



**National limitations to judicial review in migration detention cases:
Prohibition, competence or requirement of *ex officio* review?**

March 2021

Migration Law Clinic and Migration Law Expertise Centre

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1. Introduction

This expert opinion was written at the request of the lawyers of the third country nationals in the cases, which led to preliminary questions in Joined Cases C-704/20 PPU and C-39/21 PPU before the Court of Justice of the European Union (henceforth: the CJEU). It concerns the judicial review of detention measures imposed on the basis of the Return Directive (Directive 2008/115/EC).¹ Under Dutch law, the first instance and second instance courts examining the appeal against such a detention measure are bound by the grounds of appeal submitted by the third country national (henceforth: TCN).² They are not allowed to review the lawfulness of the detention measure *ex officio*. As a result, a Dutch court, which is aware that a detention measure is unlawful on a particular ground, for example because there is no prospect of removal, cannot quash this measure and release the TCN, if the TCN has not raised this particular ground to argue that the detention is unlawful. In the Netherlands, courts disagree whether this situation is in conformity with EU law. The judge of the (first instance) District Court, who referred the preliminary questions in Case C-39/21 PPU, regularly conducts an *ex officio* review and quashes the detention measure when she identifies a factual or legal circumstance resulting in unlawful detention, even if this circumstance has not been raised by the TCN in the grounds of appeal. She acts as a *habeas corpus* judge, who takes the role of a guarantor of human rights, a judge who must *actively* ensure that the detention measure is in accordance with law. The (second instance) Administrative Jurisdiction Division of the Council of State (henceforth: the Council of State), on the other hand, rejects such judicial authority and has consistently ruled that the detention judge is bound by the arguments presented by the parties, as in other administrative law cases.

1.1 Prohibition, competence or requirement of *ex officio* review?

Article 15(2) Return Directive provides that ‘detention shall be ordered by administrative or judicial authorities’. Where detention is ordered by administrative authorities, the TCN shall have access to a speedy judicial review of the lawfulness of detention. Article 15(2) Return Directive also requires that the TCN shall be released immediately if the detention is not lawful. Article 15(2) does not contain any explicit rules on whether the judge should review the detention *ex officio*. As we will show in this expert opinion, Member States have different legal practices concerning *ex officio* review in detention cases. There are three modalities, which Member States may apply:

1. The national court is *not allowed* to carry out an *ex officio* review of the lawfulness of (specific aspects of) the detention;
2. The national court is *allowed, but not required* to carry out an *ex officio* review of the lawfulness of (specific aspects of) the detention; or
3. The national court is *required* to carry out an *ex officio* review of the lawfulness of (specific aspects of) the detention.

As will be explained further in section 2 of this expert opinion, the first modality applies in the Netherlands. The District Court of ‘s-Hertogenbosch asks the CJEU in its preliminary questions in Case

¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.

² Art 8:69 General Administrative Law Act (henceforth GALA).

C-39/21 PPU whether EU law *allows* Member States to *prohibit ex officio* review.³ The Council of State in its preliminary questions in Case C-704/20 PPU asks the CJEU whether EU law *requires* the Member States to apply the third modality.⁴ This means that the CJEU will need to assess which of the three modalities described above are in conformity with EU law. If all three modalities are allowed, Dutch law is in conformity with EU law. If the second and third, or only the third modality is allowed, Dutch law must be changed.

1.2 Content and structure of this expert opinion

This expert opinion has two aims. Chapter 2 will explain in more detail how the prohibition to review detention measures *ex officio*, as it is applied in the Netherlands, plays out in practice. It will demonstrate that national procedural law limits the scope of review in detention cases, to such an extent that District Courts may not be able to quash a detention measure, even if they are aware that it is unlawful.

Chapter 3 of the expert opinion will discuss whether detention judges in Austria, Belgium, France, Germany and the United Kingdom are able or required to review a detention measure *ex officio*. This Chapter shows that divergent systems exist within Europe. In Germany judges order and prolong detention measures themselves, subjecting the lawfulness of the detention to a full and *ex officio* examination. However, in Belgium, France and the United Kingdom, judges seem only to be competent to review the detention decision of the administrative authority that imposed the detention measure on the basis of the submissions of the TCN. This underlines the importance of the preliminary questions to be answered by the CJEU and the need for a ruling on the question whether EU law permits Member States to prohibit an *ex officio* review in detention cases or conversely requires them to conduct such a review. Chapter 4 of this expert opinion draws a conclusion.

1.3 Methodology

This expert opinion is based on research of legislation, case law and literature and several interviews with experts. For section 2.1 we have searched the databases rechtspraak.nl and raadvanstate.nl for judgments concerning *ex officio* judicial review. We have also asked judges in the Netherlands, to provide examples of judgments in which District Courts explicitly applied an *ex officio* judicial review. We have chosen five different examples of judgments, issued in different years, in which the District Court felt compelled to carry out an *ex officio* judicial review even though they were not allowed to do so. The purpose of these examples is to explain the impact of the national prohibition to *ex officio* review, not to give a complete overview of the relevant case law.

Section 3 contains the results of our (limited) research into the practice of different European States: Austria, Belgium, France, Germany and the United Kingdom. These countries were chosen on the basis of the language abilities of the researchers. On the basis of legislation, case law and literature it is often difficult to establish what the exact competences are of a national detention judge. For this reason, we have contacted several national judges and lawyers, who have provided us with oral and written information. The following persons were interviewed:

- Dr. Nicolai Kaniess, Civil Judge at the *Amtsgericht Tiergarten* (Germany)

³ District Court 's-Hertogenbosch 26 January 2021, ECLI:NL:RBDHA:2021:466.

⁴ Council of State 23 December 2020, ECLI:NL:RVS:2020:3034.

- Judith Gleeson, senior judge at the UK Upper Tribunal, Immigration and Asylum Chamber (United Kingdom)
- Jana Zunker, MA Legal advisor, Independent Advice Vienna at Diakonie Flütlingsdienst gem. GmbH and Ruxandra Staicu, legal advisor at Deserteurs- und Flüchtlingsberatung (Austria).

Given the very limited time-frame, we did not find judges or lawyers in Belgium and France, who could provide us with more details and check the information we have found. For this reason, we are more cautious in the conclusions we draw with regard to these countries.

2. Judicial review of detention measures in the Netherlands in practice

In this section, we will first explain that Dutch law prohibits administrative judges, including judges ruling in appeals against detention based on the Return Directive, to review a decision *ex officio* (section 2.1.). Moreover, we will argue that, even though they rarely explicitly address this in their judgment, most District Courts of the Netherlands comply with this prohibition (section 2.2). Finally, five examples from practice will be discussed in which Dutch courts explicitly disregarded the prohibition of *ex officio* judicial review in order to end an unlawful detention. It is also demonstrated that such rulings are usually successfully appealed by the Secretary of State before the Council of State (section 2.3). The last section contains a conclusion (section 2.4).

