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Detention of Migrants in Belgium and the Criminal Judge: A Lewis Carroll World

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I. Introduction

The *Alice in Wonderland* metaphor of the title reflects the pitfalls of Belgian legislation that entrust criminal judges with the control of the legality of the detention of third-country nationals. This deprivation of liberty takes place at the borders or as pre-removal detention under the Return Directive.[1] This chapter focuses on the latter measure, and it will engage with judicial dialogue, or rather its absence, between judges operating in one jurisdiction, but belonging to different branches. We will see that Belgium's choice of appointing criminal judges to review the legality of the deprivation of liberty leads to a weakening of the effectiveness of this review. This has an impact on the scope of the control and raises a risk of inconsistency in decisions that are taken in the same case by various authorities.

Three main problems must be identified. Firstly, the scope of the control exercised by a criminal judge is restricted; she is only authorised to examine the legality of the decision. This concept includes the facts with a view to assess the respect of human rights if understood largely, but excludes them if legality is interpreted narrowly. Secondly, entrusting a criminal judge with the control of the detention of foreigners, while an administrative judge assesses the legality of decisions relating to residence, leads to contradictions and inconsistencies. These are reinforced by the absence of rules on the prevalence and temporal organisation of the two interventions. No mechanism for institutional dialogue is organised between the two judges, as the criminal judge most often confines himself to referring to the decisions taken by the administrative judge when he has already ruled. Otherwise, it may lead to absurd situations of release while the

[1] See S Sarolea and P D'Huart in collaboration with National Judge B Chapaux, *Completed Questionnaire for the Project Contention National Report – Belgium* (2014) available at http://contention.eu/docs/country-reports/BelgiumFinal.pdf, See also *Revue de droit des étrangers* (RDE) no 191, Numéro special detention (2016).

removal order remains or continued detention while the administrative judge must always decide. Lastly, from a symbolic point of view, entrusting a criminal judge with the task of reviewing decisions taken with regard to migrants sends them back to a condition of guilty or at least suspicious persons. The fact that, at the same hearing, it is necessary to examine both the files of persons suspected of offences and the detention of migrants, even unconsciously, leads to mistrust or even categorical assimilation.

In the case of illegal stay in Belgium, the Immigration Office delivers orders to leave the territory as well as detention orders. The Immigration Office is not an independent administrative authority but works under the authority of the executive power (the Ministry of Immigration). The lawfulness of orders to leave the territory is monitored by an administrative body, the Council of Immigration Disputes. However, the detention orders are monitored by the judiciary: the Council Chambers (first instance), the Indictment Chambers of the Court of Appeal (three judges – second instance) and the Court of Cassation (limited jurisdiction). These courts usually deal with criminal cases, inter alia deciding on preventive detention.

The judge in charge of the preventive detention of ordinary remand prisoners thus also decides on the legality of the detention of third-country nationals in deportation proceedings. He intervenes in parallel with the administrative judge who rules on the legality of the expulsion measure itself. Their competences are complementary but above all concurrent, since no chronology governs their referral; one can decide before, at the same time as, or after the other, and the object and scope of their judicial review is distinct.

In order to highlight the particularities of the Belgian system, this chapter analyses the two controls exercised in the area of return. First, the contribution explains how the Return Directive has been implemented in domestic law (section II). Then, the role of administrative judges in reviewing the return decision is discussed (section III). This is followed by a discussion of the role of criminal judges in reviewing the detention (section IV). On this subject, it is essential to focus on the scope of the review exercised by criminal judges (distinguishing between a review of legality of detention and of its opportunity),[2] and the procedural questions raised by borrowing from the procedure for the review of pre-trial detention. This analysis leads to a

[2] Opportunity (‘*opportunité*) in this sense can also be translated as ‘expediency’ or ‘appropriateness’. In this chapter, opportunity is used to designate the review of detention that goes beyond a narrow legality review.

critical reading of the coherence of the Belgian system and of its ability to ensure an effective remedy. The two faces of the legal framework are neither complementary nor adjusted (section V). The incongruities in the Belgian system come in even sharper relief when immigration detention is compared with pretrial detention of criminal offenders (section VII). The contribution ends with some conclusions highlighting the need for judicial reform. This is all the more urgent seeing that even if EU law – ie the Return Directive – has been formally transposed into domestic law, the main pillars of the Belgian system remain largely unchanged.

II. The Return Directive in Belgian Law and Deprivation of Liberty

In Belgium, the transposition of the Return Directive in 2012 amended several articles of the Aliens Act. Article 1 of the Act incorporated new definitions, such as the concepts of voluntary return, vulnerable persons and flight risk. The Return Directive indirectly expresses a substantive rule by rejecting the option of leaving foreigners in an irregular situation. In doing so, the Directive imposes a choice on states: either regularise the stay or adopt a return decision. Subject to certain limitations, Article 6 of the Return Directive provides that: 'Member States shall issue a return decision to any third country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.' The transposition of this article led the Belgian legislator to replace the word 'may' by the word 'must' in Article 7 of the law of 15 December 1980 when it comes to issuing orders to leave the territory.

To transpose the Directive, a new Title IIIquater titled 'Provisions applicable to the return of third-country nationals illegally residing in the territory' has been inserted in the Aliens Act. These provisions govern the prohibition of entry, expulsion decisions, the method of expulsion, the special rules applicable to unaccompanied foreign minors and the information obligations imposed on the authorities. Legally speaking, Belgian law gives priority to voluntary departure over forced departure and consists, for the foreigner, in complying with the return decision within the time limit set, generally 30 days.[3] The period for voluntary departure may be extended if 'the voluntary return cannot take place within the time limit' or if the foreigner invokes 'circumstances specific to his situation, such as the length of stay, the existence of

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[3] Art 74/14 Aliens Act, in line with Arts 7 and 8 of the Return Directive.

children in school, the finalization of the organization of the voluntary departure and other family and social links'.

The time limit for voluntary departure may also be shortened or waived. Several reasons may lead to a reduction or abolition of this period: failure to comply with one of the preventive measures; a danger to public policy or national security; failure to comply with a previous expulsion decision within the time limit; fraud; the lodging of more than two asylum applications, unless there are new elements in the application; and, in general, the risk of absconding. In addition to voluntary departure in the sense of departure within the prescribed period, Belgian law also mentions the voluntary return of any foreigner who makes use of 'an assisted return program set up by the authorities of the host country', without attaching any special regime to it.

Regarding detention, the Return Directive did not lead to major changes in Belgium law since domestic law already stipulated that the deprivation of liberty could only occur as a last resort and may not be automatic. This principle, then, was not new. However, the principle of subsidiarity and the obligation to consider less coercive measures is more precise in the Directive and thus had an influence on the case-law. Article 15 of the Return Directive only permits detention as a measure of last resort 'in order to prepare for return and/or to carry out removal'. It may be used 'in particular where: (a) there is a risk of flight, or (b) the third-country national concerned avoids or prevents the preparation of the return or removal procedure'. It is important that this deprivation of liberty be as brief as possible and continue only if 'the removal process is ongoing and carried out with all due diligence'. Therefore:

> [W]hen it appears that there is no longer a reasonable prospect of removal for legal or other reasons or that the conditions set out in paragraph 1 are no longer met, detention is no longer justified and the person concerned is immediately released.

