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IMMIGRATION DETENTION AND THE RULE OF LAW

NATIONAL REPORT: FRANCE

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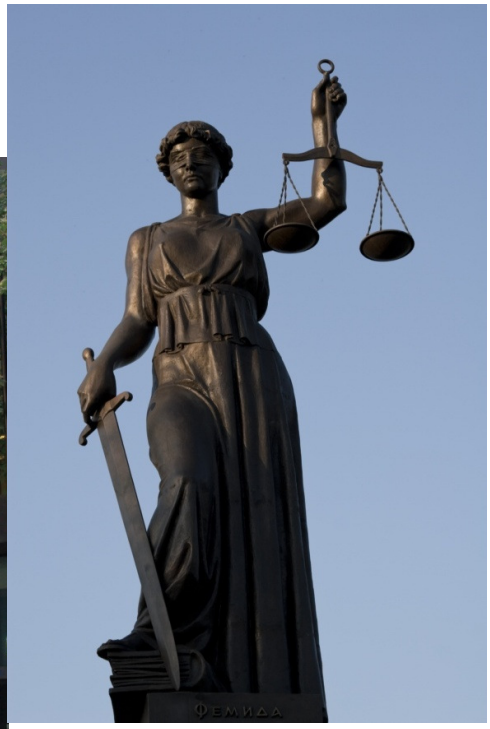

Immigration Detention – French Report

According to the EU Directorate-General for Home Affairs, 'every year, national authorities in the EU apprehend more than 500 000 irregular migrants (570 000 in 2009). About 40 per cent of them are sent back to their home country or to the country from which they travelled to the EU.' As in the other European Union (EU) Member states, immigration detention has been increasing in France where estimates of the number of irregularly residing immigrants ranged from 200 000 to 400 000 (Murphy, 2006).

The UNHCR defines detention as the 'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory'.[1] Under EU law, immigration detention applies to third-country nationals (TCNs) 'who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State'.[2] Article 5 (1) (f) of the European Convention of Human Rights (ECHR) adds that such a measure is only justified 'to prevent [a person's] unauthorized entry into the country' or where 'action is being taken with a view to deportation or extradition'. According to these definitions, immigration detention entails the deprivation of liberty of people who lack the necessary documents required by national law to reside regularly in a foreign country, and hence do not comply with the administrative regime of immigration.[3] Immigration detention can hence be justified in two cases: 1) detention of persons at the frontier seeking unauthorized entry and 2) persons pending deportation or

[1] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999, 3.

[2] See Recital 5 in the Preamble of 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 (Return Directive), *Official Journal of the European Union* L 348/98 (24 December 2008).

[3] Articles 2-1 and 3-2 of the Return Directive refer to third-country nationals staying illegally on the territory of a Member State (emphasis added). However, this report uses either the adjectives irregular or undocumented to address the non-compliance with the regime of immigration, following the terminology suggested by the Council of Europe Commissioner for Human Rights: 'Member states should avoid using the terms "illegal migrant" or "illegal immigration"... The term is counterproductive and misleading. People are not "illegal". Their status vis-à-vis state authorities may not be regular but that does not render the individual somehow beyond humanity'. See also the position of the Council of Europe: 'It should always be recalled that irregular migrants who are detained for breaching provisions relating to migration are not criminals and should be held in appropriate conditions': Commissioner for human rights, CommDH/PositionPaper (2010)5, Strasbourg, 24 June 2010, available https://wcd.coe.int/ViewDoc.jsp?id=1640817 Both French law and policy use either a phrase describing the situation of these immigrants or the term irregular. See for instance provisions in the CESEDA and the title of the recent administrative written memorandum (*circulaire*) of 28 November 2012 on the conditions for the examination of applications for stay filed by irregular foreign nationals in the framework of CESEDA: *ressortissant étranger en situation irrégulière* http://circulaires.legifrance.gouv.fr/pdf/2012/11/cir_36120.pdf, last retrieved 22 January 2013. Besides, in conformity with EU terminology, the report refers to non-EU citizens as Third-Country Nationals (TCNs).

extradition.[4] The combination of the definitions highlights the specific aim of this measure: to detain the foreigner in view of 'the enforcement of [his/her] obligation to return, namely [his/her] physical transportation out of the Member State'.[5] Nonetheless, French data shows that 55,5 per cent of immigration detainees are then released in two cases: 1) following a decision of either the *Juge des libertés et de la détention* or the administrative tribunal (29 per cent), or 2) in absence of consular *laissez-passer* or proper identification of the migrant, for the remaining number.
This measure is called *rétention administrative* in France (administrative detention).[6] The term administrative aims at distinguishing the content and legal implications of this regime of detention from the one enforced in Criminal law resulting from a criminal offence. The procedure of *rétention administrative* is set out by the articles L551-1 to L555-3, R551-1 to R553-17 and R821-1 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA).[7] This coercive administrative measure aims at facilitating the execution of the removal decision, ie the administrative or judicial decision or act, stating or declaring the stay of a foreigner to be irregular and imposing or stating an obligation to leave the territory. This applies to non-European foreigners who are subject to one or more removal measures: *obligation de quitter la France* (*OQTF*), *interdiction administrative de retour sur le territoire français* (*IRTF*), *arrêté préfectoral de reconduite à la frontière* (*APRF)*, *arrêté d'expulsion*, *interdiction judiciaire du territoire français*, or *mesure d'éloignement prise dans le cadre de l'Union européenne.*[8] Foreigners who have not left France within 7 days from the end of the first detention, and foreigners who returned to France in violation of an enforced removal order may also be subject to such a decision.

Since 2006, France has introduced annual targets for deporting undocumented immigrants, as well as more restrictive immigration legislation ranging from marriage to work authorization, from family reunification to return, from the regime of family immunities (*immunités familiales*) to humanitarian immunity (notion of *immunité humanitaire*)[9], or even procedures pertaining to Criminal law. These

[4] See for further analysis: B Nicholas, R. Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, 2003), 125.

[5] See Article 3-5 of the EU Return Directive. Article 3-3 defines return as 'the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to his/ her country of origin, or a country of transit … or another third country'.

[6] This term is also used by the Special Rapporteur on the Human Rights of Migrants (United Nations Commission on Human Rights): 'Specific Groups and Individuals Migrants Workers', Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62, E/CN.4/2003/85, 30 December 2002. See also the Observation and Position Document of the Jesuit Refugee Service: *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants,* 17 October 2005, www.detention-in-europe.org, last retrieved on 15 December 2012.

[7] These provisions lay out the framework and conditions of the detention, duration, the rights granted to the detainees and the organization of the detention locations.

[8]These removal decisions are issued by a different issuing authority: see for conditions and modalities of issuance Art. L.511-1 I and II CESEDA (OQTF and IRTF), L.533-1 and R.533-1 CESEDA (APRF), R.531-1 CESEDA (readmission Schengen), R.522-1 and following CESEDA (expulsion).

[9] See Law 2012-1560 of 31 December 2012 modifying art. L. 622-4 CESEDA. See also *Mallah v France* (ECtHR, 10 November 2011) 29681/08.

reforms have deeply modified immigrants' status and protection in France, in particular stricter provisions introduced in 2011 and 2012 regarding administrative detention.[10] Concomitantly, the Government targets have been maintained despite European/EU laws and case-law, notably thanks to procedures of removals with higher levels of execution such as readmission procedures to Schengen States, thus bypassing the control of the judges.[11] As a result, nearly 30 000 removals occurred in 2008, thus surpassing the Government's initial goal of 26 000 removals (Connexion, 2009). 32 000 people were removed from metropolitan France only in 2011, again exceeding the target set for that year (Cimade, 2011). This *politique du chiffre* has consequently implied both the rise of the number of administrative detainees: from 28 220 in 2003 to 35 008 in 2007, this number rose up to 60 000 detainees in 2010 including the French overseas detention facilities (Cimade, 2008; 2010). In 2011, 24 286 people were detained in metropolitan France and 27 099 in overseas facilities (Cimade, 2011). The detained population is primarily male (92 per cent of total number in 2011) and young (82, 4 per cent range from 18 to 39 years old). In 2006 nearly a third of all detainees were of Romanian or Bulgarian origin, whereas in 2011 detainees were predominantly of North African origin: Algerians, Moroccans, and Tunisians constituted around 40 per cent of detained migrants (Cimade, 2011). More, 384 detainees were minors, bearing in mind that 241 additional detainees had declared themselves as such, but were not recognised as minors by the administrative authority. Most of the minors were accompanied by (at least a member of) their family. At last, 160 families were detained, against 178 in 2010, excluding the case of detainees in Mayotte that we will address below. French policy has also resulted in the increase of detention capacity: from 739 in 2003 to 1711 places for 25 *centres de rétention administrative* as of 31 August 2012 (data from French Ministry of the Interior). Likewise, the legal period of detention of immigrants subject to removal has gradually been extended: from 12 to 32 days in 2003, and up to 45 days in 2011, although the actual average duration (around 10 days) has remained relatively constant since 2007 (see more on duration below).

Furthermore, French law and practices are vividly criticized regarding the treatment of asylum seekers and EU nationals. France shows the highest number of asylum seekers per annum in Western Europe (35 160 in 2008), hence ranking as the third industrialised country, after the United States and Canada (UNHCR report, 2009). Under French law, seeking asylum is not a criterion of detention as such. On the contrary, filing an application for asylum suspends the enforcement of the removal order pending the *Office Français de protection des réfugiés et des apatrides* (OFPRA)'s decision on the asylum claim.[12] Besides, the Council of Europe recalled that, '[a]s a matter of principle, no person seeking international protection should be subject to detention'. Yet, under the Dublin II Conventions regulating asylum, asylum seekers may be deported to the country where they originally entered the Schengen area or to the country where they have already filed an asylum claim, so

[10] Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité *Journal Officiel de la République Française* (JORF) n°0139 du 17 juin 2011 p.10290 ; Loi n° 2012-1560 du 31 Décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées, JORF n°0001 du 1 janvier 2013 p. 48, texte n° 4.

[11] See also footnote [21] on page 5.

[12] The OFPRA, the French agency for the protection of refugees and stateless persons, is the administrative authority (state agency) specialized in the treatment of application for asylum and subsidiary protection. See for further information http://www.ofpra.gouv.fr/

implying their detention. In addition, the common standards pertaining to the return of irregular TCNs set out by the Return Directive and the CESEDA intertwine the non-compliance with administrative stay with asylum issues.[13] Asylum seekers may hence fall in this category. As illustrations, asylum seekers who initially entered the Schengen zone through another country constituted about 8 per cent of detainees in France in 2007 (Cimade, 2008), and Chechen applicants of Russian nationality were removed to Poland where they had passed before reaching France, on the ground of readmission agreements (Cimade, 2011).

Besides, as a principle of EU law, all EU citizens (including those subject to a transitional period), may move freely within the territory of the other Member States without any condition other than holding a valid passport or ID card. More, EU citizens' right of residence is almost absolute for up to three months and residing more than 3 months in an EU member State entails limited exceptions.[14] Nonetheless, EU citizens may be detained and removed from France.[15] The removals of EU citizens have of course a limited impact, since they can easily – and most of the time legally – come back to France. Yet, several recent administrative and judicial decisions underline the French inconsistency and contradictions regarding both EU migration policy and general EU law, as illustrated by cases of detention pending removal of Romanian, Bulgarian and Portuguese nationals.[16] The EU legal framework aims at clarifying and harmonizing the terminology, procedures, rules and exceptions applicable to immigration detention.[17] More specifically, the Return Directive provides for common rules for the return and removal, the use of coercive measures, detention and re-entry that the Government transposed in French law with the law of June 2011. French late transposition of the directive, entered into force at the end of 2010, has raised numerous critics.[18] Yet, some immigration

[13] See Return Directive 2008/115, as well as Articles L. 531-1 and L. 531-2 CESEDA the provisions of which shall apply to the foreigner seeking asylum if the examination of this application is the responsibility of one of the EU Member States.

[14] See principle and exceptions: Articles 6 and 7 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
See French provisions pertaining to EU citizens' right of residence: art. L.121-1 to L121-5 CESEDA (material, financial and family conditions, as well as the registration requirement).

[15] See Art. L 511-3-1 CESEDA pertaining to the removal of EU citizens, created by art. 39 of the Law of 16 June 2011.

