative detention of illegal foreigners? Is he an administrative or a judicial judge? Do you make this distinction? Is the detention judge different from the judge in charge of deportation measures (formally, functionally, and organically)?</p> <p>Detention cases have to be taken to a District Court hearing every two weeks. First hearing will be held within four days after detaining the person. The District Court decides whether the person in detention should be released or kept in detention. The estimated duration for detention is 22.5 days. In Finland there is no legislation on the maximum duration for detention. Decisions on deportation are handled by Helsinki Administrative Court. The judicial system in Finland is divided between district and administrative courts. The district courts deal with criminal and civil cases. The decision of a district court can normally be appealed in a court of appeal. The decisions of the</p>


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		<p>courts of appeal, then, can be appealed in the Supreme Court, provided that the Supreme Court grants leave to appeal.</p> <p>The administrative courts review the decisions of the authorities. The decisions of the administrative courts can be appealed in the Supreme Administrative Court.</p> <p>Q2. Does the judge authorize a detention placing measure or does he supervise a detention placing that was decided by the administration? If the identity of an alien or his/her travel route is unclear, the police may detain the asylum seeker upon arrival in Finland. Also asylum seekers who have received negative decisions can be detained before deportation. It is then the police or the Finnish Border Guard which decides upon the detention.</p> <p>Q3. In that case, (if the judge supervises a detention placing that was decided by the administration) does he supervise detainee's conditions or procedure phases prior to detention in order to draw a conclusion on detention itself? Yes, the district court decides, whether the person should be released or kept on detention.</p> <p>Q4. If the need arises, what role does the public prosecutor play? The public prosecutor does not influence on the proceedings with detention. Prosecutors' role in judicial process: the investigation and clearing up of a crime — pre-trial investigations — is a task for the police. Once an investigation is completed, the material compiled therein is sent to the prosecutor, <u>who evaluates the charges in the matter</u>. This means that the prosecutor evaluates, for each suspected person and each alleged act, whether a criminal offence has been committed and whether there is sufficient evidence for a prosecution to be warranted.</p> <p>Legislation of relevance: Aliens Act Section 121: an alien may be ordered to be held in detention if: 1) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that the alien will prevent or considerably hinder the issue of a decision concerning him or her or the enforcement of a decision on removing him or her from the country by hiding or in some other way; 2) holding an alien in detention is necessary for establishing his or her identity; or 3) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland. (2) Holding an alien in detention on grounds that his or her identity is unclear requires that the alien gave unreliable information when the matter was processed or refused to give the required information, or that it otherwise appears that his or her identity cannot be considered established.</p> <p>Section 123 (581/2005)</p>
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		<p><i>Deciding on holding an alien in detention and placing a detained alien</i></p> <p>(1) A decision on holding an alien in detention, when taken by the Police, is made by a Commanding Officer at the District Police, the National Bureau of Investigation, the Security Police or the National Traffic Police, and when taken by the Border Guard, by an official of the Border Guard entitled to arrest people or a Border Guard officer holding the rank of major at least, and the head of the Border Guard District or Coast Guard District or the head of the Border Check Unit. The detained alien or his or her legal representative must be informed of the grounds for detention.</p> <p>(2) A detained alien must, as soon as possible, be placed in a detention unit referred to in the Act on the Treatment of Aliens Placed in Detention and on Detention Units (116/2002).</p> <p>(3) An official referred to in subsection 1 may decide on placing a detained alien exceptionally in police detention facilities if:</p> <p>1) the detention units are temporarily full;</p> <p>or</p> <p>2) the alien is held in detention far from the nearest detention unit, in which case the detention in police detention facilities may last for a maximum of four days.</p> <p>(4) In a situation referred to in subsection 3(2) the alien may exceptionally be placed in Border Guard detention facilities instead of police detention facilities, however, for a maximum of 48 hours.</p> <p>(5) A person under 18 years of age may be placed in police and Border Guard detention facilities only if his or her parent or guardian or other adult member of his or her family is also held in detention in police or border guard detention facilities.</p> <p>(6) The provisions of the Act on the Treatment of Persons in Police Detention (841/2006) apply to aliens placed in police or border guard detention facilities, taking account of the grounds for detaining a person. The provisions on appeal in Chapter 5 of the Act on the Treatment of Aliens Placed in Detention and on Detention Units apply, however, to the alien's right of appeal.