Detention cannot be an automatic measure; the decision to use it must comply with the principle of proportionality.[4]

These cumulative conditions are reflected in the provisions of the Aliens Act governing detention. Article 7 LE provides that:

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[4] Case C-357/09 *Kadzoev* ECLI:EU:C:2009:741, para 67; and Case C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268, para 41.

> [T]he Minister or his delegate may, in the cases referred to in Article 74/14, § 3, deport the foreigner to the border. Unless other sufficient, but less coercive measures can be applied effectively, the foreign national may be retained for this purpose.

The Return Directive would be infringed if the authority did not respect the principle of proportionality in enforcing return. Moreover, a decision that does not set out the reasons for the deprivation of liberty in the light of the principle of subsidiarity should be considered insufficiently reasoned.[5] It is the judge's responsibility to ensure that the required gradation is respected. Thus, the mere fact that the stay was illegal following the notification of orders to leave the country and the absence of identity documents, requiring the granting of a travel document by the national authorities, is not sufficient to justify a deprivation of liberty.[6] However, as discussed below, the case-law on this point is ambiguous.

A link could be made with the case-law of the ECtHR concerning Belgium detention cases. Even though the ECtHR does generally not require that immigration detention must necessarily be a measure of last resort, the principle of proportionality has featured prominently in its case-law when ruling on the detention of vulnerable persons. For example, in the case of a Cameroonian woman suffering from HIV, the ECtHR considered the detention arbitrary because Belgium had not considered applying less severe measures:

> The Court observes that the authorities knew the exact identity of the applicant, that she resided at a fixed address known to the authorities, that she had always attended the summonses … and that she had taken several steps … to regularise her situation. It also recalls that the applicant was suffering from HIV, that her state of health had deteriorated during her detention and that, if she had been released, she would have been dependent on emergency medical assistance … . Despite this situation, the authorities did not consider a less severe measure, such as a temporary residence permit, to safeguard the public interest of detention and avoid keeping the applicant in detention for an additional seven weeks.[7]

III. Appeal to the Administrative Judge against the Expulsion Decision

[5] Court of Appeal Bruxelles, acc, 7 March 2012 (2012) *Revue du droit des étrangers* 31.

[6] Court of Appeal Liège, acc, 22 April 2014, C-542.

[7] ECtHR 20 December 2011, *Yoh-Ekale Mwanje v Belgium*, App No 10486/10, para 124; and ECHR 19 January 2012, *Popov v France*, App Nos 9472/07 and 39474/07, para 140.

The Aliens Litigation Council is the administrative court competent to hear appeals lodged against decisions relating to asylum and residence, and decisions ancillary thereto (such as a return decision or an entry ban). It reviews the legality of these measures in the context of an action for annulment for infringement of essential procedural requirements. Where it is not automatically suspensive, the action for annulment may be accompanied by a request for suspension and a request for provisional measures.

The administrative judge exercises a marginal review of legality. He can only annul a decision affected by a defect of legality or a manifest error of assessment. He carries out an *ex tunc* examination, reviewing the legality of the decision as of the date of its adoption. If the review of legality makes it possible to cancel a decision for violation of the relevant legal provisions, defective reasons or manifest errors of assessment, it does not authorise the judge to re-examine the case and substitute his analysis for that of the administration; instead the case is referred back to the administration.

Most disputes about decisions relating to asylum and residence fall under this sole control of legality. However, these limits on the judge's powers raise questions as to the effectiveness of the remedy, specifically the appropriateness of maintaining the distinction between marginal review of legality and full review in matters involving subjective rights. This situation does not accommodate a judge reduced to exercising negative jurisdiction, because to annul is to suppress the 'evil' observed without being able to positively remedy it.[8] Thus, cancellation restores equilibrium, but it does not guarantee the enjoyment of the subjective right in question. In the absence of a mechanism such as the administrative loop that now exists before the Council of State in areas other than migration litigation, the applicant's rights are not recognised by means of an annulment. Migration litigation is thus characterised more by an administrative

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[8] '[D]uplication of proceedings before the Aliens Litigation Council should not be maintained. Any appeal should be fully contentious and in principle suspensive. The prior privilege of the administration must, as regards the residence of aliens, be reversed, since the execution of a refoulement or removal measure necessarily entails serious damage that is difficult to repair if the measure is subsequently revoked. The principle of automatic suspension could be subject to duly justified exceptions in the administrative decision, which may, in this case, lead to an administrative référé.' See JY Carlier, 'Evolution procédurale du statut de l'étranger: constats, défis, propositions' (2011) 130 *Journal des Tribunaux* 117.

carousel mechanism than an administrative loop.[9] This means that in most cases, if the judge rules that an administrative decision infringes the law, the administration has to take a new decision. This returning of files to the administration can occur several times, with consecutive 'positive decisions' by judges.

The judge in charge of the control of the legality of the return decision issued by the administration is competent to assess its compatibility with domestic as well international and European law. The return decision is most often included in a decision refusing or terminating a right of residence. They are thus concomitant. Sometimes, however, the order to leave the territory is notified independently of the decision on the residence status of the third-country national. This is the case in the asylum procedure. The return decision is adopted by the Immigration Office, whereas the decision whether or not to grant protection is taken beforehand by the asylum authorities.

This distinction between the decision on the merits of the application for asylum and the return decision led to a preliminary reference by a Belgian judge to the CJEU in *Gnandi*.[10] During the asylum procedure, the applicant enjoys provisional asylum. This right to stay is not a right of residence. In the event of a negative decision at first instance (by the administrative authority), an order to leave the territory is issued. In the event of an appeal before the administrative judge, even one that has suspensive effect, this order is maintained, but suspended, and the third-country national receives a special residence document.

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[9] On the administrative carousel, see in particular a decision of the Aliens Litigation Council that was denounced by the Council for Aliens Law Litigation (hereafter CCE, Conseil du contentieux des étrangers) (CCE, 30 November 2015, No 157.488). The CCE noted that the administration took a decision 'in identical terms' to those of an earlier annulled decision, thus violating the 'principle of *res judicata*'. Applicants who obtained the annulment of a decision of the Aliens Office following an appeal before the Aliens Litigation Council waited for several months – sometimes more than a year – before the administration complied with the judgment and ruled on their application again. The federal ombudsman has also denounced this limit to the effectivity of the rulings of the CCE, linked to the scope of its control, see Federal Ombudsman, *Régularisation médicale: Le fonctionnement de la section 9ter de l'Office des étrangers* (14 October 2016) available at www.federaleombudsman.be/sites/1070.b.fedimbo.belgium.be/files/regularisation_medicale_9ter_-_2016.pdf).

[10] Case C-181/16 *Gnandi* ECLI:EU:C:2018:465. For detailed discussion, see JB Farcy, 'L'arrêt *Gnandi*: la logique juridique sacrifiée au nom de l'efficacité des procédures de retour ?' [January 2019] *Cahiers EDEM*.