[16] Several provisions of the Law of June 2011 have been analysed as emptying out the EU citizens' right of residence for up to 3 months, for instance the removal measure (OQTF), regarding Roms (GISTI): see L. 121-4-1 CESEDA and L. 511-3-1 3° CESEDA as amended by the Law of 16 June 2011.
Romanian and Bulgarian nationals declared as Roms have been removed from the French territory despite their EU citizenship, and recently, a Portuguese national has had his arguments denied by the *Cour d'Appel de Paris* (*ordonnance* of 23 February 2013), following a period of detention and the issuance of a removal measure.

[17] For instance, the European Parliament amended the term 'temporary custody', used in the EU Commission's proposal for a directive on the return of illegally staying third country nationals, to 'detention'. This demonstrates official recognition of realities, 'given the deprivation of freedom it entails and its duration, up to six months, which is far from temporary'.

[18] The non-transposition of the Return Directive within the required period led the national courts to rule several removal procedures breaching EU provisions as null and void, notably because the quasi-systematic deprivation of liberty did not respect the requirement for less coercive measures.

lawyers have argued that the non-transposition was less problematic that the lack of clarity and the legal limbo of the provisions enacted in 2011 and 2012: the directive confers rights that are applicable at national level regardless of whether an EU State has transposed it, whereas the transposition has rendered some of these rights less effective to immigrants in France.

In light of these various comments, this reports aims at putting in evidence how such a complex legal framework, its incomplete implementation in France and the dual track of the contentious jurisdiction of immigration detention actually limit the effectiveness of detainees' legal protection. The complexity of the individual cases is further conditioned by the intricacy of the applicable procedures and regimes. This point is of peculiar importance in light of the recent European and French rulings condemning the French procedures of detention. On the one hand, the report attempts at describing the French immigration detention legal regime and practices, highlighting how the French administrative organisation and general features of French law condition the management of detention and the protection of detainees' fundamental rights. On the other, the report tries to put in evidence the downward spiral of French immigration detention practices and policies.

The legal provisions pertaining to immigration detention are provided in *Livre II, titre II, 'Maintien en zone d'attente'* (L 221-1 to L 224-4) of the CESEDA, while the *Livre V* and *Titre V* (concerning migrants detained in facilities that are not under the administration of the prison authority: L 551-1 to L 555-3) provide for the measures addressing the removal or irregular immigrants.[19] The EU framework entails an arguably functionalist approach as it specifies how EU Member States should detain irregular TCNs within the context of return to the country or origin.[20] We argue that this connection has spurred the quasi-systematic use of measures of deprivation of liberty as a mode of management of irregular TCNs' removal from France and, as a result, the use of detention as a tool of French migration policy. Indeed, the *rétention administrative* mostly occurs within the context of return although it is one modality of execution of the removal. As an illustration, La Cimade reports that among the nearly 32 000 cases of removal from metropolitan France announced by the Government for 2011, 17 000 were forced removals (*éloignements forcés*) while 15 000 were voluntary returns.[21]

Like for other countries, the incomplete implementation of international law provisions at the French domestic level has entailed critical consequences with regards to the protection of the detainees' rights on the one hand, and the legality and legal security of any irregular immigrant on the other.

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[19] Note that, for instance, in 2007, about 76 % of detainees in detention facilities were subject to a removal order, or *arrêté préfectoral de reconduite à la frontière (APRF)*. In contrast, the ban from the French territory *interdiction du territoire français* is issued alongside a criminal conviction. In 2007, 6, 5% of the detainees were subject to an *interdiction du territoire français.*

[20] See notably the definitions provided by article 3 '**for the purposes** of this Directive' (emphasis added).

[21] The data show that this is a quite stable trend: among the 28000 deportations announced by the Government for 2010, 40% occur after a period of detention, 30% consist of voluntary returns (mainly Romanians and Bulgarians) and 30% are the result of arrests without detention followed by removals to other Schengen countries following controls carried out at the French borders. On the latter issue, see also section 1.a 'Reasons' on page 9 and ff.

This general concern has to be addressed in connection with several features of the French detention regime.

First, the *rétention administrative* entails specific rules and exceptions inherent to its administrative nature and the specificity of the acts of administrative/State authorities. Second, this concern is all the more critical if one contrasts administrative detainees' legal condition with the status and level of protection of criminal detainees whose protection has been better addressed and guaranteed where necessary. The 2012 Law adds to the confusion with the introduction of a new measure of deprivation of liberty for a maximum of 16 hours, in place of the standard *garde à vue* (police custody) to check the right of residence of the TCN (*vérification du droit au séjour*). Third, the complexity of the regime of detention is further conditioned by the French *summa divisio* (separation of competences and jurisdiction according to the public/ private matters divide). The French judiciary system is organised according to the specialty of the matters: civil, criminal and commercial judges compose a different *corps* from the administrative judges. Immigration law cannot be a unified matter: both the *juge administratif* (the administrative judiciary) and the *juge judiciaire* (the ordinary judiciary) may have jurisdiction over individual cases of detention and removal.[22] As a result, the principle whereby undocumented migrants and their family have a right to protection against arbitrary detention, as well as States' obligation not to send them back to countries where they risk ill-treatment and torture face several limits inherent to the timing of distinct but connected procedures and controls. One critical issue regards the *juge des libertés et de la détention* (JLD), the judicial authority defined as the 'guardian of the freedom of the individual' in the meaning of Article 66 of the Constitution, whose control has been postponed by the law of 16 June 2011 transposing the Return Directive from the second to the fifth day of detention, alongside the extension of the legal period of detention from 32 to 45 days. As a result, as the five NGO's assisting people in detention centers have reported, 25 per cent of persons removed from France during the second semester of 2011 have not been able to have access to the control of the legality of their police arrest by the judge. Immigration practitioners have denounced a *déni de justice*, contrasting again with the criminal regime of detention. Fourth, immigrants who are awaiting final determination of their status and those who are already subject to a removal order may be detained in *centres* and *locaux de rétention administrative* (CRA and LRA). The territorial administrative organisation and management of the detention facilities have created deeper concern with regard to equality of treatment and legal security, especially as to facilities located in French overseas territories and *départements* (Cimade, 2011), and to the particularity of the waiting zones (*zones d'attente*). In addition to issues related to communication of the rights in waiting zones and the control of the judicial authority, the definition of the latter was modified by the Law of 16 June 2011, introducing the concept of *zone d'attente « extensible »* and *« transportable »*. As to the former, more than 53 000 immigrants, and not 28 000, were removed in 2010 if we include the data of facilities located overseas. In 2011, 31000 removals including 5 389 children, were operated from overseas territories and departments (mainly from Mayotte which is managed with a derogatory regime), bearing in mind that neither this number is mentioned in the Government communication for 2011.

[22] Besides, irregular immigrants may be involved in irregular activities the punishment of which may create a greater confusion, since the criminal judge is competent.

These preliminary remarks raise critical questions regarding French State's obligations as far as human and the effectiveness of the legal protection of detained immigrants are concerned.

1. Substantive criteria

Recital 4 in the Preamble of the Directive 2008/115 state that '[c]lear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy' (emphasis added). EU States are hence invited to respect a fair and transparent procedure for decisions on the return of irregular migrants, including detention issues. As a consequence of the principle of direct effect, the rights granted by the Return Directive may be invoked in proceedings before national courts, and it should be possible to file a petition or a complaint regarding its provisions and guarantees. Nonetheless, recital 4 sounds as a stepping back, as it leaves the States free to frame the grounds for detention, to implement their obligation to grant to persons residing irregularly a minimum set of basic rights pending their removal (including access to basic health care and education for children), to limit their use of coercive measures in connection with the removal of persons, and to ensure that such measures are not excessive or disproportionate. In addition, EU Member States must guarantee that the treatment and level of protection of TCNs excluded from the scope of the directive corresponds at least to several of its provisions, including the use of coercive measures in cases of detention and removal and the respect of the principle of a fair hearing. In all cases, Member States must consider the best interest of children, family life and the health of the person concerned. Yet, the French legal evolutions following preliminary rulings seem to undermine the EU provisions and the rulings of both the EU and the European judges.

a. Arbitrariness

The question of when detention is or becomes arbitrary has not been fully answered by the international instruments. Article 9 of the Universal Declaration of Human Rights merely states that '[n]o one shall be subjected to arbitrary arrest, detention or exile'. Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) is barely any clearer: 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' Likewise, in its communication n.560/1993 on *A. v. Australia* case, the Human Rights Committee does not address the issue specifically, reminding that 'the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice'.[23] Even the resolution 1991/42 of the Commission on Human Rights did not define the terms detention or arbitrary. This led to differing interpretations of the terms, which have been partly solved by the Working Group on Arbitrary Detention, following the adoption of Commission Resolution 1997/50.[24] Partly solved because the Commission opted for

[23] Note however that the Human Rights Committee stressed in its General Comment no8 on Article 9(1) of the ICCPR that this provision applies to all deprivations of liberty, including the ones related to immigration control.

[24] The mandate of the Working Group on Arbitrary Detention, established by the resolution 1991/42 of the former Commission on Human Rights, was clarified and extended by the Commission in its resolution 1997/50 to cover notably administrative detention of asylum-seekers and immigrants and measures of house arrest. See Resolution 6/4.

the term 'deprivation of liberty', hence eliminating any differences in interpretation between the different terminologies[25], but it did not define the term 'arbitrary'. Drawing on the Resolution 1991/42 as clarified by resolution 1997/50, the Working Group on Arbitrary Detention uses a more flexible yet riskier guideline based on pragmatic criteria.[26] In its annual report A/HRC/7/4 of 19 January 2011, the Group stated that, 'as a general rule, in dealing with situations of arbitrary deprivation of liberty within the meaning of paragraph 15 of resolution 1997/50, the Working Group shall refer to [five] legal categories': the fourth one regards situations where asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.[27]

The prohibition of arbitrariness (*sûreté personnelle*) is extensively provided in French law. It is stated in Article 2 of the *Déclaration des droits de l'Homme et du Citoyen* (DDHC) that has a constitutional value, as a natural and imprescriptible right. It is also proclaimed in Article 7: 'No man may be accused, arrested or detained except in cases determined by law, and according to the forms prescribed. Those who solicit, expedite, execute or cause to be executed arbitrary orders must be punished.'[28] The French notion of arbitrariness has to be understood in light of the Constitutional prohibition of Article 66 of the 1958 Constitution ('No one shall be arbitrarily detained') in connection with the constitutional guarantee whereby the Judicial Authority is the guardian of the freedom of the individual and shall ensure compliance with this principle in the conditions laid down by statute. Combined with article 136 of the French criminal code of procedure (*Code de procedure pénale* -CPP), this principle grounds the exclusive competence of judiciary tribunals in all the cases of deprivation of individual freedom. Yet, the complex regime of detention has come to limit the scope of this principle.

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[25] International instruments do not always use the same terminology to refer to this measure: they may refer to 'arrest', 'apprehension', 'detention', 'incarceration', 'prison', 'reclusion', 'custody', 'remand'. This has led to different interpretations, and hence different treatments of the related situations.

[26] Resolution 1997/50 considers that deprivation of liberty is not arbitrary if it results from a final decision taken by a domestic judicial instance and which is (a) in accordance with domestic law; and (b) in accordance with other relevant international standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned.

[27] Drawing on the Declaration, the ICCPR and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

Category I: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him);

Category II: When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;

Category III: When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character';

The category V addresses deprivation of liberty for reasons of discrimination which aims towards or can result in the violating of the principle of equality of human rights.

[28] « Nul homme ne peut être accusé, arrêté ou détenu que dans les cas déterminés par la loi et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires doivent être punis ; mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant ; il se rend coupable par la résistance ».