2.1 The Dutch legal framework

In the Netherlands, detention measures taken by the Dutch Immigration Service are administrative decisions. Such measures can be first appealed before the District Court and subsequently on higher appeal to the Council of State.⁵ If the TCN has not appealed the detention measure themselves, the Secretary of State will notify the District Court about the detention measure.⁶ As soon as the court has received the notification, the TCN is deemed to have lodged an appeal against the detention decision and submitted a request for compensation. Article 94(6) of the Aliens Act 2000 provides that the court should declare the appeal well-founded and lift the detention measure or change the enforcement of the detention measure 'if it finds that the application or enforcement of the measure is contrary to the law or not justified weighing up all interests involved'.⁷

In detention cases, the Dutch District courts operate within the general administrative legal system of the Netherlands. That means that they review the detention decision taken by the Immigration Service. They do not carry out an independent assessment themselves. This follows from Article 8:69 of the General Administrative Law Act (henceforth: GALA), which provides:

- 1) The administrative judge will rule on the basis of the grounds of appeal, the documents submitted, the proceedings during the preliminary investigation and the investigation in court;
- 2) The administrative judge shall supplement the legal grounds *ex officio*;
- 3) The administrative judge may supplement the facts *ex officio*.⁸

This provision is interpreted strictly by the Council of State. Even though this was not the intention of the legislator, the Council of State has held that Article 8:69 GALA prohibits the administrative court from ruling on aspects of the administrative decision, which have not been contested by the applicant.⁹ At the same time, the District Courts have an obligation to address all grounds of appeal submitted by the applicant.¹⁰ The court is thus bound by the propositions of the applicant about the aspects of the decision they consider to be unlawful. As example 3 in section 2.3 will demonstrate, this also applies in cases in which the Secretary of State has notified the District Court about the detention decision

⁵ Arts 94 and 95 Aliens Act 2000.

⁶ Art 94(1) Aliens Act 2000.

⁷ Our translation.

⁸ Our translation.

⁹ G.N. Cornelisse, 'Van Magna Carta naar Mahdi' *Asiel & Migrantenrecht* (2015) p 200.

¹⁰ See eg Council of State, 4 April 2018, ECLI:NL:RVS:2018:1081 paras 3-4.

because the TCN has not lodged the appeal themselves. This seems to contradict the aim of Article 94 to protect TCN's against unlawful detention.¹¹

1. *Supplementing the legal grounds*

Judges are only allowed to rule *ex officio* in three situations. The first situation is defined in the second paragraph of Article 8:69 GALA, which requires a judge to supplement (*aanvullen*) the legal grounds in a case. This means that the judge should 'translate' the grounds submitted by the parties in legal terms.¹² The court is for example required to *ex officio* examine a case under Article 8 of the European Convention of Human Rights (the right to family life), if the applicant has only referred to Article 7 of the EU Charter of Fundamental Rights (also the right of family life) in a case, which does not fall within the scope of EU law.¹³ We will show in section 2.3, that this requirement does not concern the supplementing of arguments for unlawfulness of the detention. So, if the TCN fails to mention an argument why there is no prospect of removal, the judge will not be able to raise this argument of their own motion.

2. *Provisions of 'public order'*

Second, the court is required to *ex officio* apply provisions, which are considered to be of 'public order' (*openbare orde*). The provisions covered by this rule are limited. It concerns three categories of provisions. The first category relates to access to the court, which includes admissibility criteria and standing. The second category concerns the hard outer limits of administrative competence: is an administrative body competent to take the decision involved. The third category regards rules on fair proceedings.¹⁴ An example is the situation in which the District Court exceeds the 14-day time limit for holding a hearing in a detention case.¹⁵ This is a rule, of which the compliance can only be ensured by the court itself. Also, Article 8:69(1) GALA is considered to be a 'public order' provision. This means that the Council of State rules *ex officio* whether the District Court has remained within the scope of judicial review defined by that provision.¹⁶

The court is not authorised to test a decision *ex officio* against directly applicable provisions of EU law, unless they are considered to be of 'public order'. The Council of State does not consider the provisions of the Return Directive concerning detention to be of 'public order'.¹⁷ The Council of State has ruled that the District Court cannot rule *ex officio* that the maximum duration of the custody before the detention measure was imposed¹⁸ or the detention measure (six months)¹⁹ has been exceeded, because the relevant provisions are not considered to be of 'public order'.

¹¹ G.N. Cornelisse, annotation with Council of State 16 January 2013, ECLI:NL:RVS:2013:BY9617, *Jurisprudentie Vreemdelingenrecht (JV)* 2013/117.

¹² *Tekst and Commentaar* Algemene wet bestuursrecht, Art. 8:69 Awb, Kluwer, para 3 and R. Widdershoven, annotation with Council of State 11 February 2005, nr 200409759/1, *Jurisprudentie Vreemdelingenrecht (JV)* 2005/172

¹³ Council of State 3 January 2013, ECLI:NL:RVS:2013:BY8254.

¹⁴ R. Widdershoven, annotation with Council of State 11 February 2005, nr 200409759/1, *Jurisprudentie Vreemdelingenrecht (JV)* 2005/172.

¹⁵ Art 94(2) Aliens Act 2000.

¹⁶ See e.g. Council of State 14 April 2010, ECLI:NL:RVS:2010:BM1045.

¹⁷ Council of State 26 January 2011, ECLI:NL:RVS:2011:BP2536.

¹⁸ Council of State 16 November 2004, nr 200408525/1.

¹⁹ Council of State 25 January 2013, ECLI:NL:RVS:2013:BY9617.

3. Supplementing the factual elements

Finally, the third paragraph of Article 8:69 GALA gives the judge a discretionary power to supplement the factual elements of a case. This power should remain within the limits set by Article 8:69(1) GALA.

Prohibition of ex officio review

It follows from the case law of the Council of State that Article 8:69 GALA is interpreted as a prohibition of *ex officio* judicial review in cases, which do not fall within the three situations mentioned above.²⁰ Over the years, this interpretation has been perceived by the lower courts as restrictive, especially in situations concerning deprivations of liberty. The case law from the lower courts suggests that an *ex officio* review is often the only way to guarantee an effective legal protection.²¹ As a result of this prohibition, lower courts are presented with the question of whether to act contrary to national law and conduct an *ex officio* review in order to release a detainee from an unlawful detention or to uphold a (clearly) unlawful detention and respect the prohibition of *ex officio* review.

The next section will demonstrate how such situations have been a common dilemma among lower courts in the Netherlands and how the lack of flexibility has contributed to divergence in interpretations of national law and the obligations stemming from the EU law. By describing specific examples from Dutch case law, we aim to demonstrate the impact of the prohibition of *ex officio* review of detention measure based on the Return Directive in practice. We will first illustrate how lower courts (consciously) refrain from an *ex officio* review. We will then analyse five selected judgments in which lower courts felt compelled to act contrary to the prohibition of *ex officio* review. In some cases, the judgments were annulled by the Council of State in higher appeal on this particular ground.

2.2 Courts comply with the prohibition of *ex officio* review in detention cases

Generally, the District Courts comply with the Council of State's case law and review the lawfulness of a detention measure only on the basis of the grounds submitted by the applicant. In very few cases, District Courts *explicitly* refrain from applying an *ex officio* review of the lawfulness of a detention measure. An example of such a case is a judgment of the District Court of The Hague of 14 June 2007. In the appeal, the applicant argued that he was deprived of effective legal protection because the detention measure was not reviewed *ex officio*.²² The applicant submitted that EU law requires the District Court to subject the lawfulness of the detention measure to a full and *ex officio* examination.