The distinction between a mere right to stay and a right of residence was accentuated in 2013 by an amendment to this document, which no longer states that the person concerned is authorised to stay during the appeal, but instead that 'the person concerned is neither admitted nor authorized to stay but may remain in the territory … pending a decision'. The Council of State rejected an application to annul this amendment, expressly noting that the Asylum Procedures Directive 'does not require States to grant a residence permit abroad on which the right to remain in the territory is conferred'.[11] The CJEU validated this interpretation. In *Gnandi* it ruled that the Return Directive and the Asylum Procedures Directives, in light of the principle of *non-refoulement* and the right to an effective remedy, do not preclude the adoption of a return decision in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings against that rejection. However, all the legal effects of the return decision must be suspended pending the outcome of the appeal. Moreover, the applicant must continue to enjoy the rights guaranteed by the Reception Conditions Directive (RCD).[12] In case of new circumstances, the situation must be reviewed.

The first question to be answered by the Court of Justice was indeed whether the Return Directive was applicable in this case. To this end, it must be examined whether, as soon as the CGRA rejects his application for international protection, the applicant is illegally residing in Belgium. In order for a return decision to be adopted, the addressee must be an illegal resident on the national territory.

According to Article 7(1) of the Procedure Directive, asylum seekers 'shall be allowed to remain' in the territory of the Member State in which they have lodged an application until a decision is adopted at first instance. Article 39(3) of the same Directive gives each Member State the possibility to extend this right by providing that the lodging of an appeal against the decision of the responsible authority in first instance has the effect of allowing applicants for

[11] Council of State, Decision of 8 March 2016, *Gnandi*, no 234.074.

[12] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

asylum to remain in the territory of that state pending the outcome of that appeal. Under Belgian law, Article 39/70 of the Act of 15 December 1980 specifically grants applicants for international protection the right to remain in the territory 'during the period fixed for the lodging of the appeal and during its examination'. On the ground that he had brought a full court action before the CCE, Mr Gnandi was also issued with an Annex 35, in accordance with Article 111 of the Royal Decree of 8 October 1981, authorising him to remain in the territory. Annex 35 constitutes a 'special residence document' by virtue of which the person concerned is neither admitted nor authorised to stay but may remain in the territory of the kingdom pending a decision by the Aliens Litigation Council. This somewhat ambiguous 'status' allows a foreigner to remain in the territory without having a legal right to stay.[13] However, this does not mean that the persons listed in Annex 35 are in illegal residence, as stated by the Council of State,[14] followed by the Court of Cassation.[15] As a result, the foreigner's stay in the territory is neither irregular nor regular.

In the *Gnandi* judgment, the Court of Justice held that such an authorisation to remain does not preclude the conclusion that the foreigner is an illegal resident as soon as his application for international protection is rejected with a decision in first instance.[16] Admittedly, the authorisation to remain in the territory of a Member State for the duration of the asylum procedure 'does not constitute a right to a residence permit', as specified in Article 7(1) of the Procedure Directive. However, in the previous *Arslan* judgment,[17] the Court of Justice had held that, in such a case, the asylum seeker authorised to remain in the territory of a Member State cannot be considered to be an illegal resident within the meaning of the Return Directive. The *Gnandi* judgment acknowledges that, in accordance with this case-law,

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[13] Circular of 30 August 2013 repealing the circular of 20/07/2001 on the legal scope of Annex 35 to the Royal Decree of 8/10/1981 on access to the territory, residence, establishment and expulsion of foreigners, *MB*, 6 September 2013.

[14] Council of State, Decision of 25 November 2014, no 229.317.

[15] Court of Cassation, judgment of 26 April 2017, no P.17.0375.F/1. About this decision, see S Sarolea, 'L'annexe 35 réhabilitée?' [May 2017] *Cahiers EDEM*.

[16] *Gnandi* (n 10) para 59.

[17] Case C-534/11 *Arslan* ECLI:EU:C:2013:343, paras 48 and 49.

> an authorization to remain for the purpose of the effective exercise of an appeal against the rejection of the application for international protection precludes the application of Directive 2008/115 to a third-country national who has lodged that application until the end of the appeal against the rejection of that application.'[18]

The link between the RCD and the Return Directive had led Advocate General Mengozzi to conclude that an asylum seeker cannot be considered to be illegally residing in the territory of the Member State where he has lodged his application for international protection as long as he is granted a right to remain in that territory, whether under EU law or national law, as is the case here.[19] According to the Advocate General, under penalty of depriving the appeal of effectiveness and infringing the principle of *non-refoulement*, an order to leave the territory should only be issued once the decision to reject the asylum application has become final. As a matter of principle, this reasoning seems logical.[20] Hadn't the CJEU ruled before that an asylum seeker retains his status until a final decision has been adopted?[21] However, in *Gnandi* the CJEU chose to distance itself from the conclusions of the Advocate General. In its view, the prohibition on adopting a return decision before the outcome of the appeal 'could considerably delay the initiation of the return procedure and make it more complex'.[22] However, it is not clear how this would make the procedure more complex, nor how the procedure would be delayed since all the effects of the return order are, in any case, suspended for the duration of the asylum appeal. The judgment reflects a distorted view on the balance between the effectiveness of return policy and the protection of fundamental rights.

IV. Judicial Control of the Legality of the Deprivation of Liberty

As discussed above, the Aliens Act entrusts review of the legality of immigration detention to the criminal investigating courts. For these courts it constitutes a dispute that does not fit well with their main competence relating to the deprivation of liberty of suspected criminal law

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[18] *Gnandi* (n 10) para 43.

[19] Opinion of Advocate General Mengozzi in Case C-181/16 *Gnandi* ECLI:EU:C:2017:467, para 89.

[20] ibid, para 89.

[21] Case C-179/11 *Cimade and GISTI* ECLI:EU:C:2012:594, para 53.

[22] *Gnandi* (n 10), para 50.

offenders. These courts, the council chamber and the indictments chamber sitting in criminal matters must rule on a single aspect of the return procedure – detention – without being able to decide on the stay. However, it should be noted that there is ambiguity in the terms of the law itself, seeing that the criminal court, according to section 72 of the Aliens Act, 'shall verify whether the measures of deprivation of liberty and removal from the territory are in conformity with the law'. The jurisdiction assigned to the judge may thus seem to include the legality of the removal. However, since administrative judges are specifically competent to rule on this, criminal judges rule only on the legality of the detention and not of the decision on removal from the territory.

The organisation of judicial control is a matter of national law, but it must be carried out in compliance with the Return Directive, where applicable, and with Article 5 ECHR. Article 15 of the Return Directive allows Member States to opt for exclusive jurisdiction of the judiciary to order detention or for a division of jurisdiction between the administration and the courts. In this latter case the administration takes the decision to detain the third-country national, under the supervision of the judiciary. The decision to detain must be written and reasoned, according to Article 15(1) of the Return Directive.[23] A similar requirement can be deduced from Article 5(2) ECHR, which 'requires that a person be informed, in simple language accessible to him, of the legal and factual reasons for his deprivation of liberty, so that he may discuss its legality before a court under paragraph 4'.[24] This information must be provided as soon as possible, oral communication being sufficient under the ECHR. The ECtHR considered a 76-hour delay in a case involving detention at the border excessive.[25]

In Belgium the minister or his delegate take decisions on the deprivation of liberty, as well as on its prolongation. Article 62 of the Aliens Act requires that these decisions be adequately reasoned in fact and in law. The third-country national must be informed, at the time of

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[23] See also Case C-146/14 PPU *Mahdi* ECLI:EU:C:2014:1320.