Furthermore, the European Commission interpreted 'the failure [of some Member States to transpose the provisions of the Return Directive by 24 December 2010 as] jeopardizing the efficiency and fairness of the common return procedure and undermining the EU's migration policy'.[29] Yet – and paradoxically – the French late transposition allowed in fact a more effective and complete protection, according to the principle of direct effect. Indeed, the rights and obligations provided by the Return Directive would have been fully applicable at the national level regardless of whether France has transposed the legislation, whereas the French transposition has resulted in a break with the Return Directive. As a principle, the administrative decision to deprive a person from her/his liberty in order to deport him/her has to be grounded. However, the reading of Articles L.551-1 and following CESEDA and Articles 15 to 17 of the Return Directive shows a break between French and EU laws. Under Article L.551-1 and following CESEDA, **unless s/he is under house arrest** in application of Article L. 561-2, a foreigner who cannot immediately leave the French territory **may be detained** by the administrative authority in premises that are not managed by the prison administration for a period of five days.[30] However, Article 15 of the Return Directive (that is immediately enforceable) states that '**[u]nless other sufficient but less coercive measures can be applied effectively** in a specific case, Member States **may only keep in detention** a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process' (emphasis added). Preliminary rulings about the interpretation of the Return Directive and the compliance of French law with it have been asked before the French administrative jurisdictions. Yet, not a single one has been sent to the Court of Justice of the European Union as yet.

The question of arbitrariness also relies on the condition of proportionality with regard to the context. This principle has been specified in international law for a long time. For instance, in its communication n.560/1993 *A. v Australia*, the Human rights Committee clarified that the remand in custody could be considered arbitrary if it is not **necessary in all the circumstances of the case**, for example to prevent flight or interference with evidence (emphasis added). In this case, the question for the Committee was whether the grounds were 'sufficient to justify indefinite and prolonged detention' (See Annex paragraph 9.2). The State justified the author's detention arguing he had entered Australia unlawfully and underlining the perceived incentive that the applicant would have absconded if left free.

In France, the *Cour de cassation* has recently answered this question at the procedural level addressing the broader issue of police identity checks carried out independently of any risk for the public order (*risque d'atteinte à l'ordre public*). The Court requires the security forces to provide

[29] See European Commission - Press release 'An effective and humane return policy: 8 Member States have yet to comply with the Return Directive', 29/09/2011, IP/11/1097.

[30] « A moins qu'il ne soit assigné à résidence en application de l'article L. 561-2, l'étranger qui ne peut quitter immédiatement le territoire français peut être placé en rétention par l'autorité administrative dans des locaux ne relevant pas de l'administration pénitentiaire, pour une durée de cinq jours ».

objective elements based on external circumstances (ie that are not related to the person him/herself) that show that s/he is a foreigner.[31]

a. Reasons

The Return Directive provides that decisions on returns, entry bans and removals must be provided in writing and accompanied by information on available remedies. On request, the Member State must provide a translation of these to the third-country national, unless it issues decisions by means of a standard form. International law and European law have clearly established the principle whereby foreign nationals whose offence is the non-compliance with immigration provisions should not be treated as criminals or potential criminals when transiting or staying in States. Yet, in France, there have been several concerns about the principle of a requirement to have grounds to detain, especially regarding two distinct but possibly successive procedures: 1) the police custody of an immigrant, 2) her/his placement in detention that may follow. As to the former, French law explicitly forbids ethnic profiling controls (*contrôles au faciès*). Yet, when they target foreigners, many identity checks enable the police to find out the lack of documents, and may subsequently lead to a misdemeanour procedure (in rare cases) or a placement in detention pending removal. As to the latter, the law has limited the grounds to claim the irregularity of the procedure preceding the placement in detention, and the administrative judge refuses to address the issue.[32] However, the conditions of the arrest of an immigrant prior to her/his detention and the connection of these two phases have been addressed recently by the EU judge and the *Cour de Cassation*.

Within the police procedure, if the person is detained because of a criminal reason (*garde à vue*), the criminal procedure applies. Articles 62 and following of the Code of criminal procedure set the grounds and the rights of the detainee. Articles 5 and 6 ECHR apply too. The reason for this custody is immediately notified to the person. It may last 24 hours maximum, unless the Prosecutor allows an extension for 24 additional hours. Special provisions exist in case of (acts related to) terrorist activities: the maximum duration of the custody is of 96 hours. This measure of *garde à vue* has resulted in practice in using custody of irregular foreigner as the preliminary step (antechamber) to detention. As an illustration, in 2009, 103 817 foreigners were questioned regarding their irregular stay. Among the 80 063 of them placed in police custody, 597 were subject to criminal sanctions on the sole ground of article L. 621-1 (209 prison sentences and 23 conditional fines).[33] This practice led to decisive rulings of EU and then French judges.

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[31] Cass. Civ., 6 June 2012, n° 10-25.233 : 'des éléments objectifs déduits de circonstances extérieures à la personne même de l'intéressé (faisant) apparaître sa qualité d'étranger' . The Conseil constitutionnel also put forward this procedural requirement. The Law of 31 December 2012 includes this condition and requires the respect of these obligations for all the cases of controls of residence permits, wherever they are carried out.

[32] See section on procedural safeguards below. See also the modification of the framework for control of identity documents aiming at foreigners (Art 1 to 7 of the Law L. 611-1 CESEDA), following the respective decisions of the CJEU and the *Cour de Cassation*, and prohibiting systematic controls at the borders. Regarding France, see *Melki and Abdeli* (CJUE, 22 June 2010), cases C-188/10 and C-189/10; *Cass. 1ère civ*., 6 juin 2012, req. n° 10-25.233.

[33] See V Tchen's comments on the Law of 31 December 2012: http://vincenttchen.typepad.fr/droit_des_etrangers/2013/01/loi2012.html, last retrieved 4 February 2013.

The Court of Justice in the *Achughbabian* case excluded the incarceration of a TCN on the **sole** ground that s/he has stayed on the territory despite her/his irregular situation.[34] In this case, the Court interpreted the Return Directive for a preliminary ruling from the *Cour d'Appel de Paris* (Decision of 29 June 2011) about the application of a French provision for a sentence of imprisonment and a fine in case of irregular ('illegal' according to the Court terminology) staying. The EU judge hence interprets the Return directive as precluding legislation of a Member State repressing 'illegal' stays by criminal sanctions during the return procedure, in so far as the coercive measures referred to in Article 8 have not been applied and the duration of the detention with a view to the preparation and implementation of the removal has not expired.[35] The Court of Justice thus interpreted the Return Directive as precluding the French *garde à vue* insofar as this measure consisted in imprisonment during the process of forced removal and it implemented a legislation penalizing irregular stay.[36] As a consequence, foreigners subject to identity checks would no longer face criminal sanctions, as such measures are only applicable to persons likely to face a prison sentence since the reform of the procedures of police custody in 2011.[37] This was confirmed by the *Cour de Cassation* in three cases on 5 July 2012.[38] With the Law of 31 December 2012, the French Government accordingly abolished the offense of illegal stay, thus admitting that Article L. 621-1 CESEDA was mainly used as a legal ground for the placement in police custody.

One would say that, with the Law of 31 December 2012 modifying Article L.611-1 CESEDA regarding the regimes of these controls, France drew the conclusions from the rulings of the Court of Justice in the *Achughbabian* case of 6 December 2011[39] and the decisions of the *Cour de Cassation* of 5 July 2012. Indeed, the Law of 2012 notably introduced a new procedure of ***retenue*** *administrative pour verification du droit au séjour* (Art. L.611-1-1 CESEDA) to regulate the custody

[34] Alexandre Achughbabian v Préfet du Val-de-Marne, Case C-329/ 6 December 2011.

[35] The Court added that the Directive does not preclude the application of such provisions in so far as the return procedure has been applied and the TCN is staying illegally in that territory with no justified ground for non-return. On this point, see also the Reference for a preliminary ruling from the *Corte d'appello di Trento* in Italy, *Hassen El Dridi, alias Soufi Karim*, case C-61/11of 28 April 2011. See also footnote 40 on page 11 and related text.

[36] For the Court, a prison sentence contradicts the general objective of the Return Directive as it delays the return of the TCN (par. 37 and 39). On the other hand, the EU judge also considered the possibility for the competent authorities to have 'a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national' (par. 31). On this issue, see also http://observatoireenfermement.blogspot.fr/, or http://combatsdroitshomme.blog.lemonde.fr/tag/achughbabian/, last retrieved on 5 March 2013.

[37] Law n° 2011-392 of 14 April 2011 on police custody, *JORF* of 15 April 2011.

[38] See Cass. civ. 1, 5 July 2012, n° 11-30.371; Cass. civ. 1, 5 July 2012, n° 11-30.530 and Cass. civ. 1, 5 July 2012, n° 11-19.250.

[39] In the *Achughbabian* case the Court recalled the prohibition of identity checks within 20 km from the border with a Schengen State as they constitute systematic controls at the borders prohibited by the Schengen convention.
See Joined cases C-188/10 (*Aziz Melki*) and C-189/10 (*Sélim Abdeli*) Judgment of the Court (Grand Chamber) of 22 June 2010, References for a preliminary ruling: Cour de cassation - France**.** See also, the *Adil* case 278/12 of 19 July 2012 regarding the Netherlands; Cass. 1ère civ., 6 juin 2012, req. n° 10-25.233. In France, the control were allowed only to prevent or investigate activities related to cross-border criminal activities (art. 78-2 CPP).

on the ground of the non-compliance with the administrative regime of immigration. This administrative **custody** allows the police to detain an allegedly irregular immigrant following an identity check for a maximum of 16 hours, in order to check her/his immigration status and right of residence. This new measure clearly aims at overcoming the obstacles raised by both EU and French judges in 2011 and 2012: it replaces the former police custody of irregular immigrants following a police or customs control that was prohibited by the judges. This new regime of administrative custody raises numerous concerns regarding the conditions of the custody itself and its connection with administrative detention.[40]

First, this new measure adds to the confusion: the custody of irregular immigrants is covered by a preventive identification control set by article 78-2-2 CPP that allows the Prosecutor to ask the police to systematically control the identity of any person in a determined area and during a short period of time with the justification of fighting against criminality and in order to discover criminal offenders;[41] Article 78-3 CPP already provided for a 4-hour custody to check the identity of an immigrant[42] and the Law of 31 December 2012 has not abolished the offence of illegal entry and stay in France.[43] Moreover, the combination of the two laws of 2011 and 2012 has resulted in reducing the grounds to claim the irregularity of the procedure.[44] Second, the *retenue* includes several procedural guarantees, such as financial support for the legal assistance (*aide juridictionnelle*), consult with a lawyer, control of the custody, right to contact any person and notably the immigrant's consular authority. These various obligations must be respected under penalty of having the procedure declared null and void by the JLD (L. 552-13 CESEDA). It consequently seems that the

[40] The law of 2012 confirmed the previous administrative written memorandum of the French Minister of the Interior and the Note from the Minister of Justice addressed to the Prosecutors, both dated 6 July 2012 and both prohibiting such controls at the borders on the ground of article L. 611-1 paragraph 1 CESEDA. See also footnote 31 and related text p. 9. See however the introduction in French Law of the *délit de maintien irrégulier sur le territoire* (See L. 624-1 CESEDA for the conditions and penalties) with the Law of 2012.

[41] See "France: Ethnic Profiling Challenge" an initiative by the Open Society Foundation http://www.opensociety foundations.org/publications/france-ethnic-profiling-challenge

[42]The Government argued that this duration was too short to allow police forces to control whether the stay is regular and initiate the procedure of forced removal. The 16-hour duration was vividly criticised in the French Senate: the Government justified it regarding the complexity of the measures required for such verification. Following a Senate amendment to the bill, a condition of proportionality was added: '*proportionnées à la nécessité des opérations de vérifications*', hence limiting, for instance, the use of handcuffs to 2 cases (art. 803 CPP: if the immigrant shows risks of danger or risk of flight), or the collection of biometric data.

[43] For the framing and conditions of this *délit d'entrée irrégulière en France, s*ee Art. L. 621-2 CESEDA in connection with Art. 8 CPP. See also Art. 4-3 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *Official Journal L 105,* 13/04/2006, p. 1-3, which requires the Schengen States to 'introduce penalties (...) for the unauthorised crossing of external borders (...) [that] shall be effective, proportionate and dissuasive'.

[44]The GISTI highlighted how the legal procedures and the administrative written memorandum of 21 February 2006 had resulted in the police acting at the limit of legality. See GISTI's Notes pratiques, *Contrôles d'identité et interpellations d'etrangers*, 3rd edition, « Avant-propos », p.2, http://www.gisti.org/IMG/pdf/np_controle_identite_v3.pdf, last retrieved 27 January 2013.

rights of the immigrant in administrative custody are similar to those set by the Code of criminal procedure. A similar standard of protection for both the *garde à vue* and the *retenue administrative* is thus ensured apparently, notably regarding Article 6 ECHR. However, and thirdly, since the administrative custody is supposedly an administrative procedure, both rights to remain silent and to request a lawyer are actually severely limited. For instance, the immigrant's declarations while in *retenue* can be used against him/her in a criminal procedure, if the administrative procedure is subsequently qualified as a criminal one (Article L.611-1-1-III CESEDA). In addition, the right to consult with a lawyer can only last 30 minutes and the police can start to interrogate the immigrant without her/his lawyer being present, if the latter has not arrived in the premises one hour after s/he was informed that s/he was requested by the immigrant. We argue that such exceptions violate Article 6 ECHR.