The District Court considered that the court is bound by a 'prohibition to exceed the boundaries of the claim (go '*ultra petitem*')'. 'Where a detention judge nevertheless exceeds the boundaries of the claim, they will be corrected by the Administrative Jurisdiction Division of the Council of State'.²³ Moreover, the District Court found that no provision of 'public order' warranting an *ex officio* review was at issue in this case. According to the District Court, the Return Directive does not require it to review the lawfulness of detention measure *ex officio*. Moreover, the right to effective judicial protection was guaranteed. Here, the District Court took into account that the applicant was represented by a lawyer and had a right to higher appeal.

²⁰ Council of State, 1 June 2007, ECLI:NL:RVS:2007:BA6989, paras 2-2.3.

²¹ District Court 's-Hertogenbosch 23 October 2020, ECLI:NL:RBDHA:2020:10641, paras 23-31.

²² District Court Haarlem 20 September 2017, ECLI:NL:RBDHA:2017:10768, para 3.

²³ District Court Haarlem 20 September 2017, ECLI:NL:RBDHA:2017:10768, para 3.1. Our translation.

2.3 Disobedient courts: examples of *ex officio* review

Even though the Council of State's strict interpretation of Article 8:69 GALA prohibits *ex officio* review, several District Courts have felt compelled to exercise a (full) *ex officio* judicial review in detention cases.²⁴ In this section we will describe five examples of judgments in which the District Court reviewed an aspect of the detention measure *ex officio*, concluded that the detention measure was unlawful and released the TCN. In these cases, the TCN had not been released, if the District Court would have complied with Article 8:69 GALA. The Secretary of State lodged a higher appeal against all of these judgments. Three of them were annulled by the Council of State because the District Court acted contrary to Article 8:69 GALA, one was annulled for another reason and one higher appeal is still pending. With these examples we aim to illustrate how the Dutch District Courts are limited in their judicial review in practice. We will present the cases in chronological order. The first two examples date from before the implementation of the Return Directive. The last three examples demonstrate that the Council of State has not changed its views on *ex officio* review of detention measures after the implementation of this Directive.

Example 1: No prospect of removal

In this, the District Court ruled that the detention of an Iranian TCN was unlawful and ordered his release, because there was no prospect of removal. The TCN insisted that he did not want to return to Iran. At the time, the Iranian authorities would only issue a *laissez passer*, if the TCN stated orally and in writing that he was willing to return to Iran. The District Court found that it could not be expected of the TCN to make such a false statement. The TCN had contended that there was *no prospect of removal* since the Iranian authorities would probably not grant a *laissez passer* to him, because he was undocumented. Moreover, he stated that, even if he were documented, the chances that he would be granted a *laissez passer* would be slim. The previous year (2007), no TCN had been expelled from the Netherlands to Iran. However, he had not specifically raised the argument *that the Iranian authorities were unwilling to facilitate involuntary return* in the grounds of appeal.

The Secretary of State appealed this judgment before the Council of State, contesting the District Court's ruling that the TCN could not be expected to declare that he was willing to return voluntarily. The Council of State ruled *ex officio* that the District Court had acted contrary to Article 8:69 GALA. It noted that it did not follow from the official reports of the proceedings that the applicant had raised the argument in his appeal grounds that there was no prospect of removal *because the Iranian authorities required a statement of voluntary return*, which he did not want to provide. On this ground, the Council of State declared the appeal well-founded, annulled the judgment and referred the case back to the District Court.²⁵ This example demonstrates how restrictively the Council of State interprets the District Court's competence to supplement the legal grounds and the factual elements. It was not sufficient that the TCN claimed that there was no prospect of removal to Iran. He should also have mentioned all relevant arguments substantiating this claim.

²⁴ The District Court of 's-Hertogenbosch often applies an *ex officio* review. See recently: District Court 's-Hertogenbosch 24 February 2021, NL21.2306 and 18 February 2021, NL21.1614.

²⁵ Council of State 1 April 2009, ECLI:NL:RVS:2009:2811, para 3.

Example 2: Lack of due diligence on the part of the State²⁶

The second example concerns a case in which the District Court ruled that the State had not acted with due diligence to remove the TCN. During the hearing preceding the detention measure, the TCN had stated that his passport was at the house of a friend. The TCN had been given the opportunity to contact his friend and ask him to bring the passport to the Aliens Police. However, at the time of the court hearing, this had not happened but neither had the State taken any further action. The District Court found that the State should have contacted the TCN because he did not comply with his agreement to get the passport. The District Court noted in this regard that the TCN stated during the court hearing that he had the key to the friend's house and thus could have fetched the passport himself while under police supervision. The detention was found unlawful on the ground that the State had not acted with due diligence.²⁷

The Secretary of State appealed this judgment before the Council of State. He argued that it was reasonable to wait until the TCN had fulfilled his undertaking to get the passport. Moreover, he submitted that he did not know until the court hearing that the TCN had the key to the house. The Council of State, again *ex officio*, considered that it did not follow from the grounds of appeal, nor the records of the hearing that the TCN had submitted that the State did not act with due diligence. Moreover, it held that the existence of due diligence may not be examined *ex officio* by the District Court, because it does not concern a provision of public order. Therefore, according to the Council of State, the District Court acted contrary to Article 8:69 GALA. Without further reasoning, it declared the appeal well-founded, annulled the judgment of the District Court and referred the case back to the District Court.²⁸

Example 3: Late prolongation decision

This example concerns a case in which the decision to prolong the detention of the TCN was taken one day after the six months maximum period of detention had expired. The District Court referred to the Council of State's case law, which regarded the detention measure unlawful in such a situation.²⁹ The TCN appealed the decision to prolong the detention and pleaded for its lifting. However, the TCN did not specifically raise the argument that this decision was taken *after the maximum detention period of six months*. For this reason, the District Court could only address this unlawfulness *ex officio*. The District Court considered the statutory maximum duration of detention of six months, before which a prolongation decision is to be taken³⁰ to be of 'public order'. It declared the detention measure unlawful and released the TCN.³¹ The District Court noted that it follows from the notification procedure laid down in Article 94(2) Aliens Act that it was the intention of the legislator that the District Court would assess whether the maximum duration of the detention had been exceeded, also if the TCN did not lodge an appeal themselves.

The Secretary of State appealed this judgment before the Council of State, arguing that the District Court acted contrary to Article 8:69 GALA by considering the maximum duration of the detention of six months to be of 'public order'. According to the Secretary of State, the maximum

²⁶ Of course, the two judgments of the District Court of 's-Hertogenbosch underlying the two preliminary references at issue, are also examples of an *ex officio* review of due diligence. This shows that the Council of State's case law has not changed after the implementation of the Return Directive.

²⁷ District Court The Hague 5 November 2007, AWB 07/40100.

²⁸ Council of State 17 December 2007, ECLI:NL:RVS:2007:BC9166.

²⁹ Council of State 31 October 2012, ECLI:NL:RVS:2012:BY2113

³⁰ Art 59(5) and (6) Aliens Act 2000.