[24] ECtHR 5 February 2002, *Čonka v Belgium,* App No 51564/99.

[25] ECtHR 29 January 2008, *Saadi v United Kingdom,* App No 13229/03, para 84.

notification of their continued detention, about the possibility of lodging an appeal with the criminal court.[26]

Article 15(2) of the Return Directive and Article 5(4) ECHR require judicial review of deprivation of liberty. Judicial oversight must be speedy and effective, in that it must lead to release if the decision to detain turns out to be unlawful. In *Firoz*, the applicant was deprived of his liberty for the purpose of removal for almost four months, without having been able to obtain a final decision on the legality of his detention. The ECtHR condemned Belgium, finding a violation of Article 5(4) ECHR.[27]

V. The Extent of Judicial Review of Detention: A Clear Distinction in Theory

The legality of a detention is thus monitored by a judge. The scope of review is open to discussion before both the two European courts and the Belgian courts. The case-law of the ECtHR emphasises that detention review does not necessarily have to be an opportunity review, but legality review can neither be understood solely as compliance with domestic law. This requires monitoring in the light of the ECHR and the general principles enshrined therein, in particular with regard to the specific purposes of the restrictions permitted by Article 5(1) ECHR.[28]

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[26] Royal Decree 8 October 1981, Art 75 § 3; Royal Decree laying down the regime and operating rules applicable to places located on Belgian territory, managed by the Aliens Office, where an alien is detained, placed at the disposal of the Government or maintained, pursuant to the provisions cited in Article 74/8, § 1, of the Act of 15 December 1980 on access to the territory, residence, establishment and removal of aliens, art 16.

[27] ECtHR 11 July 2013, *Firoz Muneer v Belgium*, App No 56005/10. See P d'Huart, 'Le contrôle de légalité de la détention couvre la conformité de l'éloignement à la CEDH' [January 2013] *Newsletter EDEM*.

[28] ECtHR 24 October 2012, *Mahmundi and others v Greece,* App No 14902/10. Art 5(4) ECHR does not empower the court to substitute its own assessment of all aspects of the case, including considerations of pure expediency, for that of the authority from which the decision emanates. It nonetheless calls for a review broad enough to extend to all the conditions indispensable to the lawfulness of an individual's detention in the light of para 1 (para 90).

The oversight by the domestic judge also involves monitoring compliance with EU law, mainly the Charter of Fundamental Rights of the European Union ('the EU Charter') and the Return Directive. The latter clarifies the contours of judicial review by setting firm guidelines for the possibility of deprivation of liberty in the context of removal. Legality, within the meaning of the Directive, includes subsidiarity, necessity and proportionality. In *Mahdi*, the CJEU adopted a broad interpretation of legality, aligning it with opportunity, and recognised the judge's power to substitute his own assessment for that of the administration.[29]

Nonetheless, the requirement of full judicial review can only be inferred from this judgment with caution, since it concerns the extension of detention and not the initial decision of deprivation of liberty.[30] This case-law could lead to a distinction between a review of legality immediately after the detention decision has been taken, and an opportunity review, when the detention is extended beyond six months. The nature of any checks carried out after the first

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See also ECtHR 5 July 2011, *Rahimi v Greece*, App No 8687/08, paras 116, 119; ECtHR 8 February 2000, *Dougoz v Greece,* App No 40907/98, para 61.

[29] *Mahdi* (n 23). Bulgarian courts must refer a question to the CJEU for a preliminary ruling as to the nature of the review to be carried out by the judicial authority seized of a request for an extension of detention. In *Mahdi* the third-country national, who was not in possession of identity documents and who had not obtained such documents from his country of origin, had been released on the grounds that there was no reasonable prospect of removal. The Court addressed the question of whether the judge may rule on the merits of the case and exercise full judicial review, allowing him to substitute a less coercive measure for detention on the basis of 'the facts stated and evidence adduced by the administrative authority as well as any observations that the third-country national may submit' (para 53). It recalled that 'Article 15 of Directive 2008/115 is unconditional and sufficiently precise, so that no other specific elements are required for it to be implemented by the Member States' (para 54). Art 15 does not specify the nature of judicial review (para 57), which must naturally incorporate the conditions and principles set out in Art 15: the existence of a reasonable prospect of removal (para 60) and subsidiarity, particularly with regard to the risk of flight and the co-operation of the person concerned (para 61). It follows that the court must consider all the elements of fact and law (para 62). The Court added: 'Any other interpretation of Article 15 of Directive 2008/115 would result in paragraphs 4 and 6 thereof being rendered ineffective and would deprive of all substance the examination by a judicial authority which the second sentence of Article 15(3) of the directive requires, thereby jeopardising the achievement of the objectives pursued by the directive' (para 63).

[30] ibid, para 42.

legality check and before the expiry of the six-month period of detention is not yet defined by the CJEU.

Under Belgian law, the extent of oversight is defined by the contrast between legality and opportunity. Under section 72 of the Aliens Act, the investigating courts verify 'whether the measures of deprivation of liberty and removal from the territory comply with the law without being able to rule on their advisability'. The Belgian Council Chambers are only competent to check if the detention measures and removal are in accordance with the law, without being able to decide on their opportunity. However, drawing the precise line between legality and opportunity is difficult. Indeed, the distinction between legality and opportunity is widely debated by the Belgian courts, despite the case-law of the ECtHR and the clarification provided by the Return Directive as to the role assigned to the judge. The review of legality involves in any case verification of the accuracy of the factual grounds on which the decision on deprivation of liberty is based.[31] It is not for the judge to substitute their assessment for that of the administration, which has a certain discretionary power. A corollary to this discretion is an obligation to state reasons; the administration needs to justify why detention appears to be the most appropriate means of ensuring removal.[32] The motivation must refer to the particular situation of the third-country national and cannot be limited to a general and stereotyped formula. It must allow the judge to verify its adequacy against the contents of the file. This is illustrated by a case in which the Court of Cassation ruled that, given a failure by the administration to specify whether there had been a decision on the application for a residence permit, it was impossible for the Court to exercise its review of legality.[33]

Beyond review for manifest error of assessment, Belgian case-law is divided between a marginal review of legality and a broader approach, including proportionality. The first is based on the exclusion of opportunity control, which prohibits the substitution of the assessment of

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[31] Court of Appeal Bruxelles, mis acc, 25 September 2012, no 3219; Court of Appeal Bruxelles, mis acc, 30 August 2013, no 2851.

[32] Court of Appeal Mons, mis acc, 27 October 1995. However, see also Court of Cassation, judgment of 18 December 1996, *Revue du droit des étrangers*, 218; *contra* Court of Cassation Cass (2e ch), judgment of 24 March 1998, RG no P.98.0345.N, in the case of an alien who had voluntarily come forward to the authorities.