Furthermore, the French distinction between ***retenue*** (administrative custody) and ***rétention*** *administrative* (administrative/immigration detention) raises additional difficulties regarding the communication of the reasons to detain to the irregular immigrant (*notification*). Articles 6 to 9 of Directive 2008/115 state 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'. As to the *retenue*, the decision of custody and its grounds are immediately notified to the immigrant in a language that s/he understands. However, French immigration practitioners and NGOs are now expecting problems that will arise from the use of this new measure, especially because the law of 2012 was enacted in 3 months without any referral for constitutional review to the *Conseil Constitutionnel* (art. 61 Constitution).[45] For instance, note that there is no provision ensuring that the person in *retenue* is entitled to food during this 16-hour period, but the JLD has just ruled that the fact that the right to be provided food had not been notified to a person in *retenue* is a breach of Article 3 ECHR and Article 4 of the EU Charter of Fundamental Rights.[46] Moreover, it can also be argued that the possibility for the police to take the fingerprints during the *retenue* violates Article 8 ECHR and the Charter: there is still no legal clarification as to who (among the police force) may have access to these prints, the length in time of fingerprint records, the possibility for the person whose prints had been taken to have access to the records and demand their erasure. Lastly, there is no independent authority to review the use of such records. As a consequence, an application for a priority preliminary ruling on the constitutionality of the *retenue* would solve the questions raised by this new procedures applying to police controls and the implications that they entail for the foreigner.[47] The decision of administrative detention is also communicated to the detainees in writing by an administrative authority listed by decree. The decision is motivated, so that the person knows why s/he is deprived of her/his liberty: '*décision écrite et motivée prise par une autorité administrative définie par décret en Conseil d'Etat*'.[48] A set of rights in *rétention administrative* are also notified at the time the immigrant is placed in

[45] See reports of the French Parliament: Report n° 463 by Y. Galut for the *Assemblée Nationale* (Ass. nat., 28 November 2012) and report n° 85, G. Gorce, *Sénat*, 24 October 2012.

[46] JLD Toulouse 19 May 2013 n°13/00366.

[47] Question prioritaire de constitutionnalité: see Art. 61-1 of 1958 Constitution.

[48] The notification is also required for cases in the framework of European Conventions (L531-1).

immigration detention.[49] However, under the Law of June 2011, the foreigner is not necessarily informed of these rights at the time s/he is informed of the decision of detention, but **as soon as possible** following it (Article 52 of the law of 2011 – Art. L. 552-2 CESEDA): '*dans les meilleurs délais suivants (sa) notification*'. Note also that the detainee may not be handled in the copy of the decision immediately, which entail crucial legal consequences regarding the practice of an effective remedy.

Finally, the communication of the rights of the person held in waiting zone and the control of the JLD were also modified by the Law of June 2011. The immigrant's rights are notified *'dans les meilleurs délais'* (in the best timing) and not immediately (Article L.221-4 CESEDA), and the control of the judge has been restricted (See section on procedural safeguards).

b. Who has the authority to detain?

The legal framework of the administrative detention is complex both at the level of the decision and that of its control. The detention is decided by the administrative authority, and may be extended by the judge if the immediate departure of the foreigner from France is impossible. Immigration detention should be limited to the time necessary to organize the removal and should not exceed 45 days, with exceptions. This principle has however to be considered in light of the new procedure of the *retenue pour verification du droit au séjour* and the related issue of the competent authority regarding the grounds to detain an irregular immigrant.

In theory, the measure of deprivation of liberty decided by the police is triggered by clues that a person has committed a criminal offence or that s/he is involved in criminal activities. In this case, the person is detained within the criminal regime of the procedure of *garde à vue* (police custody), during which the police may find out that the person is an irregular immigrant. Note that the *garde à vue* is decided by an Officer of judiciary police (*officier de police judiciaire* -OPJ), who has a higher ranking than a simple police agent. However in practice, custody of irregular immigrants results massively from ethnic profiling and the controls are very often carried out near areas where immigrants live. If a person cannot prove her/his identity and if there are 'exterior objective signs' (very often police says that the person has voluntarily declared him/herself foreigner) that s/he is a foreigner or if s/he presents a foreign identity, the Police may then check whether the person has the right to stay in France (Articles L.611-1 and ff CESEDA). Failing to prove the right to stay in France allows the OPJ to order the administrative custody of the immigrant in order to verify her/his right to stay or circulate in the country.
The same authority therefore has the power to detain, but on the basis of two different sets of grounds. Under article 62-2 CPP, introduced by Law 2011-392 of 14 April 2011 on Police Custody, a person can only be placed in police custody if there is probable cause to suspect that the person has committed or attempted to commit a crime or a *délit* punishable by imprisonment. The objectives of the custody are set out in Article 62-2 CPP. They all address criminal activities: to allow the authorities to pursue investigations that require the presence or participation of the person in custody;

[49] See Articles L.551-2, L.551-3, L.553-1, R.551-4, R.553-11 and ff CESEDA.

to guarantee that the person can be brought before the Public Prosecutor, so that official can decide how the investigation should proceed; to preserve evidence; to stop pressure being placed on a victim or witness; to avoid communication between the suspects and their accomplices; and to put an end to the crime or prevent its repetition. In contrast, the procedure of administrative custody is applicable if there is probable cause that the immigrant is undocumented. The authority aims in that case at verifying the immigrant's status under immigration law.[50] Both procedures have to be controlled by the Prosecutor. Since the introduction of the *retenue* by the law of 31 December 2012, the latter is systematically used when the only suspicion that exists against a person is to irregularly stay in France.

The administrative detention order is issued by the administrative authority (*Préfet*) and it usually follows the administrative custody.[51] The *Préfet* has the authority to detain in a CRA, usually at the end of the expiration of the period of the administrative custody. The initial administrative decision orders the detention for 5 days maximum. Afterwards, the *Préfet* must ask the authorisation to extend the detention to the *JLD* who can authorize the detention for up to 20 days. This is renewable once. At the expiration of this period, the *Préfet* has to ask the authorization for a renewal of the detention for 20 additional days if the removal order has not been enforced yet. To have the detention renewed for 20 more days the *Préfet* is required to demonstrate that he has done all reasonable efforts to organize the departure. In total, the detention cannot last more than 45 days. So the Judicial Authority is competent to decide the extension of the duration of the detention of an individual,[52] but the administrative authority is the initial authority to decide on the deprivation of liberty. The Judicial authority acts *a posteriori*[53], either to authorize the extension of the duration of the detention or to end it in the framework of a procedure of *référé.*

c. Use of fast-track procedures/administrative detention

[50] See the distinction provided in the Opinion of the Criminal Chamber of the *Cour de Cassation* of 5 June 2012: Avis n° 9002 du 5 juin 2012 de la Chambre criminelle. Precisely, the question submitted to the Court was whether, in light of CJEU Opinion C-61/11 *Hassen El Dridi* on 28 April 2011 and *Achugbabian* case on 6 December 2011, the Article 63 of the French Code of Criminal Procedure in the version prior to the law of 14 April 2011, and the Articles 62-2 and 67 of the criminal Procedure Code in the wording in force, TCNs could be placed in custody on the sole ground of article L. 621-1 CESEDA.

[51] The *retenue administrative* may indeed result in a removal order, a decision of placement in a detention facility or a home confinement. For the administrative detention procedure an order, see articles L.552-1 and following of the CESEDA.

[52] CC 97-389 DC, 22 avril 1997, *Certificats d'hébergement,* RlCI, p. 707, considérant 60 : « *Considérant* (...) *que lorsqu'un magistrat du siège a, dans la plénitude des pouvoirs que lui confère l'article* 66 *de la Constitution en tant que gardien de la liberté individuelle, décidé par une décision juridictionnelle qu'une personne doit être mise en liberté, il ne peut être fait obstacle à cette décision* (...) ». See also, CC. 92-307 DC, 25 février 1992, *Zones de transit,* considérant 15

[53] The Judiciary judge may decide to maintain the detention after 5 days for the administrative detention, but after 4 days for waiting zones.

There are several concerns regarding the applications for asylum submitted by administrative detainees to the OFPRA.[54] Application processing times and rights vary whether a migrant's application for asylum falls under a normal or a fast-track procedure (*procédure prioritaire*). In France, the latter is applicable in three cases: 1) applicants holding the citizenship of a country that the OFPRA does not consider as a risk-country or the country is not (anymore) on the list of 'safe countries of origin' established by the OFPRA[55] ; 2) applicants whose presence in France constitutes a serious threat to the public order, public safety or the security of the State; 3) if the application for asylum is allegedly abusive or fraudulent or purportedly aims at avoiding a measure of removal.[56] Most of the administrative detainees fall under the vividly discussed third category that explicitly targets immigrants concealing their identity and immigrants filing an asylum application while their removal is in process.[57] Consequently, they have their application for a refugee status (or, if denied, for the subsidiary protection) processed in the framework of the *procédure prioritaire,* the most limitative regime of this double-track system.

The *procédure prioritaire* was initially – and arguably – intended to process asylum applications that were unlikely to get a positive decision. It has widely deviated from its initial purpose and is now used as a tool of management of migration flows and a means to reduce Government spending in this field. As an illustration, since 2004, asylum applications processed under the fast-track procedure have ranged between 16 and 30 per cent of all the applications. More, although this procedure initially aimed at treating requests for review and applications submitted by an immigrant during her/his detention, the *préfets* have increasingly used it for the examination of first-time applications. As a result, the processing of fast-tracked applications for asylum has increased from 34 per cent in

[54] As to the Common European Asylum System (CEAS), see the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Directive), the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive), the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive), and the Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation).

[55] Un pays est considéré comme sûr s'il 'veille au respect des principes de la liberté, de la démocratie et de l'état de droit, ainsi que des droits de l'homme et des libertés fondamentales'.

[56] See Article L741-4 CESEDA as amended by the Article 96 of Law n°2011-672 of 16 June 2011 and the scope of Article L714-4 4 CESEDA as clarified by the Law of 16 June 2011 : « *Constitue une demande d'asile reposant sur une fraude délibérée la demande présentée par un étranger qui fournit de fausses indications, dissimule des informations concernant son identité, sa nationalité ou les modalités de son entrée en France afin d'induire en erreur les autorités* ».

[57] The altering of the fingerprints (hence impeding any control through the Eurodac system) is considered as constitutive of such a fraud or abusive action, justifying consequently the use of the *procédure prioritaire* and the denial of immigrant's stay in France. As an illustration, see the written memorandum dated 2 April 2010 to *préfectures*: if the collection of the fingerprints fails, the applicant must be given another appointment one month later for the reconstruction of his/her fingerprints, if necessary. Hence, the access to the procedure of asylum is conditioned by the collection of the fingerprints, the failure of which get the applicant to have his/her application processed within the fast-track procedure.

2006 to 63 per cent in 2011 and fast-track procedure accounted for 26 per cent of all the applications in 2011.[58]

This procedure provides for a processing time of 96 hours for administrative detainees once the application is transmitted by the *préfecture* to the OFPRA.[59] OFPRA officers must process fast-tracked application and hear the applicants in the same conditions as those applicable in 'normal' procedures. Note however that the conditions of work of this administrative authority and the increase of the number of cases have had a negative impact in practice. Indeed, in 2011, 83,1 per cent of first-time applicants for asylum in the fast-track procedure (excluding administrative detention centres) were called for an interview with the OFPRA. About 70 per cent of them were actually heard, while two-thirds of first-time applicants held in detention centres were heard by an OFPRA officer (*Rapport Sénat*, 2012). Moreover, the various administrative authorities have further limited the possibility to file an asylum claim under the fast-track procedure, following the position held by the *Conseil d'Etat* in 2009.[60] As an illustration, in a written memo dated 3 November 2011, the OFPRA Director General highlighted the difficulty of examining asylum applications by persons knowingly concealing their identity, and instructed OFPRA officers to reject any application submitted by an immigrant who had altered her/his fingerprints. These instructions were suspended by the *Conseil d'État statuant en référé* on 11 January 2012, and the merits of the decision were confirmed subsequently (*décision confirmée au fond*) on 3 October 2012. The national administrative court specialized in asylum matters (*la Cour nationale du droit d'asile* - CNDA) also rejected this note on 21 February 2012, stressing that, although it is not for the Court to address the legality of OFPRA Director General's decision, this goes otherwise when the plaintiff has been deprived of the guarantee to have the elements that s/he submitted in support of her/his application examined.[61] Note that most of the asylum-seekers concerned by this note were then granted OFPRA protection (*Rapport Sénat,* 2012).