³¹ District Court Amsterdam 9 November 2012, ECLI:NL:RBSGR:2012:BY8756, para 1.

duration of the detention measure does not constitute a core element of the Dutch legal order. It is an interest, which detainees should protect themselves. The Council of State agreed with the Secretary of State and considered that the maximum duration of the detention measure does not need to be ensured irrespective of the will, knowledge, or interest of the parties and that it also does not affect the competence of the court. On the basis of the official reports and the applicant's written submissions in the proceedings before the District Court, the Council of State established that the applicant had not brought forward any arguments concerning the untimely prolongation decision. For this reason, it annulled the judgment of the District Court and denied the TCN's compensation claim.³²

Example 4: Insufficient grounds for detention

In this example, the TCN was detained with a view to his transfer to another Member State under the Dublin Regulation.³³ In the appeal against the detention measure, the TCN did not contest the ground for detention that he entered the Netherlands illegally. The District Court examined the applicability of the ground *ex officio* and concluded that this ground could not justify the detention. The court referred to a judgment of the Council of State and considered that it assumed that the Secretary of State also knew this judgment, but nevertheless did not drop this ground for the detention of his own motion. The District Court noted that, if it would not rule *ex officio* about this ground of detention, the unlawfulness of the detention measure would not be established and the TCN would continue to be unlawfully detained, even though the Secretary of State and the court are (or should be) fully aware of that. According to the court, this could not be tolerated in the light of a proper course of justice.³⁴

The Secretary of State appealed this judgment before the Council of State, arguing amongst others that the District Court did not comply with Article 8:69 GALA. The Council of State did not rule about the legality of the *ex officio* examination by the District Court, because it already considered the higher appeal well-founded on another ground. It annulled the judgment of the District Court, declared the appeal before the District Court unfounded and refused the claim for compensation.³⁵

Example 5: Lack of legal protection of a minor

The last example concerns a 15-year-old Vietnamese minor, who was found in the back of a truck and detained with a view to removal. The minor appealed both the return decision and the detention decision to the District Court. The District Court established that the contested detention measure contained serious flaws, which necessitated the immediate lifting of this measure. Taking into account the seriousness of these flaws and the violation of the rights of the child, the District Court examined the preliminary stage of the detention, the hearing and the reasons for and enforcement of the measure *ex officio*. The District Court concluded that the detention was unlawful on the following grounds³⁶:

1. The minor was arrested and placed in detention in the late evening without a hearing and without having been informed about the reasons of the detention. The minor was heard and

³² Council of State 25 January 2013, ECLI:NL:RVS:2013:BY9617.

³³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180.

³⁴ District Court Zwolle 26 April 2017, ECLI:NL:RBDHA:2017:4555.

³⁵ Council of State 29 December 2019, ECLI:NL:RVS:2017:3621.

³⁶ The judgment only mentions that the TCN submitted that he should not have been detained, even though he disappeared from the reception centre, because he is a minor.

informed about these reasons only in the early afternoon of the next day. According to the District Court, this constituted a violation of Article 5(2) ECHR;

2. The Immigration Authorities failed to establish whether the detainee was a minor and whether he wished to apply for asylum, before contacting the Vietnamese embassy;
3. The Immigration Authorities failed to inform the Dutch Legal Aid Board (*De Raad voor de Rechtsbijstand*) before the first hearing with the minor took place and the detention decision was taken;
4. The detained minor was heard in the absence of a guardian and a lawyer and the questions asked and the information provided to the minor were not appropriate to his age;
5. The measure of detention was insufficiently reasoned, lacking a specification on the realisation of the removal, the foreseeable duration of the detention measure and the proportionality of the detention measure;
6. The national authorities failed to consider whether less intrusive measures could be applied;
7. The minor stayed in police cell for more than three days, which was not in accordance with Dutch law; and
8. On the day of the court hearing, 12 days after the minor's initial arrest, the minor had still not been allocated a guardian.³⁷

The Secretary of State lodged an appeal against this judgment on 2 September 2019. In March 2021, the Council of State still had not issued a judgment.

2.4 Conclusion

The examples described above demonstrate that the strict interpretation of Article 8:69 GALA by the Council of State, *prevents* the Dutch District Courts from ending unlawful detention measures, if the TCN has not submitted the correct arguments for the unlawfulness of the detention in the grounds of appeal. In particular the first example discussed in the previous section shows that this is very demanding for the (lawyer of) the TCN. The TCN mentioned in the appeal the right ground why the detention measure was unlawful (lack of a prospect of removal) and two arguments for that ground (the fact that he was undocumented and that no removals to Iran had taken place in the previous year). However, he failed to make the argument that Iran only cooperated with voluntary (and not forced) return. The Council of State did not allow the District Court to ex officio take this last argument into account. Apart from the high standards this interpretation thus poses to the quality of legal aid, the interpretation by the Council of State as to which provisions are of 'public order' and which are not is questionable. This is particularly salient in the case dealing with untimely prolongation. If a judge cannot declare the detention unlawful in the absence of a prolongation decision after six months, because a third-country national has not made this particular argument in his appeal, this essentially means that the judge cannot end a measure of *de facto* detention.

In this context, it is telling that the District Court of Arnhem decided on 5 January 2021 to change its usual practice, until the judgment of the CJEU on the preliminary question referred by the Council of State. The District Court will now take unlawfulness into account without it being raised by the applicant if:

- The District Court is fully aware of the fact that the detention measure is unlawful; and

³⁷ District Court 's-Hertogenbosch 23 August 2019, ECLI:NL:RBDHA:2019:8709.

- This unlawful situation will continue if the court does not declare the appeal well-founded.³⁸

This implies that, before the preliminary reference by the Council of State, the District Court of Arnhem did not take into account (*prima facie*) unlawfulness, if the relevant arguments for deeming the detention unlawful were not mentioned in the appeal grounds.

The divergence among different lower courts and the disagreement between them regarding the Council of State's standing case law, have created a situation of legal uncertainty that has drastic effects on the individuals whose right to personal liberty is at stake. On the one hand, most lower courts refrain from *ex officio* review, being conscious of the prohibition following from the Council of State's strict interpretation of Article 8:69 GALA. On the other hand, certain courts feel compelled to exercise *ex officio* review, in order to guarantee the right to personal liberty and effective legal protection. Hence, it can be said that the outcome (deprivation of liberty or not) varies from one court to the other.

The analysis above demonstrates that, in situations where a District Court decides to exercise *ex officio* review, the Secretary of State will submit a higher appeal to the Council of State. The higher appeal will subsequently be declared well-founded and the judgment of the lower court will be quashed. This amounts to a prohibition for District Courts to carry out *ex officio* review. This situation can only be remedied if the CJEU rules that the current interpretation of Article 8:69 GALA, which *prevents* the Dutch Courts from reviewing an aspect of the detention measure *ex officio* does not comply with Article 15 Return Directive.

³⁸ District Court Arnhem 5 January 2021, ECLI:NL:RBDHA:2021:61.

3. *Ex officio* judicial review of detention measures in other European States.

In this section, we will address legal practice concerning judicial review of detention measures based on the Return Directive in other European States. We will show that these States have implemented different systems of judicial review. We will first demonstrate in this section that the Belgian, French and British courts reviewing the detention decision made by the administrative authorities do not seem to be allowed to rule on aspects of this decision *ex officio*. After that we will discuss legal practice in Austria and Germany, where detention judges have much wider powers. With regard to all countries, we will first briefly address the legal framework, after which we discuss the scope of judicial review.