[33] Court of Cassation, judgment of 23 August 2006, RG no P.06.1068.F [2006] *Revue du droit des étrangers* 375.

the judge for that of the administration. The second incorporates into legality the review of necessity and subsidiarity, which requires the judge to consider the possibility of less coercive measures. The very wording of the provisions of the Aliens Act invites him to do so by using, for all cases of deprivation of liberty, the verb ‘may’, thereby indicating that detention is not an obligation and should not be systematic. This wording, combined with the principles of the Return Directive, subjects the use of detention to an examination of the necessity and proportionality of detention and to an analysis of the feasibility of removal. An intermediate position consists of reviewing the detailed reasoning of the decision and requiring it to convince the judge that the administration has carried out a balancing of interests, without actually substituting the judge’s assessment for that of the administrative authority.

VI. In Practice: The Ambiguities of Belgium Case-Law

Several decisions illustrate the ambiguities of Belgium case-law. For instance, in 2016, the Court of Cassation said that it does not follow from Articles 5(4) and 13 ECHR that, when carrying out a review of immigration detention, investigating courts must be able to assess the opportunity of the measure imposed. But it also said that the absence of such a review does not prevent a third-country national from submitting an arbitrary or disproportionate deprivation of liberty for review by the investigating courts.[34] Thus, the question arises: how can a court practically use those criteria, while avoiding a review of opportunity?

Thus, in a case in which the Court of Cassation exercised a limited review, it quashed a judgment by a criminal judge who had invalidated a detention measure because it was based on facts and decisions dating back ten years, and did not pay sufficient attention to positive changes in the third-country national’s situation. The Court argued that the criminal judge had reviewed the opportunity and not the legality of the decision.[35] Another judgment by the Court quashed a judgment of the Indictment Chamber that a detention measure was disproportionate in view of the third-country national’s behaviour. He had been issued a visa, although it had expired,

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[34] Court of Cassation (2e ch), judgment of 14 September 2016, RG no P.16.0936.F.

[35] Court of Cassation (2e ch), judgment of 19 March 2013, RG no P.13.0337.N/1.

and the steps he had taken showed a willingness to comply with the legislation on residence. The Court considered that the judges carried out an opportunity review.[36]

On the other hand, the Court of Cassation has also ruled that if an administrative file does not mention any objective and serious element evidencing a risk of flight, release may be ordered.[37] The judiciary must be able to verify the way in which the administration has assessed the risk of absconding in the light of the criteria laid down by law. In the same vein, another Court judgment maintains that the review of legality includes verification that the risk of flight has been assessed in the light of the defendant's current situation.[38]

To justify the prohibition on substituting their assessment for that of the administration, the investigating courts sometimes refer to Article 237 of the Criminal Code, which prohibits the judge from exercising his power 'by interfering in matters attributed to the administrative authorities'. Accordingly, the judge would violate this provision if he interpreted an administrative measure 'on its merits, relevance or effectiveness'.[39] But this seems to be the wrong interpretation: Article 237 of the Criminal Code, like all provisions of criminal law, is to be strictly interpreted. This provision is found in a chapter titled 'Encroachment by administrative and judicial authorities'. It aims to protect the separation of powers and only prohibits judges from interfering 'either by making regulations on these matters, or by prohibiting the execution of orders issued by the administration'. In other words, judges are neither the legislature nor the executive. This does not prevent them from exercising the authority that is vested in the judiciary. This role is particularly important when a fundamental right, such as personal liberty, is at stake.

Furthermore, there is nothing in the Aliens Act requiring the application of this provision of the Criminal Code to the deprivation of liberty of third-country nationals in view of their removal. Since 2008, such an extensive application of criminal law is even contrary to the Return

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[36] Court of Cassation (2e ch), judgment of 10 June 2015, RG no P.15.0715.F/1.

[37] Court of Cassation (2e ch), judgment of 27 June 2012, RG no P.12.1028.F.

[38] Court of Cassation (2e ch), judgment of 17 December 2014, RG no P.14.1810.F.

[39] Court of Cassation, judgment of 10 June 2015, RG no P.15.0715.F; Court of Appeal Bruxelles, mis acc, 13 June 2014, no 2083.

Directive. In light of the Directive, review of the merits, relevance and effectiveness of a measure are equally necessary to ensure its legality. Thus, the obligation to consider alternative measures as an element for lawful detention implies an examination of the proportionality of the deprivation of liberty. The requirement of reasonable prospects of removal, in particular when considering the extension of the period of detention, also implies an examination of the opportunity of the deprivation of liberty.

As regards the review of the extension, the Return Directive states: 'In each case, detention shall be reviewed at reasonable intervals, either at the request of the third-country national concerned or ex officio. In the case of extended retention periods, reviews shall be subject to review by a judicial authority.'[40] Belgian law specifies in Articles 74/5 and 74/6 LE Aliens Act that the extension of detention is only authorised if the objective of ensuring removal is real and effectively pursued. It is subject to three conditions: (i) that the detention be limited to the time 'strictly necessary' for the execution of the removal order; (ii) that the steps towards removal be taken within seven working days of the arrest; and (iii) that the actual removal of the third-country national remains possible. The effectiveness of removal procedures must be maintained throughout the period of detention, with standards growing ever more rigorous over time.

A. Review of the Lawfulness of Detention and Article 3 ECHR

The review of legality includes conformity with fundamental rights, such as Article 3 ECHR, which prohibits removal if there is a risk of torture or inhuman and degrading treatment, and Article 8 ECHR, which protects family life. With regard to Article 3 ECHR, a judgment by the Court of Cassation concludes that the removal of an alien and the measure of deprivation of liberty taken for that purpose may result in a situation falling within the scope of this provision if there are serious reasons for fearing that, after or as a result of their removal, the alien would be in danger of being subjected either to torture or to inhuman or degrading treatment or punishment. It follows that, when an alien invokes such a risk, the investigating court must assess its existence by way of a review of legality and not of opportunity.[41] In such a case, a

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[40] Art 15(3) of the Return Directive; *Mahdi* (n 23).

[41] Court of Cassation (2e ch), judgment of 18 January 2012, RG no P.11.2130.F.

risk of treatment contrary to Article 3 ECHR upon return would lead to the release of the third-country national by the criminal courts.

In another case, the Court of Appeal quashed a judgment by the Indictment Chamber which found that detention was unlawful because, in the event of deportation, the third-country national would experience a significant reduction in their life expectancy. The appellate court argued that detention in this case did not deprive the third-country national of an effective remedy. The Court of Cassation, however, considered that the judgment of the Court of Appeal did not argue convincingly that the execution of the removal order was not likely to expose the applicant to a serious risk of serious and irreversible deterioration in their state of health. In its view, the Court of Appeal had not adequately justified its decision that the non-suspensive nature of the action for annulment did not affect the regularity of their detention order.[42]

A recent case has once again illustrated the difficulties in delimiting the power of the criminal judge deciding on detention and harmonising their approach with that of the administrative judge. This is the widely reported case of removals to Sudan in January 2018 on which the Court of Cassation ruled on 31 January 2018.[43] The Court, deciding on the detention of the Sudanese nationals, rejected the Aliens Office's argument that it would only be required to examine the risk of treatment contrary to Article 3 ECHR when a foreign national had lodged an asylum application. Meanwhile the Aliens Office, with the help of Sudanese intelligence services, was seeking to identify and expel irregularly staying Sudanese nationals to Khartoum.