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[58] These data from the 2012 French Senate Report on asylum procedures are similar to those respectively released by the Ministry of Interior and the OFPRA.

[59] The other applications within the fast-track procedure are granted a process of less than 15 days, whereas the normal procedure provides for a processing time of several weeks to more than 6 months.

[60] See the ruling of the Conseil d'Etat en *référé* of 2 November 2009: « *l'étranger qui demande à bénéficier de l'asile doit justifier de son identité, de manière à permettre aux autorités nationales de s'assurer notamment qu'il n'a pas formulé d'autres demandes ; qu'il résulte, en particulier, des dispositions du règlement du 11 décembre 2000 que les demandeurs d'asile âgés de plus de quatorze ans ont l'obligation d'accepter que leurs empreintes digitales soient relevées ; que, par suite, les autorités nationales ne portent pas une atteinte grave et manifestement illégale au droit d'asile en refusant de délivrer une autorisation provisoire de séjour au demandeur qui refuse de se soumettre à cette obligation ou qui, en rendant volontairement impossible l'identification de ses empreintes, les place, de manière délibérée, par son propre comportement, dans l'incapacité d'instruire sa demande* ».

[61] *Mlle Y v OFPRA* (CNDA, 21 February 2012), n. 11032252: « s'il revient à la Cour, en tant que juge de plein contentieux, non d'apprécier la légalité de la décision du directeur général de l'OFPRA, mais de se prononcer elle-même sur le droit du demandeur à une protection au titre de l'asile en substituant sa propre décision à celle de l'office, il en va autrement lorsque le demandeur d'asile a été privé de la garantie essentielle d'un examen particulier des éléments qu'il a présentés à l'appui de sa demande ; qu'il appartient en ce cas à la Cour d'annuler la décision attaquée et de renvoyer la demande à l'examen de l'office ».

Moreover, the processing of asylum applications under the fast-track procedure results in severely reducing the rights, benefits and protection of the asylum-seekers, in contrast with those granted in the framework of the normal procedure. First, the applicants within the *procédure prioritaire* are not granted a temporary residence permit, whereas those applying under the normal procedure may be provided it upon preliminary approval of their application. In this case, the latter are released from detention, and may be accommodated in specific non-secured facilities: the *centres d'accueil de demandeurs d'asile* (CADA). Conversely, the former – who are consequently not authorized to stay on the French territory – are not entitled to any social rights or benefits. They are not eligible for an accommodation in a CADA or for the basic universal health coverage (CMU or AME) for instance. They do not receive any social subsidy, no financial help to eat, find a place to leave or move around, which has a negative impact on their ability to complete and submit their application for asylum on time.[62] This leads to the second point: the immigrant has only 15 days, or 5 days if s/he is detained in an administrative detention facility, to submit her/his request to the OFPRA in conformity with the legal requirements put forward (language, evidences/objective elements in support of the application...). Third, in case of a refusal (ie if the OFPRA does not grant either the refugee status or the subsidiary protection), the applicant may lodge an appeal before the CNDA. However, under the *procédure prioritaire*, the appeal does not have any suspensive effect. Consequently, the applicant risk at any time to be arrested and removed to her/his country before the CNDA has reviewed the case processed by the OFPRA, notwithstanding the risks the applicant would face in the event of her/his removal. As a result, French requirements pertaining to the submission of the application (time, form and content) are difficult to respect in practice, especially, for an immigrant in detention. International institutions and NGOs have repeatedly criticized France regarding this fast-track procedure, stressing that the examination of asylum cases in this framework does not ensure effective remedy to asylum seekers, hence putting them at risk in case of a negative decision.

The European Court of Human Rights (ECtHR) has recently addressed the availability and effectiveness of remedy in the French system in the *I.M. v France* case (application n. 9152/09), precisely because of the lack of suspensive effect regarding an application for asylum.[63] In this case, the OFPRA rejected a Sudanese's application for asylum on 31 January 2009. This applicant appealed OFPRA decision to the CNDA but since his asylum application had been refused, and in absence of any suspensive effect of the remedy, the authorities were about to deport him: a *laissez-passer* had already been issued by the Sudanese authorities. The applicant subsequently applied to the ECtHR under Rule 39 of the Rules of the Court to have the order of his removal suspended pending the CNDA's decision. On 19 February 2011, the CNDA granted the applicant refugee status.

[62] http://www.hrw.org/fr/news/2012/02/02/france-la-proc-dure-d-asile-d-faillante-condamn-e-par-la-cour-europ-ennedes-droits-, last retrieved 20 March 2013.

The *Conseil d'Etat* ruled that asylum seekers under the fast-track procedure should be able to access the State temporary subsidy (*allocation temporaire d'attente*) and an emergency accommodation pending OFPRA decision.

[63] Arrêt 2.2.2012 [Section V] 9152/09.

As illustrated by this case, the issue of effectiveness pertains both to the legal regime of fast-track procedures and the regime of detention. In this case, although the appeals filed by the applicant were available in theory, they had actually been limited by several factors, mainly: 1) the procedural difficulties inherent to the situation of the applicant who was detained first in prison and then within the administrative regime, 2) the processing of the application for asylum as a *procédure prioritaire,* 3) the limited time available for the remedies. Moreover, the TCN submitted his application in Arabic as he had 48 hours to file it with no access to an interpreter and to legal assistance from the beginning. The insufficient access to legal aid and language assistance in this case shows to what extent the quality of the decision-making process (both of the OFPRA and the administrative judge) is conditioned by how effectively basic rights are guaranteed to the administrative detainee. And these lacks could not be compensated by an appeal precisely because there was no suspensive remedy. As a consequence, only Article 39 of the Rules of Court could suspend the removal of the applicant, and the Court concluded that without its intervention, the applicant would have been subject to removal to Sudan before the examination of his claim was completed. In practice, the applicant did not benefit from effective remedies enabling him to argue the merits of the decision of his return to Sudan while his removal was in progress.

The European judges unanimously held that there had been a violation of Article 13 ECHR, providing for a right to an effective remedy, in connection with Article 3 ECHR (prohibition of inhuman or degrading treatment) in the processing of the Sudanese immigrant's application for asylum under the *procédure prioritaire*. They stressed the lack of an effective remedy in the fast-track procedure that yet authorizes the removal of asylum applicants to their country.

In 2011, the OFPRA granted the refugee status or the subsidiary protection to 8, 9 per cent of asylum seekers under the fast-track procedure (13,4 per cent, including the first-time asylum applications that were not submitted in a detention centre). Moreover, 3551 cases submitted to the CNDA regarded fast-tracked applications processed by the OFPRA: they accounted for 10,2 per cent of the overall number of applications. And the CNDA declared null and void 14,2 per cent of them (*Rapport Sénat*, 2012). More, the NGO Human Rights Watch argues that elements such as the denial of a stay permit or the negative bias resulting from the criteria of the *procédure prioritaire* suggest that the applicants under the fast-track procedure are merely tolerated on the French territory. At last, the increasing use of the *procédure prioritaire* and the rulings of European and French judges raise the question of the legitimacy and the consistency of this procedure. France has to draw conclusions from the recent data provided by the OFPRA and the ECHR judgement explicitly calling for an effective suspensive remedy to the CNDA.[64]

d. What is a fair hearing?

[64]See the analysis of the practice and legal implications entailed by the processing of the applications for asylum, as well as the the 21 propositions in the Report drafted in the framework of the adoption of the Law on Budget for 2013: *Rapport d'information du Sénat n. 130*, 14 November 2012 http://www.senat.fr/rap/r12-130/r12-1301.pdf last retrieved 20 January 2013.

The right to a fair hearing (*droit d'être entendu*) is connected to the question whether a detention measure is or becomes arbitrary. For instance, the Human Rights Committee stressed the violation of Article 9 paragraph 1 in its communication n°1014/2001 *Baban v Australia*, underlining that keeping the plaintiff and his son in immigration detention for almost two years, without allowing them to challenge the lawfulness of the measure was arbitrary:

> 'Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1 ... In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated'. [65]

Under European law, the right to a fair hearing, connected with the right to a fair trial/right of defence is guaranteed by Article 6(1) ECHR, which complements domestic law, as well as articles 5 and 7 and articles 2 to 4 of the 7th Protocol to the Charter. More specifically, it is also included in article 41 (principle of good administration) of the EU Charter of Fundamental Rights (EUCFR): 'This right includes: …the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. The last provision has been recently addressed in French law, following references for preliminary rulings regarding removal procedures. Although, the immigrant is entitled to ask notably for a translator to understand the hearing and for legal assistance when s/he has no financial resources, there are diverging interpretations in France as to whether irregular immigrants should be given prior notice of the decision of removal, a fair opportunity to answer it and to present their own case because the measure may affect their rights. The recent rulings of February and March 2013 do not address issues of detention specifically, but they put at the front of the legal debates both the issues of the field of application and scope of the principle of a fair hearing in pre-contentious matters in France. They highlight the French situation in three respects. First, for the first time, immigrants' right to a fair hearing in French administrative proceedings, held as a consequence of the general principle of EU law of the right to good administration enshrined by Article 41 EUCFR, is clearly connected to French pre-contentious procedures pertaining to OQTFs (*obligation de quitter le territoire français*: obligation to leave the French territory). Second, they question the long-lasting position of the *Conseil d'Etat* exempting the administration of such an obligation in spite of the international principles, the evolution of EU laws and case-law, and even the French provisions. Third, they underline the procedural factors contributing to the massive increase of contentious cases in detention/removal issues that could have been avoided if the administration had been specifically required to hear irregular immigrants before ordering or enforcing any decision.[66]

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[65] *Omar Sharif Baban v Australia*, CCPR/C/78/D/1014/2001, UN Human Rights Committee (HRC), 18 September 2003, available at: http://www.unhcr.org/refworld/docid/404887ee3.html last retrieved 12 March 2013.

[66] This issue is addressed in the section on procedural safeguard. See for further analysis, Serge Slama's comments: 'Droit des étrangers (PGDUE des droits de la défense, Art. 41 CDFUE, Directive 2008/115/CE) : Question préjudicielle sur le droit d'être entendu par l'administration préalablement à l'édiction d'une OQTF', on

Article 24 of the 'DCRA' Law of 12 April 2000 on the rights of the citizens in their relationship with the administration grounds the general principle of the right to a fair hearing in administrative proceedings in French law.[67] This principle was previously affirmed by the *Conseil d'Etat* (CE Section, 5 mai 1944, *Dame veuve Trompier-Gravier*) and enshrined in Article 8 of the *Décret 'Le Pors'* of 28 November 1983 addressing the motivation of individual unfavorable administrative decisions falling under the scope of the Law of 11 July 1979:[68]

> '*Toute demande qui est concernée par une décision … doit être entendue, si elle en fait la demande, par l'agent chargé du dossier ou, à défaut, par une personne habilitée à recueillir ses observations orales. Elle peut se faire assister ou représenter par un mandataire de son choix'.*

However, since the *Demir* case in 1991, the *Conseil d'Etat* has systematically limited the scope of this *principe du contradictoire préalable* in pre-contentious phases of removal, hence excluding the application of Article 8 of the *Décret 'Le Pors'* and the subsequent Article 24 of the 'DCRA' Law of April 2000. According to the administrative judge, the provisions of the *Ordonnance* of 2 November 1945 (enforced at that time) regarding the removal of irregular foreigners,[69] as amended by the laws of 2 August 1989 and 10 January 1990, already ensured the effectiveness of the remedy granted to the foreigner. According to the *Conseil d'Etat*:

> '*le législateur a entendu déterminer l'ensemble des règles de procédure administrative et contentieuse auxquelles sont soumises l'intervention et l'exécution des arrêtés de reconduite et par suite, exclure l'application des dispositions … de l'article 8 du décret du 28 novembre 1983'.* [70]

Several procedural safeguards have been created such as the issuance of opinions by the *Commissions de séjour* (mainly composed of administrative and judiciary judges) prior to any decision refusing to an immigrant the right to reside in France.[71] Yet, as underlined by Serge Slama, the *Conseil d'Etat* has never modified its position following their creation, neither following the enforcement of the Law of April 2000 (notably Article 24), the *Décret* 2001-492 of 6 June 2001 (article 5 notably), or even following the introduction of the OQTF in 2007 (Article L.511-1

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http://revdh.org/2013/03/19/droit-des-etrangers-question-prejudicielle-droit-detre-entendu-oqtf/ last retrieved 20 March 2013, referring to 'La suppression du commissaire du gouvernement dans le contentieux des OQTF : une fausse solution à l'encombrement », *Blog droit administratif,* 20 April 2008.