3.1 Belgium, France and the United Kingdom: no *ex officio* review

3.1.1 Belgium

In order to be able to impose a detention measure, the Belgian Immigration Office (*Dienst Vreemdelingenzaken*) must obtain a valid return order.³⁹ A person can be detained for a maximum of two months, after which prolongation up to five months is possible. A TCN can appeal the detention measure before the criminal court.⁴⁰ Belgian law does not impose a time limit within which an appeal should be submitted, nor will the appeal automatically be submitted on behalf of the applicant.⁴¹ The first automatic review happens after four months, when the minister decides to prolong the detention measure a second time.⁴²

The applicant cannot appeal solely on the ground that he has been detained. They must mention the specific elements that are to be reviewed by the investigative judge.⁴³ In cases where the applicant does not specify which type of arrest they are challenging, the investigative judge will decide, based on the information on the respective case, which type of arrest the case concerned.⁴⁴

The criminal court is competent to examine whether the detention is in conformity with the law, but may not rule on its appropriateness.⁴⁵ This latter question is reserved for the Secretary of Asylum and Migration. The court is also not allowed to substitute its own decision for that of the

³⁹ *Bevel om het grondgebied te verlaten*. See Art 7 *Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*.

⁴⁰ Raadkamer van de correctionele rechtbank.

⁴¹ Mercuriale 'Integrale versie van de studie voorgesteld in de heropeningsrede uitgesproken door de heer procureur-generaal bij het Hof van Cassatie van België Andre Henks op de plechtige terechtzitting van 2 september 2019' (2019) p 15.

⁴² Art 74 *Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*.

⁴³ Court of Cassation 26 November 2008, P.08/1533.F.

⁴⁴ Court of Cassation 11 April 2018 P.18.0257.F.

⁴⁵ Art 72 *Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*. See also Mercuriale 'Integrale versie van de studie voorgesteld in de heropeningsrede uitgesproken door de heer procureur-generaal bij het Hof van Cassatie van België Andre Henks op de plechtige terechtzitting van 2 september 2019' (2019) p 12.

administrative authority.⁴⁶ The Court of Cassation has for example ruled in 2013 that by ruling that the illegal activities of the TCN did not seriously endanger public order and national security, the criminal court has substituted its appreciation of the fact for that of the Migration Office. In doing so, it exceeded the limits of the review.⁴⁷ The demarcation of competences in detention cases, between the executive branch and the judiciary, stems from Article 237(3) of the Belgian Constitution and the constitutional principle of separation of powers.⁴⁸ Sarolea notes that the Belgian case law is divided between, on the one hand, restrictive exercise of judicial review based on a marginal review of legality, and on the other hand a broader approach including proportionality.⁴⁹

Once the detention measure is prolonged, the review of the investigative judge in the appeal procedure becomes broader.⁵⁰ The judge reviews whether all conditions for detention were respected and whether the administrative authorities have conducted the necessary efforts for an effective repatriation. The judge also reviews whether the effective repatriation within a reasonable time period is still possible.⁵¹ The legality review of the judge refers to the formal validity of the measure, such as whether the reasons for the detention measure are in accordance with the international law that has been transposed into national law (such as the Return Directive).⁵² Furthermore, the judge examines whether there are factual errors such as a manifest error of assessment by the administrative authority.

The Court of Cassation has stated that, if the detention measure does not contain elements pertaining to the risk of absconding, evasion or obstruction of the repatriation procedure, it shall be declared unlawful.⁵³ In a similar case, the Court of Cassation decided that the risk of absconding must be real and actual and established on the basis of objective and serious elements.⁵⁴ The Court of Cassation also reaffirmed that the courts have to examine whether the detention order has been reasoned and whether it is in conformity with international and national law. They also need to check whether the detention order is not based on a manifest error of judgement or fact.⁵⁵ In all these cases the TCN had submitted grounds of appeal regarding this ground.

The Belgian court only seems to review limited issues *ex officio*. A ruling of 2013 mentions under the *sub heading* 'ex officio examination of the decision' that the substantial or on penalty of nullity prescribed formal requirements (*rechtsvormen*) have been observed and the decision has been taken in accordance with the law.⁵⁶ Apparently those are the requirements that the court may or must examine *ex officio*.

⁴⁶ S. Sarolea, 'Detention of Migrants in Belgium and the Criminal Judge: A Lewis Carroll World' in M. Moraru, G. Cornelissen, P. De Bruycker (eds) *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, (2020) 99 Modern Studies in European Law p 268.

⁴⁷ Court of Cassation 2 January 2013, P.12.2019.F/1.

⁴⁸ See Court of Cassation (*Hof van Cassatie*) 17 November 2010, P.10.1676.F.

⁴⁹ S. Sarolea, 'Detention of Migrants in Belgium and the Criminal Judge', p 268.

⁵⁰ Mercuriale 'Integrale versie van de studie voorgesteld in de heropeningsrede uitgesproken door de heer procureur-generaal bij het Hof van Cassatie van België Andre Henks', p 13.

⁵¹ Artt 7(5), 29(2), 44 septies(1)(2), 74/5(3)(1).

⁵² See Court of Cassation 17 November 2010, P.10.1676.F.

⁵³ Court of Cassation 21 January 2014, P.14.0005.N.

⁵⁴ Court of Cassation 27 June 2012, P.12.1028.F/1.

⁵⁵ Court of Cassation 2 January 2013, P.12.2050.N/1.

⁵⁶ *Ibid*, para 6.

3.1.2 France

The French Constitution provides that no one may be detained arbitrarily. A judicial authority, guardian of personal freedom, ensures the respect of this principle within the conditions provided by law.⁵⁷ Since 2016, the Judge of Freedoms and Detention (henceforth: JLD)⁵⁸ is responsible for deciding on detention measures.⁵⁹ The administrative tribunal⁶⁰ is responsible for appeals against expulsion measures.⁶¹

The JLD can review the lawfulness of the acts of the authorities preceding the detention measure as well as the lawfulness of the detention measure itself. It is competent to review the conditions of the arrest of the alien, the conditions and the execution of the administrative detention (including the notifications of rights, and the diligence of the administration with regard to the execution of the removal) and the lawfulness of the initial detention measure.⁶² According to the French Court of Cassation, the JLD must, at any moment, put an end to the detention when the circumstances of law or fact justify it, notably looking at the conformity of the detention measure with EU law.⁶³

However, this does not seem to imply that the JLD is reviewing all these aspects of the detention measure *ex officio*. Before the JLD, any grounds for unlawfulness must be raised *in limine litis* (from the start of the process) in written form.⁶⁴ A study based in Lyon mentions that the JLDs may order the release of the TCN or issue a compulsory residence order (*assignation à résidence*) *if these measures are in fact raised by the lawyers of the detainee*, either because grounds for unlawfulness have been raised or because means of recourse have been presented regarding the initial detention or the prolongation.⁶⁵ If none of these issues are raised, the judges do not rule on the matter, since the JLDs (at least in Lyon) consider that they rarely may take it upon themselves to raise these issues and therefore make a decision that is not asked explicitly from them.⁶⁶

⁵⁷ Art 66 French Constitution (*Constitution Française*), 4 October 1958.