On 26 September 2017, the united chambers of the Aliens Litigation Council, the administrative court, warned the Aliens Office against the forced removal of Sudanese nationals in violation of Article 3 ECHR.[44] Next, the Court of Cassation ruled on the legality of the detention. In its judgment of 20 December 2017, it reversed the decision of the investigating courts ordering the

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[42] Court of Cassation (2^{e} ch), judgment of 24 June 2015, RG no P.15.0762.F.

[43] Court of Cassation, judgment of 1 January 2018, P.18.0035.F; see also JB Farcy, 'Rapatriements vers le Soudan: l'obligation d'examiner les risques de traitements inhumains ou dégradants préalablement à tout éloignement' [February 2018] *Cahiers EDEM*.

[44] CCE judgment of 26 September 2017 (GC), no 192 584, available at www.rvv-cce.be/sites/default/files/arr/a192584.an_.pdf.

release of the person concerned.[45] However, the extension of detention is subject to further appeals, and thus the detention judge can pronounce on several occasions. In this instance the indictment division ordered the person's release. It considered that the administrative file did not show an assessment of the risk that a return to Sudan would represent with regard to the requirements of Article 3 ECHR. The measure involving deprivation of liberty was therefore judged unlawful: in view of the notoriously well-known information about the particularly alarming situation in Sudan, the Secretary of State for Asylum and Migration could not envisage the removal of the third-country national without ensuring that he would not be returned to a country where he would run a real risk of being subjected to treatment contrary to Article 3 ECHR.

Since the situation in Sudan could not be ignored by the administration, the judges considered that it was their responsibility to make the necessary checks to ensure that the return of the person concerned did not entail a violation of Article 3 ECHR, irrespective of the fact that he had not applied for asylum in Belgium. The Belgian state appealed this judgment before the Court of Cassation, arguing that the person had failed to provide any prima facie evidence of the existence of a risk of inhuman or degrading treatment in the event of his return. However, the Court of Cassation did not follow the argument put forward by the State:

> Insofar as it amounts to arguing that the [authorities] would only be required to examine the risk invoked by an alien to undergo treatment contrary to Article 3 of the Convention when he has lodged an asylum application, the plea is unfounded.

The Court recalled the obligation for the Aliens Office to verify the existence of a possible risk that the person under a removal order might face treatment contrary to Article 3 ECHR. When an appeal is lodged, the investigating courts must assess whether the authorities have carried out such a control. As the Court pointed out, such an examination falls within the scope of the review of legality, and not the opportunity of detention. Accordingly, if the Aliens Office fails to verify the existence of a risk of inhuman or degrading treatment in the event of return to Sudan, the removal order, of which the detention measure is an accessory, does not meet the legal requirements. The appeal brought by the state was dismissed. This case illustrates once again that it is impossible to strictly confine the review of the detention judges solely to the measure of detention, without reviewing the removal order itself. Another conspicuous aspect

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[45] Court of Cassation (2e ch), judgment of 20 September 2017, RG no P.17.1232.F.

of the case is that during the litigation, no references were made to the Return Directive, in particular Articles 5 and 9, or to the case-law of the CJEU.

B. Review of the Lawfulness of Detention and Article 8 ECHR

Several judgments by Belgian courts have considered detention measures unlawful because they violated the right to family life under Article 8 ECHR. The detention of an Algerian national who was the father of four children, the youngest of whom was two months old, and who benefited, like their Moroccan mother, from a right of residence in Belgium, was thus considered disproportionate to the interference it constituted to the right to private and family life.[46] In another case, however, a Belgian court held that there was no disproportionate interference in the right to family life in the case of a woman who was five weeks pregnant and wished to marry a Belgian.[47] Another judge again considered that the obligation to temporarily return to the country of origin in order to apply for a residence permit does not infringe Article 8 ECHR, and thus detention was deemed lawful.[48]

Surprisingly, in 2018, the Court of Cassation ruled in favour of a very narrow review in cases of detention of asylum seekers, explicitly referring to EU asylum law. It held that neither Article 8 of the recast Reception Conditions Directive ('the recast RCD'),[49] nor Article 74-6, § 1bis, of the Aliens Act, which transposes the recast RCD into Belgian law and is in force at the time of the administrative decision, provide that the authority which decides to keep an alien in a given place, during the examination of his application for international protection, must take into account the circumstances relating to his family life.[50]

C. Detention of Children

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[46] Court of Appeal Bruxelles, mis acc, 18 July 2012, no 2583.

[47] Court of Appeal Bruxelles, mis acc, 13 August 2012, no 2757.

[48] Court of Appeal Bruxelles, mis acc, 20 November 2015.

[49] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of persons seeking international protection [2013] OJ L180/96.

[50] Court of Cassation (2e ch, F), judgment of 11 April 2018, P.18.0326.F.

A new Belgian law has reintroduced the possibility of detaining families with minor children in closed centres.[51] An action for annulment has been brought before the Council of State against the new legal provisions, and by a decision of the 4 of April 2019, the Council suspended this new regulation on the basis of risks linked to the high level of noise around the airport:

> It follows from the case law of the European Court of Human Rights that the Court admits the detention of young children in a place where they are exposed to significant airport nuisances for only an extremely short period of time. In the present case, it should be noted that, pursuant to the contested Royal Decree, young children may be detained for up to one month in houses located on the site of the 127bis centre, located on the runways of the important Belgian airport of Brussels Airport. Prima facie, taking into account this time limit, the positive obligations arising from Article 3 of the Convention on Human Rights should lead the King to provide that family homes may not be located in an environment in which children are likely to be exposed to serious noise pollution. The fact that the houses are in a building zone is not likely to upset this observation.[52]

In any case, this legislation raises other issues regarding its compatibility with the EU Charter and the ECHR as well. In the past, the ECtHR has condemned Belgium in several cases concerning the detention of children, as these measures violated Articles 3, 5 and 8 ECHR. While the ECtHR has never ruled that a child can never be deprived of his liberty under immigration legislation, it has never accepted that the actual conditions of detention were in accordance with the ECHR. In addition, it uses a stringent proportionality test.

Thus, in *Muskhadzhiyeva*, the ECtHR judged that in view of the young age of the children, the duration of their detention and their state of health as attested by medical certificates, the conditions in which they had been held in the closed transit centre had attained the minimum level of severity required to constitute a violation of Article 3.[53] The ECtHR recalled in

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[51] Royal Decree amending the Royal Decree of 2 August 2002 laying down the regime and operating rules applicable to places located on Belgian territory, managed by the 'Office des Etrangers', where an alien is detained, placed at the disposal of the government or maintained, in accordance with the provisions cited in Art 74/8 § 1 of the law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners (Aliens Act).

[52] Council of State, Decision of 4 April 2019, no 244.190.