[67] 'Exception faite des cas où il est statué sur une demande, les décisions individuelles qui doivent être motivées en application des articles 1er et 2 de la loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public n'interviennent qu'après que la personne intéressée a été mise à même de présenter des observations écrites et, le cas échéant, sur sa demande, des observations orales. Cette personne peut se faire assister par un conseil ou représenter par un mandataire de son choix.'

[68] See *Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public* last amended by law of 17 May 2011.

[69] Notably Articles 22 and 22 bis providing for a remedy with a suspensive effect before the administrative judge

[70] CE, Sect, 19 April 1991, *Préfet de police v Demir*, n°120435. See for subsequent confirmation: CE, 14 March 2001, *Boulahas,* n°208923.

[71] See Art 18bis of the *Ordonnance* of 2 November 1945 as amended by Art 73 of Law 91-647 of 10 July 1991.

CESEDA).[72] There are few exceptions to this principle of exclusion.[73] The *Conseil d'Etat* also applied its jurisprudence to EU citizens and their relatives in 2008, excluding the procedural safeguards provided by the Directive 2004/38/CE of the European Parliament and the Council of 29 April 2004.[74] Slama recalls that this notably prompted the EU Commission to initiate an infringement procedure against France (MEMO/10/384, 25 August 2010), aborted then for political reasons.[75]

On 8 March 2013, the *juge de la reconduite à la frontière* (the administrative judge in charge of the removal procedures) at the *Tribunal administratif* of Melun (TA) referred a question to the EU Court of Justice for a preliminary ruling: whether the right to be heard before the administration is applicable to *OQTF* ordered in the framework of the Return Directive.[76] In this case, the judge set the foreigner free and cancelled the decision of detention, unlike the judge's position in *Melki and Abdeli* case of June 2010, certainly because the former admitted the criterion of urgency. The judge of Melun stayed the proceedings regarding the cancellation of the OQTF and the decision on the country of destination until the judgment of the Court of Justice. The Court is yet to rule on this specific matter, but the preliminary ruling also raises the question of the scope of the EU principles of a fair hearing in France in view of the narrower position of the *Conseil d'Etat*.
The preliminary ruling of March 2013 follows the CJEU decision of 22 November 2012 *M. M v Minister for Justice, Equality and Law Reform*,[77] as well as two judgments of the TA of Lyon both

[72] See respectively CE, 9 July 2003, *Préfet de Police v Mme Krstic*, n°253776 ; CE, 9 January 2004, *Préfet du Val d'Oise v Mme Kerroumi*, n°247915.
Although the OQTF are not autonomous removal measures and may be ordered alongside a decision affecting immigrants' stay, the *Conseil d'Etat* has not modified its case-law. See two opinions of the administrative judge: CE, avis, 19 October 2007, *Hammou et Benabdelhak*, n°306821-30682 ; CE, avis, 28 November 2007, *Barjamaj*, n°307999

[73] For instance, under Article L.531-1 CESEDA (measures in the framework of European Conventions), the decision is enforced **after** the immigrant was able to present individual justification and comments and to inform (or have informed) her/his consular authority or any person of her/his choice: '***après que** l'étranger a été mis en mesure de présenter des observations et d'avertir ou de faire avertir son consulat, un conseil ou toute personne de son choix*' (emphasis added). The right to a fair hearing is thus connected to a double obligation upon the French administrative authority: in addition to the formal obligation of *notification* addressed earlier, the authority must actually ensure the effectiveness of this right. Likewise, the 'Schengen removals' of Art L. 531-3 CESEDA are also considered as specific measures governed by particular rules regarding both the administrative proceedings and the control/review. As such they are excluded from the administrative judge's limitation: see CE, 24 November 2010, *Eddomairi*, n°344411.

[74] See *Conseil d'Etat*'s opinion: CE, avis, 26 November 2008, *Silidor*, n°315441.

[75] See S Slama: 'La Commission européenne évalue les récents développements en France, discute la situation générale des Roms et le droit de l'UE sur la libre circulation des citoyens de l'UE', IP/10/1207 29 September 2010 ; 'Circulaire du 5 août 2010 d'évacuation prioritaire des « Roms »: une violation frontale de l'article 1er de la Constitution. Mais après ?', CPDH 10 April 2011.

[76] TA Melun, JRF, 8 March 2013 *Mme Sophie Mukarubega*, n°1301686.

[77] Reference for preliminary ruling on subsidiary protection, CJEU judgment in Case C-277/1, *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, 22 November 2012, notably par. 81-89.
For further analysis in France, see F Gazin: 'Droit d'être entendu', *Europe* January 2013 Comm. nº 1, 29-30; J Petin, 'La portée du droit d'être entendu lors d'une demande de protection subsidiaire : confirmation de la prééminence des droits

dated 28 February 2013, which addressed for the first time the non-conformity of the French provisions with the EU principles in pre-contentious phases of OQTF procedures. A recent decision by the delegate magistrate (the judge who controls the legality of return decisions when a retention decision is taken in a speedy trial at the initiative of the person placed in detention) of the TA of Toulouse dated 9 April 2013 n°1301513, applied the general principle of European law of the rights of the defense and article 41.2 of the Charter and found that a person caught by the police and placed in *retenue* (art. L611-1 CESEDA), prior to her immediate removal (OQTF sans DDV) and retention, needed to be informed during the *retenue* that the administration was considering his removal in order to give him a chance to communicate pertinent information to the administration in order to prevent his removal or his retention. The police failed to do so and so the decisions of removal and retention needed to be annulled in order to make the EU law prevail.

The Court of Justice has given a broader scope to the right to a fair hearing, connecting explicitly Articles 41, 47 and 48 to fundamental principles of EU law guaranteeing the right to a defence:

> 'it must be recalled that observance of the rights of the defence is a fundamental principle of EU law …with regard more particularly to the right to be heard in all proceedings, which is inherent in that fundamental principle …that right is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration' (par. 81 and 82).

Consequently, the Tribunal, ruling in extended composition in both cases, recognized this right to the benefit of EU citizens[78] as well as TCNs[79]. According to the tribunal, the *préfecture* must hear foreigners prior to issuing a decision of OQTF, hence recognizing that the *principe du contradictoire*

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fondamentaux dans le système européen d'asile commun, CJUE, 22 novembre 2012, M.M., C-277/11', GDR-ELSJ of 1 December 2012 : http://www.gdr-elsj.eu/2012/12/01/asile/la-portee-du-droit-detre-entendu-lors-dune-demande-de-protection-subsidiaire-confirmation-de-la-preeminence-des-droits-fondamentaux-dans-le-systeme-europeen-dasile-commun/, last retrieved 13 February 2013.

[78] See TA Lyon, 28 February 2013, Mme Ancuta D., n°1208055: 'le droit d'être entendu préalablement à toute décision qui affecte sensiblement et défavorablement les intérêts de son destinataire... trouve à s'appliquer aux administrations des Etats membres dans une situation régie par le droit de l'Union européenne' ; 'tel est le cas d'une obligation de quitter le territoire français prise à l'égard d'un citoyen de l'Union européenne qui restreint le droit fondamental et individuel de circuler et de séjourner sur le territoire des autres Etats membres, conféré directement par les traités à chaque citoyen de l'Union Européenne, lequel s'exerce dans les conditions et limites prévues notamment par la directive n° 2004/38/CE susvisée' (cons. 4).
http://combatsdroitshomme.blog.lemonde.fr/files/2013/03/TA-Lyon-28-f%C3%A9vrier-2013-1208055-PGDUE.pdf last retrieved 30 March 2013.

[79] See TA Lyon, 28 February 2013, Mme Lareille LM, n°1208057: the right to a fair hearing is also applicable to une OQTF « prise à l'égard d'un ressortissant d'un pays tiers, qui restreint sa liberté de circulation dans les conditions prévues par la directive n° 2008/115/CE susvisée, laquelle harmonise dans son intégralité la législation des Etats membres de l'Union européenne portant sur les décisions de retour en fixant des normes et procédures communes' (n. 10), http://combatsdroitshomme.blog.lemonde.fr/files/2013/03/TA-Lyon-28-fev-2013-N%C2%B0-1208057.pdf, last retrieved 30 March 2013.

préalable is applicable in administrative proceedings pertaining to removal procedures governed by EU law, and therefore to Member states administrations: '*trouve à s'appliquer aux administrations des Etats membres dans une situation régie par le droit de l'Union européenne'*. Moreover, the tribunal stressed that the principle of a hearing prior to a decision of OQTF is a constitutive element of the right of defence as part of the general principles of EU law ('*l'une des composantes du droit de la défense qui fait partie des principes généraux du droit de l'Union européenne***'**), which is a variation of the right to good administration of Article 41 of the EUCFR and, as such, applies when EU law is implemented.

In light of these judgements applying general principles of EU law and the EU Charter of Fundamental Rights, some commentators quickly claimed a renewal/consolidation of the legal grounds of foreigners' right to be heard by the administration before it orders an OQTF. Yet, the recent pro-EU positions are not unanimous as two subsequent rulings, respectively by the *Tribunal administratif* of Montreuil and the *Cour Administrative d'Appel* (CAA) of Lyon, suggest[80]

In the judgment of 14 March 2013, the TA of Montreuil held that the application of general principles of EU law is limited to acts undertaken in situations **fully** governed by 'Community law' (ie EU law): *'dans une situation juridique* ***intégralement*** *régie par le droit communautaire*' (emphasis added). According to this arguable interpretation, this would not be the case of procedural rules pertaining to decisions on stay taken alongside an OQTF under Article L.511-1 CESEDA. On the other hand, the CAA of Lyon recognizes the application of the general principles of EU law, and even the principle of good administration of Article 41 of the EU Charter to the extent that the OQTF implements EU law. However, the Court considers that the right to be heard does not require the administrative authority to invite individuals to submit oral or written comments prior to issuing a decision. The CAA added that the procedural safeguards provided in the framework of contentious administrative procedures by Article L. 512-3 CESEDA are sufficient to ensure the 'full respect of the rights of the defence, in the meaning of the fundamental principle that Articles 41, 47 and 48 of the Charter underlie':

> '*garantissent à l'étranger la possibilité d'être entendu par un juge avant que la décision d'éloignement ne puisse être exécutée d'office par l'administration … la garantie dont il dispose de ce chef est de nature à assurer pleinement le respect des droits de la défense, au sens du principe fondamental que sous-tend les articles 41, 47 et 48 de la Charte des droits fondamentaux de l'Union européenne, dont le respect du droit d'être entendu fait partie intégrante, avant que la décision l'obligeant à quitter le territoire ne soit susceptible de l'affecter défavorablement, par son exécution d'office*' (cons. 15).

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[80] TA Montreuil, 14 March 2013, *M et Mme R.*, n°1210341-1210332, and CAA Lyon, 14 March 2013, *Préfet de l'Ain c/ Luc B.G.,* n°12LY02737.