</p> <p>Section 124</p> <p><i>Notifying of detention and court proceedings</i></p> <p>(1) The official responsible for a decision on holding an alien in detention or on placing him or her exceptionally in police detention facilities referred to in section 123(3) shall, without delay and no later than the day after the alien was placed in detention, notify the District Court of the municipality where the alien is held in detention or, in an urgent case, another District Court of the matter, as further provided by Ministry of Justice decree. Notification may be made by telephone or electronically. A notification made by telephone shall be submitted without delay to the District Court in writing.</p> <p>(2) The District Court shall hear a matter concerning the detention of an alien or the exceptional placement referred to in section 123(3)(1) without delay and no later than four days from the date when the alien was placed in detention. In the case referred to in section 123(3)(2), the matter shall be heard without delay and no later than 24 hours from the notification.</p> <p>(3) In matters concerning detention, the chairman alone constitutes a quorum of a District Court. A district court hearing may be held at a time and place other than the one laid down in the provisions on district court hearings.</p> <p>(4) The provisions of section 5 of the Act on Calculation of Time Limits (150/1930) do not apply to the determination of time limits referred to in this section.</p>
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			<p>Section 125 <i>District court procedure</i></p> <p>(1) The official or the person delegated by this who is responsible for the decision on holding an alien in detention or on placing him or her exceptionally in police detention facilities referred to in section 123(3) shall be present at the hearing of the matter at a District Court.</p> <p>(2) When the matter is heard by a District Court, the Court shall be presented with a statement on the requirements for detention or the exceptional placement of a detained alien. An alien held in detention shall be brought before the District Court to answer questions concerning the requirements for holding him or her in detention or for his or her exceptional placement.</p> <p>(3) The hearing of the matter may be postponed only for special reasons. The detention will continue until the next hearing of the matter unless otherwise ordered by the District Court.</p> <p>Section 126 <i>Decision of a District Court</i></p> <p>(1) A District Court shall order a detained alien to be released immediately if there are no grounds for holding him or her in detention. The decision shall state the grounds for detention or transfer. The decision shall be pronounced immediately after the hearing.</p> <p>(2) If the District Court orders that the detention of the alien be continued, the alien shall be ordered to be sent to detention facilities referred to in section 123(2) or</p> <p>(3).If the grounds for holding the alien in pretrial detention facilities no longer exist, the District Court shall order that the alien be returned to the detention facilities for aliens.</p> <p>(3) If the decision on detention or transfer is made by a District Court other than the District Court of the place of detention, the District Court shall immediately notify the District Court of the place of detention of its decision.</p> <p>Section 127 <i>Releasing detained aliens</i></p> <p>(1) The authorities handling the matter shall order a detained alien to be released immediately once the requirements for detention cease to exist.</p> <p>(2) If the District Court has decided that the detention of the alien be continued, the authorities shall immediately notify the District Court of the place of detention of the alien's release. The notification may be made by telephone or electronically. A notification made by telephone shall be submitted without delay to the District Court in writing.</p>
	<p>France</p>	<p>Yes</p>	<p>Q1. In France, there are two court orders concerning these issues:</p> <ul style="list-style-type: none"> - An administrative judge who makes judgements on deportation measures. - A judicial judge who is in charge of detention (“rétention” in French). <p>Q2. Initially, the prefectural authority who is in charge of the execution of deportation measures decides if a foreigner has to be placed in detention.</p> <p>After a delay of 48 hours, the period of detention can only be extended by the judicial judge for a maximum duration of 15 days. An additional extension of 5 or 15 days can be given according to circumstances, based on a judicial decision, which leads to a total duration of the period of detention of maximum 32 days (Entry and Residence in France and Right of Asylum Code, articles. L. 551-1 to L. 555-3).</p>






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			<p>Q3. The judicial judge has a constitutional role of guardian of freedom. According to Article 66 of the 1958 Constitution, the judicial judge is given the charge of guardian of individual freedom. Formally, he must authorize or reject the extension of a measure that deprives someone of his/her freedom. The judge must make sure the foreigner is well-informed on his/her rights concerning the decision of detention placing. To sum up, the judge must make a judgement on surveillance and control measures but also make sure of the regularity of the procedure prior to the entitlement of jurisdiction so that no one can oppose to the administrative nature of the acts contested by the foreigner if these acts affect individual freedom.</p> <p>Q4. In France, the public prosecutor does not play any role in this field since the judicial judge is in charge of making a judgement on administrative detention.</p>