[53] ECtHR 19 January 2010, *Muskhadzhiyeva and Others v Belgium*, App No 41442/07. The applicants – a mother and her four children (aged seven months, three and a half years, five and seven years at the material time), Russian nationals of Chechen origin – arrived in Belgium, where they sought asylum. As they had spent some time in Poland, the Polish authorities agreed to take charge of them, by virtue of the Dublin II Regulation. The Belgian

particular that the extreme vulnerability of a child was a paramount consideration and took precedence over illegal alien status. The fact that the four children had not been separated from their mother did not exempt the authorities from their obligation to protect them. In *Kanagaratnam*,[54] in similar circumstances, the ECtHR reiterated that the particular vulnerability of the children, who were already traumatised even before their arrival in Belgium as a result of circumstances relating to the civil war in their home country and their flight, had been recognised by the Belgian authorities when they recognised the family's refugee status. That vulnerability had increased on their arrival in Belgium, following their arrest at the border and placement in a closed centre pending their removal.

D. Interaction between Judges

The above examples illustrate the difficulties of the interaction between control by investigating courts and control by administrative judges. How can a decision by an investigating court finding that removal violates fundamental rights be reconciled with an administrative decision ruling in the opposite direction, sometimes validated by the Aliens Litigation Council?[55] We have seen that this difficulty also results from Article 72 of the Aliens Act, which entrusts the criminal courts with the task of 'verifying whether the measures involving deprivation of liberty and removal from the territory comply with the law without being able to rule on their appropriateness'.

The majority of the case-law pronounced by criminal courts is in line with the judgments taken by administrative judges, and considers that it is not possible to diverge from these judgments on residence even if the situation has changed, for example as a result of appeals, new requests or the intervention of another authority, such as a criminal investigating judge. Thus, the Court of Cassation emphasises that neither the fact that a non-suspensive appeal is pending before the

authorities accordingly issued a decision ordering them to leave the country. In January 2007 they were placed in a closed transit centre run by the Aliens Office near Brussels airport, pending their removal.

[54] ECtHR, *Kanagaratnam and others v Belgium*, App No 15297/09, 13 March 2012.

[55] Court of Appeal Bruxelles, mis acc, 4 April 2014, no 1279.

Council of State or the Aliens Litigation Council,[56] nor the introduction of an application for a residence permit on humanitarian grounds subject to the Minister's discretionary power,[57] nor the fact of being a civil party against the police officers who made the arrest,[58] allows one to challenge the legality of detention.

Even if an investigating judge lifts an arrest warrant while asking the applicant not to leave Belgian territory, this is not sufficient to authorise him to remain on the territory, according to the Court of Cassation. In this case, the judges of appeal had, in accordance with Article 72 of the Aliens Act, refused to rule on the advisability of the measure of deprivation of liberty and removal from the territory, thus confirming the continuation of this deprivation of liberty, even if an investigating judge had set the plaintiff free by imposing the condition not to leave the territory.[59]

These difficulties are mainly linked to the fact that detention is a means of enforcing a removal order, aimed at an irregularly residing third-country national. The coherence problems reported are much less significant when it comes to the detention of third-country nationals who are legally residing in the territory, such as asylum seekers. An asylum seeker may be detained during the asylum procedure for various reasons: if he applies at the border; if he is found to be abusing the asylum procedure; if he presents a danger to public order; or if he is in the Dublin phase. In these cases, the judge assesses the reasons given for depriving the person of liberty:

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[56] Court of Cassation, judgment of 18 April 2007, RG no P.07.0320.F; Court of Appeal Bruxelles, mis acc, 20 Nov 2015.

[57] ibid. See also Court of Cassation, judgment of 27 July 2010, RG no P.10.1206.F.

[58] Court of Cassation, judgment of 4 Oct 2006, RG no P.06.1208.F.

[59] Court of Cassation, judgment of 12 November 1997, RG no P.97.1355.F; see also Court of Appeal Bruxelles, mis acc, 1 December 2015. The Court of Appeal, relying on the case-law of the Court of Cassation, stated that: '[A]ny conditions of residence set by the investigating judge are intended to apply only if the person concerned obtains a right of residence in the territory and do not result in the granting of such a right, this competence being vested exclusively in the administrative authority.'

is there a risk of absconding? Is the request abusive? The judge's review concerns detention only and is generally based on more precise criteria.[60]

VII. Procedural Differences in Treatment between Third-Country Nationals and Persons Subject to Criminal Proceedings

In addition to the ambiguities described above, recourse to the procedure before the investigating courts disadvantages the third-country national as they are in some respects treated worse, legally speaking, than a defendant or an accused person. Proceedings before the investigating courts on immigration detention are governed by Articles 71 et seq of the Aliens Act and the Pre-trial Detention Act. This last reference is ambiguous and generates recurring interpretation difficulties, making it hard to determine which law on pre-trial detention is applicable. Indeed, on the date the Aliens Act entered into force, the provisions on preventive detention were contained in a law of 20 April 1874 and in the Code of Criminal Procedure. The new law on preventive detention of 20 July 1990 followed the Aliens Act of 15 December 1980.

The Court of Cassation infers from this that 'the law of 20 July 1990 on preventive detention, which devotes a chapter to an appeal in cassation, has not amended article 72 of the law of 15

[60] For instance, the Court of Cassation has judged that a decision to take into consideration a repeated asylum application by the CGRA means that the reason to detain grounded on the abuse of the asylum procedure is no longer valid. The fact that the application has been considered leads to the conclusion that there can be no question of fraud or misuse of the asylum procedure in accordance with Arts 74/6 §1bis, 9° and 12° of the Aliens Act. See Court of Cassation, judgment of 16 January 2018, P.18.0002.N. According to another Court of Cassation judgment, the automatic detention of asylum seekers at the border is illegal. The Court of Cassation considered that the only grounds for attempting to enter the kingdom to apply for asylum without satisfying the conditions of the law do not allow not for the Aliens Office to resort to placement in a closed centre in order to guarantee a possible return when it has not carried out an individualised examination of the applicant's situation: Court of Cassation, judgment of 27 December 2017, P.17.1244.F. It also ruled in an asylum case that: '[T]he Dublin III Regulation is applicable to the detention of an asylum seeker in a Member State, in particular where it does the subject of a request to take back, even if no new application for protection has been submitted has been introduced in the Member State making the request for recovery.' See Court of Cassation, judgment of 20 December 2017, P.17.1192.F.

December 1980'.[61] Consequently, notwithstanding the entry into force of a new law on preventive detention, appeals against immigration detention are still regulated by the previous legal framework, including less favourable time limits for lodging appeals in cassation.[62] The Court of Cassation's excessively formalistic reasoning in this area reinforces legal uncertainty and creates an unjustified difference in treatment.

In addition, the Court of Cassation has refused to refer a question to the CJEU for a preliminary ruling on accelerated judicial review.[63] The question concerned the time limit within which the Court of Cassation is required to rule when it is seized with an appeal against a decision by an Indictment Chamber to detain an illegal alien. In settled case-law, as discussed above, the Court considers that the time limit of six days for lodging an appeal against preventive detention as laid down in the Act of 20 April 1874 and that the Code of Criminal Procedure applies in the case of immigration detention, and not the delays found in the new law governing preventive detention, which is 15 days.