See Serge Slama's comments in, 'Question préjudicielle sur le droit d'être entendu par l'administration préalablement à l'édiction d'une OQTF' in *Lettre « Actualités Droits-Libertés » du CREDOF*, 19 March 2013: http://revdh.org /2013/03/19/droit-des-etrangers-question-prejudicielle-droit-detre-entendu-oqtf/

Several months after the interpretation by the Court of Justice regarding asylum/subsidiary protection cases, and several days after the pro-EU rulings, such positions sound like replicating the *Conseil d'Etat*'s case-law, as Slama stressed it. In addition, the diverging interpretations of the application of the right to a fair hearing in the judgements of March 2013 also highlight the lack of clarity among the French administrative judges as to the scope of the principle.[81]

The French rulings rely on Article 51 which limits the application of the provisions of the Charter (including Article 41) to situations where Member States are implementing EU law: recourse to the Charter would be possible only if it is possible to link EU law to the situation. On the one hand, the Court confirms in the *M.M.* case that the question whether a situation falls within the scope of EU law is to be determined by the referring court.[82] On the other, the Court has broadened its jurisdiction gradually extending the field of application of the principle included in the Charter so as to have it comparable to that of general principles of EU law:[83] 'the Charter's field of application ... is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law. That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union' (par. 17 and 18). The definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter. However, '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction' (par 21 and 22). Therefore, and following Slama, it can be argued that in the case *Préfet de l'Ain c/ Luc B.G* of 14 March 2013, the *Cour administrative d'appel* de Lyon righlty ruled that the *préfet* implements EU law when he uses the procedure of OQTF governed by Article L511-1 CESEDA *('mise en œuvre' du droit de l'UE*).

Another question regards the wording of article 41(1) whereby '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the **Institutions, bodies**

[81] As stressed by Slama, the CAA maintains a legal position that does not respond to the reality of French and EU legal settings as far as the application of this principle as a procedural safeguard is concerned. See section on procedural safeguards below.

[82] See CJEU *Dereci and others v Bundesministerium für Inneres,* Case C-256/11, 15 November 2011. See par. 79 also *Iida* case. CJEU 8 November 2012, Case C-40/11: to determine whether the State authorities' refusal 'falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it. See ML Basilien-Gainche's comments ADL 29 November 2011.

[83] CJEU, GC, 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, case C-617/10.

and agencies of the Union' (emphasis added),[84] while 'Article 41(2) of the Charter provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions'. As mentioned earlier, the Court of justice provides a broader interpretation of the right to be heard in all proceedings in the *M.M* judgement, and specifically stated that, 'as follows from its very wording, that provision is of general application', 'even where the applicable legislation does not expressly provide for such a procedural requirement' (par 82 to 86). he TA of Lyon did not rely on this interpretation of article 41(2) but on the general principle of EU ensuring the right of defence. Therefore, the question of the field of application of these principles in France is still opened. Following the reference for a preliminary ruling made by the judge of the TA of Melun on 8 March 2013, we are now waiting for the Court of Justice's judgment to clarify this issue.

e. Duration of detention

French legal evolutions have tended to extend the period of detention without distinction of the categories of immigrants concerned. Moreover, the issue of the duration of detention highlights the complex framework resulting from the diversity of authorities involved on the one hand, and the various decisions regarding the detention the judge may order on the other: the combined reading of the applicable provisions entails that the judge may order the extension of the detention, decides 'exceptionally' a measure of home detention or refuses the extension.

Article L. 554-1 CESEDA explicitly connects detention with the removal process, recalling that detention must occur only for the time strictly necessary to organize the removal of irregular immigrants. The length of administrative detention in France may last 45 days maximum, with some exceptions: following the initial period of 5 days by order of the administration, the *préfet* may request an extension of the detention for a period of 20 days. The period of detention may be renewable once: at the expiration of the first period of 5 + 20 days, the *préfet* may ask the judge to authorize an extension of 20 days maximum. The second extension may be ordered under specific conditions: 1) absolute urgency, 2) serious threat to public order, 3) if the detainees has not been removed because s/he has deliberately obstructed the removal process, or if s/he has lost or destroys her/his travel documents or IDs (See Article L.552-7 CESEDA). The judge may also authorize the second extension of the duration of detention even if the delay in the removal process is not attributable to the detainee: no issuance of the *laissez-passer* by the relevant consular authority or no means of transportation; issuance of the *laissez-passer* too late during the first period. Beyond this legal period of detention, the immigrant who has not been removed by the administrative authority must be set free.

[84] See applications to measures of OQTF in France: CAA of Bordeaux, 29 March 2012, *Artak X.*, n° 11BX01905 ; CAA of Bordeaux, 3 April 2012, *Jamel A.*, n° 11BX02847 ; CAA of Nancy, 23 April 2012, *Karush A.*, n°11NC01074 ; CAA of Douai, 5 July 2012, *Solomon A.*, n° 12DA00509.

The duration of detention as well as the grounds for extension have been questioned in France.
As mentioned earlier, the maximum length of administrative detention in the CRAs was increased from 12 to 32 days in 2003 and to 45 days with Article 56 of the *Loi Besson* (Article L.552-7 CESEDA), which has harmonised the former Articles L.552-7 and L.552-8 CESEDA. However, the actual average length of detention in 2007 was 10.17 days (Cimade 2008) and has remained slightly the same so far. Consequently, the NGOs involved with immigration detention insist that the recent extension of this duration is not justified. Moreover, it is worth mentioning that the administrative detention may be ordered following the 16-hour administrative custody, or a period of imprisonment, hence involving different successive procedures.

Lawyers have focused on the procedures of detention to have decisions cancelled. The administration has to seize the judge before the duration of lawful detention expires in order to be granted an extension. The judge has to decide upon the extension in the 24h of his seizing. Failing to do so, even if only minutes, leads to the immediate release of the person in detention. For instance, in October 2012, a French immigration lawyer reported a case where he challenged the moment of the extension before the *Cour d'Appel* of Aix-en-Provence.[85] This case illustrates the way the administrative national authorities manage the use of TCN detention.
A third country national was subject to a removal order (*arrêté préfectoral ordonnant sa reconduite à la frontière)* dated 15 September 2012 notified to the plaintiff the same day. The detention of the client had been extended once and the lawyer challenged the second extension before the *Cour d'Appel* of Aix-en-Provence. He claimed the arbitrariness and the lack of legal ground of the continued detention of his client, in view of the gap of 36 minutes between the end of the first extension and the beginning of the next one. The counsel argued that the request for extension should have been submitted to the JLD at the expiration of the first period of detention, so that s/he would have ordered the extension of the detention by the end – and not after the expiration – of the first extension of the detention. The *Cour d'Appel* followed his argument in its *Ordonnance* No. 12/00578 of 11 October 2012.[86] The decision of the JLD to renew the detention for an additional period of 20 days occurred after the expiry of the first period of extension, and the *ordonnance* does not mention at what time the debates before the JLD started. So, there was a gap of 36 minutes between the end of the first period and the order of the second one. Consequently, the Court cancelled the delayed decision of the JLD of the *Tribunal de Grande Instance* of Marseille in date 10 October 2012. The *Cour d'Appel* of Metz had already made a decision in this perspective in 2010, but the *Cour d'Appel* of Aix-en-Provence took such a position for the first time. Now the question is whether the Court will confirm it or not.
As to the exceptions, the detention is typically extended in cases of acts or activities related to terrorism (*actes ou activités à caractère terroriste*). The law provides that a TCN sentenced to a ban from French territory (*ITF*) for acts of terrorism or against whom a removal order has been issued for conduct related to such activities, may be placed in administrative detention where there is a

[85] See http://avocats.fr/space/ramzan/content/_70dc97ed-0c2e-40ff-847f-f59b9f46f80a , last retrieved 16 January 2013.

reasonable prospect of execution of the removal order and no measure of home detention allows a sufficient control: '*une perspective raisonnable d'exécution de la mesure d'éloignement'*, '*aucune décision d'assignation à résidence ne permette un contrôle suffisant*'.[87] The JLD may order the extension of the detention for one month, renewable up to a maximum of six months. The bill provided for a possible extension of 12 months, but the *Conseil Constitutionnel* declared that this measure affecting the individual freedom violated the principle enshrined by Article 66 of the Constitution: *'[porte] à la liberté individuelle une atteinte contraire à l'article 66 de la Constitution*'.

Detention of immigrants who do not comply with the immigration regime may occur in other locations and facilities: in LRAs and in waiting zones in ports of entry. The case of detention in overseas facilities must also be addressed.

Detention in LRAs is legally limited to 48 hours when there is a CRA in the territorial jurisdiction of the competent tribunal or court of appeal. If immediate deportation is not possible, detainees are typically transferred from an LRA to a CRA. The period of detention may be extended if two conditions are met: if an appeal against the order of the JLD or against the administrative order of removal (APRF) is lodged; if there is not any CRA within the jurisdiction of the *Cour d'appel* where the LRA is located. As a result, detainees may remain in a LRA until the date set for the hearing of appeals contesting the extension of the duration of detention or the APRF (that is five days). The period of detention may hence exceed 48 hours, especially given the suspensive effect as reported by La Cimade (2008).

Likewise, people may be held by the administration in waiting zones in ports of entry, for only a few hours to a maximum legal limit of a maximum of 4 days. Beyond this period, the detention may be extended by the JLD for up to 8 days, renewable once. So the maximum period is of 20 days (4+8+8) and up to 26 days in specific cases, knowing that these facilities are intended for very short-term detention and often lack permanent holding structures (ANAFE 2008). The average duration of the placement in waiting zones was 4 days in 2007, in 2008 2, 69 days at Roissy Charles de Gaulle airport and 53 hours at Orly airport. However, there have been cases of excessively long confinement in the zones, notably at the airport of Roissy CDG.[88] Detention in waiting zone is limited to the time strictly necessary for TCN's departure, if s/he has not applied for asylum at the border. If the TCN has applied for asylum at the border, the detention is limited to the time strictly necessary to examine whether the application does not manifestly lack ground. The second extension may be ordered only in exceptional circumstances or in cases of deliberate obstruction of the removal process by the foreigner. However, there are three specific cases of possible extension. First, if the TCN files an application for asylum between the 14th and the 20th day of her/his detention, the detention is extended for 6 days from the filing of the application for asylum. Consequently, detention in waiting

[87] See Decree of 25 January 2012 : Décret n° 2012-90 du 25 janvier 2012 relatif à la rétention administrative de longue durée de certains étrangers, JORF n°0023 du 27 janvier 2012 page 1522**.**

[88] See also the case of Asebeha Gebremedhin, an Eritrean national seeking asylum in France, who was held in a Parisian airport for 20 days and subsequently brought an unsuccessful claim of illegal detention to the European Court of Human Rights (*Gebremedhin v France* 2007, §75).

zones may last up to 26 days. The JLD may order the termination of the extension. A second case is the recourse against the decision of refusal of asylum protection at the border. If an appeal against the negative decision on an application for asylum is lodged during the last four days of detention in the waiting zone, detention is automatically extended to 4 days, starting from the filing of the appeal. Here again, the JLD may order the end of this extension. Lastly, we must mention the case of groups of foreigners detained in "mobile" waiting zone (*zone d'attente transportable*). When a group of at least 10 foreigners is exceptionally placed in this zone, the maximum period of detention is 26 days.
Although waiting zones are intended for the time strictly necessary to TCNs' departure or the treatment of their application for asylum, the law provides maximum legal limits to the detention in waiting zones. Once these limits are reached, the TCN is immediately set free and may hence enter the French territory, even if a non-admission measure had been ordered.
Lastly, the duration of detention in overseas facilities is governed by Article 48 of the respective *Ordonnance* on entry and stay of Mayotte and Wallis and Futuna, and Article 50 of the respective *Ordonnance* on entry and stay of New Caledonia and French Polynesia. [89] The duration of detention is organized according to the same mechanism, but the legal duration differs from the rules set by the CESEDA, and there are distinct variations from one territory to another within this derogatory regime.

f. Alternatives to detention (i.e., appropriateness/detention as a last resort)

The Council of Europe Commissioner for Human Rights stressed in his Paper Positions that 'detention should be used only as a last resort, judicially authorised, and not for an excessive period of time'.[90] Indeed, detention as a measure to organize the removal of the immigrant should only be used when it is thoroughly justified and when it is clear that the removal cannot take place in the immediate future. This means that administrative authorities should limit the time rejected asylum seekers and irregular migrants have to spend in detention to a strict minimum. More specifically, this implies that, in situations where it is impossible to remove foreigners, the administrative authorities

[89] Article L111-2 CESEDA : 'Le présent code régit l'entrée et le séjour des étrangers en France métropolitaine, dans les départements d'outre-mer et à Saint-Pierre-et-Miquelon. Il régit l'exercice du droit d'asile sur l'ensemble du territoire de la République. Ses dispositions s'appliquent sous réserve des conventions internationales. Les conditions d'entrée et de séjour des étrangers à Mayotte, dans les îles Wallis et Futuna, en Polynésie française, en Nouvelle-Calédonie et dans les Terres australes et antarctiques françaises demeurent régies par les textes ci-après énumérés :1° Ordonnance n° 2000-373 du 26 avril 2000 relative aux conditions d'entrée et de séjour des étrangers à Mayotte ;2° Ordonnance n° 2000-371 du 26 avril 2000 relative aux conditions d'entrée et de séjour des étrangers dans les îles Wallis et Futuna ;3° Ordonnance n° 2000-372 du 26 avril 2000 relative aux conditions d'entrée et de séjour des étrangers en Polynésie française ;4° Ordonnance n° 2002-388 du 20 mars 2002 relative aux conditions d'entrée et de séjour des étrangers en Nouvelle-Calédonie ;5° Loi n° 71-569 du 15 juillet 1971 relative au territoire des Terres australes et antarctiques françaises.'
[90] Positions on the rights of migrants in an irregular situation, CommDH/PositionPaper(2010)5, Strasbourg, 24 June 2010, https://wcd.coe.int/ViewDoc.jsp?id=1640817.

should find alternative solutions to confinement for indefinite periods, such as home detention or the use of electronic monitoring devices. According to the UNHCR in 1999, '[t]here is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention'.[91] Yet, the alternative measures provided by French law show that detention outside of administrative facilities, which seems *a priori* less coercive, involves an extensive control of the immigrant and restrictions on her/his freedom of movement anyway.