	Germany	Yes	<p>Q1. In the German legal system, the function of a judge only exists as an organ of the judicial power carrying out the legal review of challenged administrative decisions. In the executive power (administration), there is no such function of a judge. The decision to order detention for the purpose of deportation is taken by a judge of the local court, i.e. it falls in the jurisdiction of the ordinary court system which is responsible for all civil and penal cases. The decision on the injunction and enforcement of deportation by the administrative authorities is taken by a judge of the administrative court which is responsible for public cases of non-constitutional character.</p> <p>Q2. The detention prior to deportation is taken by a judge; it is the responsibility of the administrative authority to apply to a local court for a detention order. The administrative authority responsible for the application may place the foreigner in temporary custody without the prior order of a judge if there is a strong suspicion that the foreigner may intend to evade deportation and the judicial decision on the order cannot be obtained beforehand. In case of temporary custody, the foreigner must be immediately brought before a judge who decides on the detention (Section 62(4) of the German Residence Act).</p> <p>Q3. The judge is also responsible for the extension of the detention order up to the maximum permissible period, as well as for determining that detention is not permissible if it is established that it will not be possible to carry out deportation within the next three months for reasons beyond the foreigner's control (Section 62(2) and (3), Residence Act).</p> <p>Q4. The prosecutor has no competence in the procedure before the local court regarding an order of detention prior to deportation. The interest of the public is represented by the administrative authority which lodges the application for a detention order.</p>
	Greece	Yes	
	Hungary	Yes	
	Ireland	Yes	
	Italy	Yes	






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	Latvia	Yes	<p>Q1., Q2., Q3. In Latvia the administrative judge is in charge of the control of administrative detention of illegal foreigners (and in charge of deportation measures, too). The judicial judge involves in process in two cases: 1) when the foreigner appeals the decision of detention for a period not exceeding 10 days; 2) when there is a necessity to detain the foreigner for period more than 10 days. The judicial judge revises if the decision made by the administrative judge is legitimate.</p> <p>Q4. The public prosecutor does not play any role, because he is not responsible of administrative procedures. (In Latvia the public prosecutor takes part in the criminal and civil cases).</p>
	Lithuania	Yes	<p>Q1. Illegal aliens who have no proof of identity can be arrested for a period up to 48 hours until their identity is determined; this decision is made by the chief of local police station. If by that time his/her identity is not determined an alien is detained at the Foreigners' registration centre by a decision of a local district court judge. When alien's country of origin provides with a return document, which proves that this country is accepting the alien, he/she is then expelled from the Centre to his country of origin. The decision of expulsion is being taken by the Migration Department under the Ministry of the Interior.</p> <p>Q2. The judge sets a term for the alien's detention at the Foreigners registration centre or sets a remedy, alternative to detention e.g. to periodically register at the local police station.</p> <p>Q3. -</p> <p>Q4. Public prosecutor is not involved in the procedure of aliens' detention.</p>
	Luxembourg	Yes	
	Malta	Yes	
	Netherlands	Yes	<p>Q1: In the Netherlands only one (type of) judge is involved in judging the legality of the continuation of the detention. He is an administrative judge. He makes a judgement of the perspectives on deportation and the measures taken. Based on that, he judges if the detention is still a legal measure. The detainee is allowed to appeal again and again during the detention.</p> <p>Q2: The detainee can appeal in court against the measure of detention (taken by the authorities). The judge decides if the appeal is founded or not. If so, this decision means that the authorities have to end the measure of detention. If not, continuation of detention is allowed. Unfortunately, the distinction made in question Q2 is not quite clear. In the Netherlands, there is no such thing as a limited duration of the detention.</p> <p>Q3: In the Netherlands it is the job of the authorities to make sure that all necessary measures are taken and that all of the rules (procedures and rights) are lived by. It is up to the judge to decide if this is done properly.</p> <p>Q4: In the Netherlands the Public prosecutor does not have a role in detention of illegal aliens.</p>




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	Poland	Yes	
	Portugal	Yes	<p>Q1. The foreign citizen who illegally enters or stays in national territory is detained and presented (within forty eight-hours at the most) to the judge of primary criminal jurisdiction under his/her jurisdiction or the district courts in other areas of the country, in order to its validation and application of coercion measures. The removal decision based on illegally staying is an administrative one, taken by administrative authorities.</p> <p>Q2. Detention placing measures are authorized by a judicial judge. The detention in a temporary lodging centre cannot exceed more than the necessary period to allow the execution of the removal decision, which is of 60 days.</p> <p>Q3. Not applicable.</p> <p>Q4. Public prosecutor does not play a relevant role in this very point.</p>