However, the law of 20 July 1990 should be applicable for reasons of legal certainty. Moreover, this new law did not merely amend the law of 1874 but replaced it completely, with the exception of the provisions relating to compensation in the event of inoperative preventive detention. It seems contrary to legal certainty for a judge to apply a law that has been repealed for more than 25 years. Furthermore, the application of the Act of 20 April 1874 creates a difference in treatment between two categories of persons deprived of their liberty who,

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[61] Court of Cassation, judgment of 20 September 2017, RG no P.17.0933.F.

[62] See L Denys, 'Antwoord op de noot "Wettigheidscontrole op de aanhouding van een illegale vreemdeling met het oog op verwijdering van het grondgebied"' [2013] *Rechtskundig Weekblad* 1395; JB Farcy, 'Le pourvoi en cassation en matière de privation de liberté d'un étranger demeure soumis à des règles procédurales distinctes de celles relatives à la détention préventive: un formalisme excessif ?' [2017] *Cahiers EDEM*; S Sarolea, 'Le pourvoi en cassation en matière de privation de liberté d'un étranger soumis à des règles procédurales distinctes de celles relatives à la détention préventive' [August 2016] *Newsletter EDEM*; and D Vandermeersch, 'La détention préventive de la personne présumée innocente et la privation de liberté de l'étranger' [2015] *Revue Droit Pénal* 602. See also Court of Cassation (2e ch), judgment of 10 September 2014, RG no P.14.1374.F; Court of Cassation (2e ch), judgment of 21 December 2011, RG no P.11.2042.F; and Court of Cassation (2e ch), judgment of 15 June 2016, RG no P.16.0604.F.

[63] Court of Cassation, judgment of 20 September 2017, RG no P.17.0933.F.

according to 1980 legislation, were to be treated similarly. Although the law of 15 December 1980 provides for the alignment of the regime of detention of irregular aliens in view of their removal with that of pre-trial detention, the Court of Cassation case-law creates an unjustifiable difference of treatment.

Preventive detention refers to the deprivation of liberty of a person suspected of having committed an offence, and is subject to strict legal conditions. Although the deprivation of liberty of an illegal alien in view of their removal in no way constitutes a measure of preventive detention (recalling that illegal residence falls under criminal law, not administrative law), the 1980 law aimed to apply the latter's procedural conditions to the former with a view to 'assimilating the foreigner to a Belgian'. It also emerged from the explanatory memorandum to the Act of 15 December 1980 that the Government did not wish to follow the advice of the Council of State to completely organise the procedure in the Act because 'this would create the risk of omissions and the need to amend the Act if changes were made to those relating to remand'. The intention, then, was to apply the regime of remand while considering its possible future developments.

Moreover, whether detainees are remand prisoners or illegal aliens, in both cases they are deprived of their liberty on a preventive basis, and the lawfulness of their detention is only monitored by the judiciary a posteriori. This indicates the need for an accelerated procedure. However, according to the case-law of the Court of Cassation, foreign nationals detained in view of their removal and persons suspected of having committed a criminal offence are treated differently, to the detriment of foreign nationals. In addition to the question of time limits, there is also the fact that the Public Prosecutor's Office can appeal to the Court of Cassation against a decision of a Chamber of Indictments ordering the release of a third-country national. This difference in treatment, created by the Court against the legislative intent, is not justified and the Court should not hide behind excessive legal formalism to maintain a new 'migration exception'. The Constitutional Court could thus be seized of the question, even if it seems unlikely that the Court of Cassation would ask for a preliminary ruling, seeing that it refused to do in September 2016 on the grounds that the principle of reasonable time might be violated. In that same judgment, the Court refused for the same reason to refer a question to the CJEU for a preliminary ruling. The litigants had argued that it should ask the CJEU about the conformity of Belgian laws regulating appeal before the Court of Cassation with Articles 13 and 15 of the Return Directive, requiring a speedy judicial review. The Court refused to do so since, in its view, the reasonable time limit might be exceeded in the present case if a preliminary question were put. Moreover, it argued that European law does not determine the period within which a decision of the Court must be taken.

The first argument by the Court seems nonsensical since it results in the European judge being de facto excluded from litigation. Moreover, Article 267 TFEU on the preliminary ruling procedure does not provide for such a limitation. On the contrary, it specifies that ‘if such a question is raised in a case pending before a national court concerning a person detained, the Court shall decide as soon as possible’. An urgent preliminary ruling procedure (PPU) has been set up to enable the CJEU to deal with the most sensitive questions relating to the areas of freedom, security and justice within a considerably shorter time frame, and it has been used several times in cases relating to the Return Directive. This case-law illustrates the differences in treatment of criminal offenders and migrants, the procedure applied to migrants being less protective.

VIII. Conclusions: The Urgent Need to Reform a Low-Quality Legal Framework

This chapter has attempted to illustrate the poor quality of the current legal regime regulating detention of third-country nationals in Belgium. The Belgian legal framework does not work due to the combined procedure and delimitation of judicial competences which are not interlinked or communicating. In addition to the questions that this alignment inevitably raises on the symbolic level, seeing that it implies a blurring between third-country nationals and criminal offenders, this competence is problematic in two other respects. First, the risk of conflict between the decisions of the criminal judge and those of the administrative judge is high, and such conflict undermines the transparency and coherence of the system. Second, in most situations both administrative review and judicial review have non-suspensive effect and suffer from a lack of effectiveness. To return to Lewis Carroll, Alice’s rabbit is always late, and so is the criminal judge who rules on freedom when the administrative judge has already ruled. Alice finds herself in an absurd world or at least one foreign to her, like the criminal judge immersed in immigration law.

The complexity of applicable standards subjects third-country nationals and their counsels to a high degree of legal uncertainty. These defects raise questions in the face of the requirements derived from Article 5 ECHR concerning the quality of the law, which should be clear and foreseeable. With regard to the Return Directive, a particular problem is whether Belgian law provides for a speedy judicial review and the refusal of the Belgian judge to refer a question to the CJEU.

More fundamentally, these difficulties add to the inadequacy of the control exercised by the investigating courts mentioned above. The law confines the judge to a review of legality to the exclusion of opportunity, whereas the Return Directive requires such an examination, including of the proportionality of the detention. Finally, the criminal judge is to review the legality of detention in view of removal, while the removal order itself is reviewed by the administrative judge. If it is merely a question of deciding on the subsidiarity of the use of detention, there is not much difficulty. However, if it is a question of examining, via assessing the deprivation of liberty, a violation of the right to respect for family life or the existence of a risk of inhuman and degrading treatment, the criminal court runs the risk of adopting a decision contradicting that taken by its administrative counterpart.

As stated in the invitation recently made by Damien Vandermeersch to set up a full judicial review of the detention of third-country nationals, all human beings deprived of their liberty, Belgian or foreign, innocent or presumed innocent, must have access to a full judicial remedy to verify and assess the absolute necessity of their continued detention.[64] The issue of the effectiveness of judicial control has serious ramifications for the entire field of migration law, particularly when it comes to the deprivation of liberty. This chapter has tried to demonstrate this and to argue in favour of reform of judicial oversight.

[64] Vandermeersch (n 65) 618.