⁵⁸ *Juge des libertés et de la détention*.

⁵⁹ Art 33 Loi n° 2016-274 du 7 mars 2016 relative au droit des étrangers en France.

⁶⁰ *Tribunal Administratif*.

⁶¹ Art 33 Loi n° 2016-274 du 7 mars 2016 relative au droit des étrangers en France.

⁶² Annexe 1 : FICHE : La répartition des compétences entre les deux ordres juridictionnels après l'entrée en vigueur des dispositions de la loi n°2016-274 du 7 mars 2016 relative au droit des étrangers in *BOMJ n°2016-11 du 30 novembre 2016 – JUSC1631527C*. This includes the 'external lawfulness' (the competency of the author of the act, procedural or formal errors) and internal lawfulness (error of fact, error of law or error of legal qualification).

⁶³ It is up to the JLD : 'de mettre fin, à tout moment, à la rétention administrative, lorsque des circonstances de droit ou de fait le justifient, résultant, notamment, de la recherche de la conformité au droit de l'Union de la mesure de rétention'. Cass 1 ère civ, 9 November 2016, np 15-27.357, available at <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000033374926/>> accessed 15 March 2021.

⁶⁴ Association Nationale d'Assistance aux Frontières pour les Etrangers (Anafé), *Compétence du Juge des libertés et de la détention : Quels moyens invoquer au profit des étrangers maintenus en zone d'attente?* available at <http://www.anafe.org/IMG/pdf/note-competence-juin_2010-_quels_moyens_invoquer_au_profit_des_etrangers_maintenus_en_za-2.pdf> accessed 16 March 2021, p 3.

⁶⁵ Les Amoureux au ban public, La Cimade and Ligue de droits de l'homme, *Presentation des personnes étrangères retenues devant le Juge des Libertés et de la Détention du TGI de Lyon : Regard Citoyen sur l'impact de la réforme du 7 Mars 2016*, available at < www.lacimade.org/wp-content/uploads/2018/10/Rapport-dobservations-citoyennes_r%C3%A9tention-administrative-JLD-de-Lyon_2016-2017.pdf> accessed 15 March 2021, p 16.

⁶⁶ *Ibid*, p 16.

Another indication that the JLD does not review aspects of detention measures *ex officio* can be seen in cases relating to involuntary psychiatric treatment. The Cassation Court has held that JLDs are not in principle required to raise any issues, which the parties may have omitted.⁶⁷ This reasoning is based on the underlying principle according that the appeal is between the parties (*la chose des parties*).⁶⁸

However, JLD's are required to raise issues of 'public order' (*moyens d'ordre public*) *ex officio* (*soulever d'office*). These issues of 'public order' are serious breaches in procedure, for example the incompetence of the authorities to carry out a particular administrative act.⁶⁹ Although the courts have not commented on this question to date, this could imply that in principle the JLD has the possibility (if not the obligation) to review a serious breach of procedure during the review of the detention of a TCN.

3.1.3 The United Kingdom

The United Kingdom (henceforth: the UK) did not participate in the Returns Directive⁷⁰, but is bound by Article 5 of the European Convention of Human Rights. In the UK, there is no statutory right to appeal a detention decision under national law. Detainees can only challenge the lawfulness of detention by applying for *habeas corpus*⁷¹ or judicial review before the High Court. Habeas corpus is available only when detention is carried out by a person or body which lacks the authority to do so. Judicial review is the method by which detainees may challenge the correct and lawful exercise of these statutory detention powers.

Judicial review in the UK courts is expressly not an appeal. It is a discretionary remedy which belongs to the High Court. Permission for judicial review is granted only where there is an arguable public law error in an administrative decision.⁷² Challenge must be 'prompt, and in any event, within three months' of the decision under challenge.

Judges undertaking judicial review only have authority to consider an error of law identified by the applicant.⁷³ The grounds for judicial review may be amended up to the grant of permission, but can then be amended only with the permission of the judge.⁷⁴ The High Court thus does not review the detention measure *ex officio*. In the review of the detention measure, the High Court applies the Wednesbury principles. This means that the High Court may only quash a detention decision if it finds it unreasonable or perverse, meaning that no reasonable decision maker could have reached the same

⁶⁷ Arrêt n°270 5 March 2020 (19-23.287) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2020:C100270, discussed in *Soins psychiatriques: pas d'obligation pour le JLD de soulever les moyens de droit que les parties auraient oubliés* available at <www.editions-legislatives.fr/actualite/soins-psychiatriques-pas-d-obligation-pour-le-jld-de-soulever-les-moyens-de-droit-que-les-parties-au> accessed 15 March 2020.

⁶⁸ Ibid.

⁶⁹ *Soins psychiatriques: pas d'obligation pour le JLD de soulever les moyens de droit que les parties auraient oubliés* available at <www.editions-legislatives.fr/actualite/soins-psychiatriques-pas-d-obligation-pour-le-jld-de-soulever-les-moyens-de-droit-que-les-parties-au> accessed 15 March 2020, which refers to CE, 9 juin 1978, n° 02403 ; CE, 8 févr. 1999, n° 185749).

⁷⁰ Recital 26 Directive 2008/115/EC.

⁷¹ *R v Secretary of State for the Home Department, ex parte Muboyayi*, [1992] 1 QB 244.

⁷² *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7.

⁷³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, para 3.

⁷⁴ Rule 54.15 of the Civil Procedure Rules.

decision on the same available information.⁷⁵ If detention is found to be unlawful following judicial review, the High Court has the power to order an appropriate remedy including release and/or pecuniary damages. It is not under a duty to order the release of the applicant, nor is the Secretary of State prevented from making a new decision in favour of detention.

3.2 Austria and Germany: application of *ex officio* review

In this section, we will discuss the legal systems of Austria and Germany. In both countries the judge is required to carry out an *ex officio* examination or review of the lawfulness of the detention measure. In Austria the judge only conducts an *ex officio* review of the continuation of the detention measure. In Germany the civil judge orders and prolongs the detention measure on the request of the administrative authorities. They carry out a full *ex officio* examination of the lawfulness of the detention.

3.2.1 Austria: forward looking *ex officio* review

In Austria, the Federal Migration and Asylum Office (henceforth: the BFA)⁷⁶ issues the detention order. The BFA is required by law to check whether:

1. there is a danger of absconding;
2. the execution of the measure is possible within the maximum duration of detention;⁷⁷
3. the personal circumstances of the applicant allow for detention (*commensurability*); and
4. there are less coercive measures that could ensure deportation.⁷⁸

The applicant may at any moment appeal the ‘illegality of his arrest or custody or of an administrative decision ordering his detention pending deportation’⁷⁹ to the Federal Administrative Court⁸⁰ (henceforth: the BVwG).⁸¹ The BVwG must issue a decision within a week if the person is detained or within 6 months if they have been released.⁸²

If a TCN is detained for a continuous period of more than four months pending deportation, the reasonableness of his custody shall be reviewed by the BVwG after the day on which the fourth month elapses and thereafter every four weeks.⁸³ According to Austrian law, the appeal shall be deemed lodged on behalf of the detained TCN upon presentation of the administrative records. No automatic appeal will take place if the applicant has already lodged an appeal themselves.⁸⁴

⁷⁵ These principles are set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1.