	Romania	Yes	
	Slovak Republic	Yes	<p>Q1. Slovak Republic does not distinguish between an administrative and judicial judge (for the reasons of different judicial system as in France).</p> <p>Q2. Not the judicial but administrative bodies decide on the detention and administrative expulsion in the Slovak Republic.</p> <p>Q3. NA</p> <p>Q4. Prosecution in line with the Act on Prosecution (Nb. 153/2001) supervises the application of the law in places where the detained persons are deprived of their personal freedom, or persons whose personal freedom is restricted following the decision of the court or another relevant state institution.</p>
	Slovenia	Yes	<p>Q1: In Slovenia there is not the judge responsibility to control the administrative detention (accommodation) of illegal foreigners. An alien who fails to leave the country by the specified deadline and who for whatever reason can not be removed immediately shall be ordered by the police, by the time of his removal from the country, to stay in the Alien's Centre. The provision shall also be applied in cases where the identity of the alien is not known. An alien's accommodation at the Centre or outside the Centre and accommodation under stricter police supervision shall be ordered by the police with a decision, against which the alien may file an appeal with the Minister responsible for the interior within eight days of the receipt of a written copy of the decision. The Minister shall decide upon an appeal within eight days. An administrative dispute may be initiated against the decision to appeal. The administrative court must decide on an appeal against decision on the accommodation of an alien in the Centre and arrangement of residence under stricter police supervision within eight days and in this case we can talk on judge "involvement or supervision" of specific administrative decision on detention.</p> <p>If for objective reasons it is not possible to deport an alien even after six months have passed, the police may extend accommodation and stay under stricter police supervision at the Centre for a further six months.</p> <p>Q2: No</p> <p>Q3: Supervision on detention is done by the different governmental, non-governmental or international organisations (Human Rights Ombudsman, PIC etc.).</p>

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			<p>Q4: The public prosecutor shall be bound to institute criminal prosecution if there is reasonable suspicion that a criminal offence liable to prosecution ex officio has been committed.</p>
	Spain	Yes	<p>Q1. In accordance with Spanish legislation, the governmental (in other words, administrative in nature) authority responsible for processing files in which removal from Spain (and within this category, only in those cases specifically set forth by law) may be proposed, may request of the magistrate that the foreigner be interned in a non-penitentiary confinement centre.</p> <p>Thus, in Spain, the competent body for authorising internment in a foreigner confinement centre is <u>always</u> a judicial body, namely the examining magistrate by virtue of the territorial jurisdiction where the detention took place.</p> <p>Likewise, the magistrate with competencies in controlling the stay of foreigners in confinement centres is the examining magistrate of the place where these centres are located.</p> <p>Q2. According to the aforementioned, the examining magistrate of the place where the detention takes place has the competencies to authorize the internment of a foreigner in a foreigner confinement centre for as long as necessary and, in any case, for a period not to exceed 60 days.</p> <p>Q3. In accordance with the preceding point, it is unnecessary to answer this question.</p> <p>Q4. In Spain, the Prosecution Service does play an important role in that (along with the foreigner) this body is heard by the examining magistrate prior to deciding (by means of a reasoned order) on the confinement. Thus, the examining magistrate, by virtue of the principle of proportionality, considers the concurrent circumstances and, in particular, the risk of default given the lack of residence or identity documents, the actions of the foreigner for the purpose of impeding or avoiding removal, as well as the existence of prior sentencing or administrative penalties and other pending criminal or disciplinary administrative procedures. Likewise, in the event the foreigner is seriously ill, the magistrate must evaluate the risk confinement may pose to public health or the health of the foreigner.</p> <p>Likewise, when the abovementioned conditions are no longer in effect, the Prosecution Service may request of the magistrate that confinement be terminated and that the foreigner be immediately released.</p>
	Sweden	Yes	
	United Kingdom	Yes	<p>Q1 There is no direct judicial oversight of immigration detention. Where a detainee wishes to challenge this lawfulness of detention it is open to him/her to do so through judicial review and habeas corpus. This satisfies the requirement in ECHR Article 5 (4) that detained persons should be able to bring proceedings before a court to challenge the lawfulness of their detention.</p> <p>I should add that immigration detention has never been subject to judicial authorisation or direct oversight. This is fully in line with ECHR Article 5, which does not require there to be such judicial involvement in immigration detention decisions.</p> <p>Q2. There is no judicial involvement.</p>

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			Q3. As above
			Q4. Not relevant.