⁷⁶ *Bundesamt für Fremdenwesen und Asyl*.

⁷⁷ The usual maximum period of detention is six months. If you apply for international protection while in detention, the detention may last up to ten months, in order to secure this procedure. If the alien has taken measures to prevent their deportation (for example non-cooperation, identity documents) the detention may last up to 18 months.

⁷⁸ See for the conditions of detention para 76 *Fremdenpolizeigesetz 2005* (FPG).

⁷⁹ See the translation of the BFA Procedures Act (*BFA - Verfahrensgesetz*) available at <www.refworld.org/docid/5c863e697.html> accessed 15 March 2021.

⁸⁰ *Bundesverwaltungsgericht*.

⁸¹ Art 22a BFA Procedures Act.

⁸² Art 22a(3) BFA Procedures Act.

⁸³ Art 22a(4) BFA Procedures Act.

⁸⁴ Art 22a(4) BFA Procedures Act.

During an appeal against a detention measure, the BVwG considers two time periods. The first period spans from the moment the person is taken into until the moment the decision on appeal is taken by the BVwG. This backward-looking period thus concerns the period of time the TCN has already spent in detention. The unlawfulness of this period of detention can thus only lead to financial compensation for the TCN. The second period begins from the judgment of the BVwG. It is thus forward-looking and concerns the question whether the TCN should be released. The automatic periodic judicial reviews, which take place after four months of detention and then every four weeks, are always only forward-looking.

The BVwG should examine the lawfulness of the detention in the former period on the basis of the submissions of the parties. It is not allowed to examine this lawfulness *ex officio*.⁸⁵ However, the BVwG has a wide power to *ex officio* supplement the grounds submitted by the TCN.⁸⁶ If the TCN claims that the detention is contrary to a legal provision, they do not need to raise further arguments in support of this claim. For example, if the applicant simply claims that the condition of commensurability is not met, this will allow the judge to review all the personal circumstances of the person concerned in this context.⁸⁷ However, if - for example - the complainant claims only a certain period of time to be unlawful, the court could not look at other time periods of the detention.⁸⁸

For the second period (future of the detention), the BVwG 'shall demonstrate why it is necessary and reasonable to maintain the detention order in force'.⁸⁹ The BVwG shall 'establish whether, at the time of its ruling, the requirements determining the continuation of the detention are satisfied and whether it is reasonable to maintain the detention order in force'.⁹⁰ This should be done on the basis of the administrative records, which the BFA should provide to the BVwG in time.⁹¹ This seems to imply that the BVwG carries out a full and *ex officio* examination of the lawfulness of the continued detention. One of the experts consulted for this expert opinion confirmed that the BVwG is competent to conduct a forward-looking *ex officio* review in an appeal lodged by the TCN and in the automatic judicial review. The BVwG must review all four conditions for detention mentioned above, in the light of the ECHR, national law (including personal freedom in the Austrian Constitution and habeas corpus) and EU law. In practice, the BVwG limits itself to the assessment of those four conditions.⁹² It is possible that the BVwG modifies the legal grounds of the detention decision, in order to make the detention lawful.

The Austrian High Administrative Court has recently decided that the TCN must be heard in the context of the judicial review of the BVwG.⁹³ Prior to this decision, Courts were able to schedule a hearing or ask for written submissions from the applicant but this was rarely practised.⁹⁴ Now, the High

⁸⁵ Interview conducted with Jana Zunker (MA, Legal advisor at Diakonie Flüchtlingsdienst gem. GmbH) and Ruxandra Staicu, (BA, Representative of Deserteurs- und Flüchtlingsberatung), Friday 12 March 2021.

⁸⁶ This follows from Paragraph 37 ff. Allgemeines Verwaltungsverfahrensgesetz (AVG) combined with Paragraph 17 Verwaltungsgerichtsverfahrensgesetz (VwGVG).

⁸⁷ Interview with Jana Zunker and Ruxandra Staicu, referring to Arts 37 ff AVG combined with Paragraph 17 VwGVG.

⁸⁸ Interview with Jana Zunker and Ruxandra Staicu.

⁸⁹ See the translation of Art 22a(4) BFA Procedures Act available at <www.refworld.org/docid/5c863e697.html> accessed 15 March 2021.

⁹⁰ Ibid.

⁹¹ Art 22a(4) BFA Procedures Act.

⁹² Art 76 FPG.

⁹³ VwGH 27 August 2020, Ro 2020/21/001. See also VwGH 12 January 2021, Ra 2020/21/0378.

⁹⁴ Interview with Jana Zunker and Ruxandra Staicu.

Administrative Court will ask the applicant whether they would like to express themselves at a hearing or in written form, which enables them to provide relevant information to the BVwG.

3.2.2 Germany: a full *ex officio* examination

Germany is the only EU Member State in which all types of detention, including detention based on the Return Directive, are imposed by a judge.⁹⁵ This system is based on Article 104(2) of the German Constitution.⁹⁶ This idea was first formulated in the 19th century and is still enshrined today in Paragraph 58 and further in conjunction with Paragraph 415 of the Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction (henceforth: FamFG).⁹⁷ The reservation of the judge's prerogative is the result of a historical development that wanted serious infringements (such as deprivation of liberty) to be regulated by an independent body. It places judges at the core of decision-making in detention cases.

The civil judge is competent to order and prolong the detention of TCN's based on the Return Directive.⁹⁸ At the same time, the administrative judge is competent to examine the legality of a final deportation order.⁹⁹ The civil judge's competence to assess the proportionality of detention is therefore limited, particularly with regard to the administrative authorities' conduct facilitating a deportation with due diligence.¹⁰⁰

Under German law, the civil judge examining whether a TCN should be detained, must take an independent decision on the merits. This is necessary in order to fulfil the function accorded to the judge by Article 104(2) of the German Constitution and to provide prior protection of fundamental rights.¹⁰¹ At the request of the competent administrative authority to order detention, the judge conducts a full and *ex officio* independent examination¹⁰², which deals with the legal as well as the factual aspects and considerations.¹⁰³ The judge is not limited to the arguments of the parties, but can conduct investigations on his own motion.¹⁰⁴ They can for example question witnesses or request documents from third parties.¹⁰⁵ According to Article 103(1) in conjunction with Article 104(2) GG it is

⁹⁵ F.W. Dollinger 'Geordnete-Rückkehr-Gesetz' *Zeitschrift für Rechtspolitik* (2019), para 133.

⁹⁶ Ibid Art 104(2) GG: 'Only the judge shall decide on the admissibility and duration of a deprivation of liberty. In the case of any deprivation of liberty not based on a judicial order, a judicial decision must be obtained without delay. The police may not, on their own authority, keep anyone in their own custody longer than until the end of the day following the seizure. Further details shall be regulated by law'.

⁹⁷ Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG).

⁹⁸ Ibid para 58 seq FamFG in conjunction with para 415 FamFG: '[...] a person is deprived of her liberty when she is held in a closed facility against her will or under circumstances of a lack of will.' See also: H. Dörig, 'Nicolai Kaniess, Abschiebungshaft', *Thüringer Verwaltungsblatt* (2021).

⁹⁹ W. Kluth, in: W. Kluth and A. Heusch, Aufenthaltsgesetz, para 62, AufenthG (2018), para 26.

¹⁰⁰ J. Bornemann and H. Dörig 'The Civil Judge as Administrator of Return Detention: The Case of Germany', in: G. Cornelisse et al., *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (2020) p 232.

¹⁰¹ Bundesverfassungsgericht 4 October 2010, 2 BvR 1825/08.

¹⁰² Para 26 FamFG provides that 'The court shall conduct necessary inquiries *ex officio* to establish facts that are relevant to the decision'.

¹⁰³ V. Epping and C. Hillgruber, *Beck Online Kommentar zum Grundgesetz* (Munich, C.H.Beck, 2020), Art 104 GG para 12.

¹⁰⁴ Bundesverfassungsgericht 30 October 1990, 2 BvR 562/88; H Dreier, 'GG Kommentar' (Tübingen, Mohr Siebeck, 2015), Art 104 GG, para 36.

¹⁰⁵ Interview with Dr. Nicolai Kaniess, Civil Judge at the *Amtsgericht Tiergarten* on the judicial review by a German Civil judge in detention cases on 10 March 2021.

also necessary to hear the TCN affected by the decision before it is issued.¹⁰⁶ If this personal hearing is not conducted, the detention is unlawful. An infringement cannot be cured retroactively.¹⁰⁷ The judge weighs the grounds for detention under strict proportionality considerations.¹⁰⁸ Article 15 Return Directive and Paragraph 62 of the German Residence Act¹⁰⁹ (henceforth: AufenthG) specify under which circumstances the order of detention pending deportation is lawful.¹¹⁰ Within these legal limits, judges enjoy considerable discretion regarding the assessment of proportionality of the detention.¹¹¹

It was made clear during the interview with German civil judge Dr. Nicolai Kaniess, that it is unthinkable in this system that the judge will order detention if the authorities have not provided detailed and complete information, showing that all legal requirements have been fulfilled.¹¹²

¹⁰⁶ Bundesverfassungsgericht 5 May 2008, 2 BvR 1615/07, 2008; Sachs/*Degenhart*, GG Art 104 para 22.

¹⁰⁷ Bundesgerichtshof 4 March 2010, V ZB 184/09.

¹⁰⁸ The proportionality test for judicial enquiries derives from national constitutional law (Art 20 (3) GG). See also: M. Klatt and M. Meiste, 'Der Grundsatz der Verhältnismäßigkeit: Ein Strukturelement des globalen Konstitutionalismus' in: *Juristische Schulung* (2014/03), p 193.

¹⁰⁹ *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet* (AufenthG).

¹¹⁰ Para 62 AufenthG.

¹¹¹ J. Bornemann and H. Dörig 'The Civil Judge as Administrator of Return Detention', p 228.

¹¹² Interview with Dr. Nicolai Kaniess on 10 March 2021.

4. Conclusion

The preliminary questions in Joined Cases C-704/20 PPU and C-39/21 PPU essentially ask the CJEU to rule about the role of a national detention judge under Article 15 Return Directive and Articles 6 and 47 of the Charter. Does EU law require this judge to act as a *habeas corpus* judge, who must actively ensure that the detention measure is lawful? Or does EU law allow that national procedural rules limit the scope of review to the arguments raised by the applicant in the grounds of appeal, thus prohibiting *ex officio* review of those aspects of the detention measure, which were not contested?

This expert opinion has demonstrated in Chapter 2 that the restrictive interpretation of Article 8:69 GALA by the Council of State, prohibits the Dutch District Courts to rule *ex officio* in the appeal against a detention measure. The District Courts are only allowed to apply provisions which are considered to be of ‘public order’ *ex officio*. These provisions concern access to the court, administrative competence and rules on fair proceedings. Moreover, the courts are required to supplement *ex officio* the legal grounds and allowed to supplement *ex officio* the factual elements of the case. However, the District Court’s competence to supplement the legal grounds and the factual elements is interpreted restrictively by the Council of State.¹¹³

Most District Courts in the Netherlands comply with the prohibition of *ex officio* review. However, some District Courts such as the referring District Court of ‘s-Hertogenbosch, have felt compelled to carry out an *ex officio* judicial review in order to ensure the fundamental right of personal liberty by ending the unlawful detention and ordering the release of the TCN. In this expert opinion, we have described five examples of such judgments in more detail. These concerned situations in which the judge was aware that the detention was unlawful because there was no prospect of removal, there was a lack of diligence on the part of the State, the maximum period of detention had been exceeded, there were insufficient grounds for detention or the rights of a minor were violated. The judge could only end the unlawful detention by acting contrary to the current restrictive interpretation of Article 8:69 GALA. The Secretary of State lodged a higher appeal against all the judgments discussed in our five examples. In three of the higher appeals the Council of State ruled that the District Court had exceeded its competence by conducting an *ex officio* review.¹¹⁴

The divergent practice between the District Courts leads to differences in judicial protection of detained TCNs in the Netherlands. Moreover, as this expert opinion demonstrated in Chapter 3, important differences exist between the systems of judicial review in European States. Belgium and France have systems of judicial review that are similar to the Dutch system. Detention judges do not have the competence to review all aspects of a detention measure *ex officio*. They can conduct an *ex officio* review of provisions that are considered to be of ‘public order’. The detention measure is examined on the basis of the grounds of appeal submitted by the TCN. In the United Kingdom, the High Court can only conduct a judicial review of a detention measure if permission is granted to the TCN because there is an arguable public law error in the detention decision. The High Court rules on the basis of the grounds put before it by the TCN and examines the (Wednesbury) reasonableness of the detention measure.

The level of protection for detained TCNs is higher in Germany and Austria. In those countries, the detention courts examine detention of TCNs *ex officio*. In Germany, the Constitution requires that a judge orders and prolongs a detention measure, and as such all aspects of the lawfulness of a detention measure are subject to judicial scrutiny. In Austria, detention judges apply a forward-looking

¹¹³ See e.g. example 1 in section 2.3 of this expert opinion.

¹¹⁴ One higher appeal is still pending, the other was well-founded on another ground.

ex officio review. They examine *ex officio* whether it is necessary and reasonable to maintain the detention order in force. The review of the lawfulness of the detention, which has already been executed, is based on the grounds submitted by the TCN in the appeal.

The Dutch prohibition of *ex officio* review can be remedied if the CJEU rules that the current restrictive interpretation of Article 8:69 GALA does not comply with Article 15 Return Directive read in light of Articles 6 and 47 of the Charter. Only then will Dutch District Courts be able to end an unlawful detention measure and order the release of the TCN as required by Article 15 Return Directive in a situation in which the TCN has not submitted the correct appeal grounds. We have demonstrated that such a judgment is also relevant to other Member States, such as Belgium and France. Moreover, in view of significant divergences between the Member States with regard to the scope of *ex officio* judicial review of detention under Article 15 Return Directive, a ruling by the CJEU will ensure uniformity in the level of fundamental rights protection of detained TCNs in the Member States.