The Return Directive requires that State authorities (ie the *Préfet* in France) should first search for reasonable alternative to detention. When less coercive measures are not sufficient, Member States may detain a third-country national during the return procedure, in specific cases, notably if s/he risks fleeing or obstructs the preparation of return or the removal process. Therefore, there is no legal obligation upon the Member States. In France, the administrative authority may order the home detention of a non-European citizen (a TCN) when it is impossible to enforce immediately her/his removal. Articles L561-2 and L562-1 CESEDA both provide for home detention measures aiming at securing the immigrant in the prospect of her/his removal.[92] This *assignation à residence administrative* may, in some cases, substitute the placement in detention and hence be ordered as an alternative to the placement in a CRA. A special measure of home detention includes the electronic monitoring of the immigrant confined. Yet, home detention measures are not frequent in France, as a consequence of both the absence of EU legal obligation and the wording of French provisions that does not impose to administrative authorities to search first for alternative measures to detention (see our answers to point 1.a): according to Article L 551-1 CESEDA, the foreigner who is subject to a measure of removal may be placed in an administrative detention facility unless the foreigner is in home detention in application of Article L 561-2. Moreover, the *Cour de Cassation* ruled that the judge is not bound by the wording of the law, which provides that home detention is 'exceptional', to comply with Article 16 of the Return Directive.[93] Although the administrative authorities may decide the placement in home detention, in light of the criteria they do not seem to have discretionary power to decide between 'regular' detention and home detention, and to opt for one or another type of home confinement.

In criminal proceedings, only the judicial authority is competent to decide on such measures. The *juge d'instruction* or the JLD are competent when it comes to an alternative to detention during judicial control, while the *JAP*, the judge in charge of the enforcement of the sentence is competent when it comes to arranging the sanctions (*aménagement de peine*). Note that the consent of the accused or convicted person is required. Conversely, the home confinement resulting from an administrative decision is decided by the *préfet* (in case of a decision of *reconduite à la frontière*)

[91] UNHCR, 1999, 3.

[92] Home detention may be decided under Article L 523-3, for absolute urgency, public security and state safety (*sûreté*). This measure may last for a maximum of one month and is decided before any removal decision. Home detentions governed by Article L 561-1 allow immigrants' temporary presence on the French territory and are authorized independently of a removal process. Note however that all the measures of removal are concerned, as the Articles L 523-3 to L523-5 refer to this provision in case of expulsion.

[93] See C. Cass, Civ 1, 24 October 2012, case n. 11-27956.

and by the Minister of Interior (for cases of *expulsions* and *interdiction du territoire).* Measures of home detention require that the immigrant facing a removal measure resides in places determined by the administrative authority (her/his domicile or a relative's) and reports regularly to police departments or units of the *gendarmerie.* Besides, the issue of alternative measures to detention is connected to the effectiveness of the right to a fair hearing. Indeed, during the judicial hearing that aims at allowing the *Préfet* to extend the detention for 20 additional days, the detainee is entitled to ask for a measure of home detention instead of the detention in administrative facilities. It is therefore critical that administrative authorities ensure the effectiveness of immigrants' right to a fair hearing, to guarantee the request for such alternatives and their benefit to immigrants.

The CESEDA provides for the following alternatives to detention: signing a registry at the police station to inform the authorities of measures taken to voluntarily leave the country (Article L.513-4), 'classic' measures of home detention and home detention with electronic monitoring (Articles L.562-1 and following).

Article 47 of the Law of June 2011 created a new mechanism of home detention: the *assignation à residence jusqu'à 'perspective raisonnable d'exécution' de la mesure d'éloignement*. Under the new section L561-2 CESEDA, the *Préfet* may decide a long-term home detention (1 year maximum) for TCNs facing a removal measure but who are unable to leave France and cannot return to their country of origin or travel to another country: '*être dans l'impossibilité de quitter le territoire français ou ne peut ni regagner son pays d'origine ni se rendre dans aucun autre pays'.* This provision concerns, for instance, asylum-seekers or sick foreigners facing a measure of removal that the administrative authority cannot enforce because of the risks they would face if sent back in their country or because of their medical situation. The TCN is consequently granted a measure of home detention until there is a reasonable prospect of execution of her/his obligation to leave the country. This measure can be ordered for up to 6 months, renewable once or more in the limit of 1 year maximum.[94] The TCN is required to reside in places imposed by the public authority and may circulate in a delimited perimeter. S/he must report (*pointer*) daily to police stations or *gendarmerie* units (in some cases even several times per day). To be eligible to these measures, the immigrant has to prove guarantees of representation (Article L.552-4 CESEDA), s/he must hand in a valid passport to the police prior to the hearing and the *préfecture* may hold its IDs (Article L. 561-1 CESEDA). S/he receives a receipt (*récépissé*) to be able to prove her/his identity.

Such a measure is also applicable for the 'classic' form of home detention set out by Article L.561-2 CESEDA, when there is a 'reasonable prospect of removal' of the foreigner (*avec perspective raisonnable d'exécution de la mesure d'éloignement*).[95] This measure concerns TCNs facing a removal order who can be subject to administrative detention (in case of an *OQTF* of less than 1 year and *interdiction administrative de retour en France*), but their removal is delayed due to technical

[94] Note that this measure is not applicable for the TCN facing an *interdiction judiciaire du territoire français*, since s/he may be home detained all the time necessary to organize her/his removal, and specific rules are applicable for TCNs facing an *arrêté d'expulsion.*

[95] See Art. L.561-2 CESEDA: 'une perspective raisonnable d'éloignement » présentant des « garanties de représentation effectives propres à prévenir le risque (…) qu'il se soustraie à la mesure d'éloignement'.

reasons external to the immigrant: absence of proper identification documents, travel documents or means of transportation: '*des motifs techniques tenant à l'absence d'identification, de documents de voyage ou de moyens de transport*'. This measure is ordered by the *préfet* or by the Minister of Interior when the TCN faces a court ban from the French territory (*interdiction judiciaire du territoire français*). In both cases, the decision is written and grounded and must be communicated to the TCN. Home detention under Article L. 561-2 may therefore be an alternative to administrative detention if the TCN proves guarantees of effective representation to prevent the risk s/he subtracts the removal. This short-term home detention measure concern particularly families with minor children. It is applicable for a maximum period of 45 days, renewable once for a maximum of 90 days.[96]

Both decisions of home detention must be grounded (*décision motivée*) and may be challenged before the administrative tribunal, within the normal 2-month period applicable for administrative remedy for the long-term home detention and within 48 hours for the short-term measure.

Lastly, home detention with electronic monitoring (Article L. 562-1 CESEDA) may be decided in two situations. This alternative to detention may be used in particular for families. It may include the port of an electronic bracelet (Article L.552-4-1 CESEDA). This measure may be decided for the father or mother of a minor child residing in France, who has actually contributed to the care and education of her/his child since the birth or for at least for two years in accordance with Article 371-2 of the *Code Civil*: '*contribue effectivement à l'entretien et à l'éducation dans les conditions prévues à l'article 371-2 du code civil depuis la naissance de celui-ci ou depuis au moins deux ans'*. Under this article, home detention with electronic surveillance may also be decided for a TCN facing a removal order that cannot be immediately enforced but who does not have sufficient guarantees of representation. In both cases, the TCN must give her/his consent. The decision is taken by the administrative authority for an initial period of 5 days. The JLD is then competent for a possible extension under the same conditions as those applicable for the detention in administrative facilities: two possible extensions of 20 days for a maximum total period of 45 days. The TCN may not leave the domicile or the location designated by the *préfet* or the JLD outside of the hours specified in the written decision. S/he must carry an electronic device for the remote surveillance by the police or the *gendarmerie*. The TCN may have to hand in her/his passport, travel or ID documents *contre un récépissé*.

The TCN may use the administrative remedy to request the TA of her/his place of home detention to cancel the initial decision of home detention (*recours pour excès de pouvoir*). S/he may lodge an appeal against the decision of extension of the JLD before the *Cour d'Appel* (*Premier Président de la Cour d'Appel*).

NGOs and immigration lawyers claim that these measures, which seem a more favourable treatment of irregular TCNs, actually consist in an excessive use of home detention for the sole purpose of

[96] See Circulaire of 6 July 2012 Mise en œuvre de l'assignation à résidence prévue à l'article L. 561-2 du CESEDA, en alternative au placement des familles en rétention administrative sur le fondement de l'article L.551-1 du même code NOR INTK1207283C : http://circulaire.legifrance.gouv.fr/pdf/2012/09/cir_35851.pdf , last retrieved 6 December 2012.

controlling TCNs. These seriously limit TCNs' freedom of movement, privacy as well as their material conditions of existence. Indeed, the TCN in home detention is not authorized to leave her/his domicile or the determined place of detention. S/he may have to carry a remote control device. Moreover, the law does not allow them, for instance, to work during this period and the TCN in home detention must be delivered an authorization to work by the administration. Lastly, measures of home detention blur the already fragile distinction between administrative and criminal regimes of detention. Indeed, the TCN who does not comply with the conditions of the *assignation à residence*, faces 6 months to 3 years of imprisonment.

2. Procedural safeguards

The 2008 Directive aims at limiting the use of detention, binding it to the principle of proportionality and establishing minimum safeguards for detainees. The Return directive specifies that detentions are ordered in writing by administrative or judicial authorities and must be reviewed regularly. It recalls that TCNs must be given the possibility to appeal against/seek review of return decisions, as well as to obtain legal aid or representation free of charge. Besides, decisions are to be reviewed by a competent independent judicial or administrative authority or body who has the power to temporarily suspend the enforcement of the decisions.

Procedural safeguards relying on French principles and EU standards of protection exist in France. The administrative judge controls the legality of the measures of removal and detention, the *Procureur de la République* is informed of the procedure from its beginning, the *ordonnances* of the JLD may be challenged, and the *ordonnance* of the first President of the *Cour d'Appel* may be appealed before the highest court of the judiciary (*pourvoi en cassation*). Lastly, the detainee may request at any time the JLD to end her/his detention and the JLD may, on her/his own initiative, decide the end of the detention if the circumstances justified it.
However, as mentioned earlier notably in the section on the right to a fair hearing, the *Conseil d'Etat*'s interpretation and the practice have had an impact on the effectiveness of the procedural safeguards. The last progress report of the *Conseil d'Etat*, which underlines that contentious matters in foreigners' law have increased, confirms this concern. The triple issue of the existence, access and effectiveness of procedural safeguards is all the more important that the enforcement of the law of June 2011 has led to an increase of 50 per cent of contentious cases of removal reviewed as urgent matters (*examinés en urgence)* for the second semester of 2011, compared to the second semester of 2010, as well as an increase of 15 per cent of the contentious cases that do not regard removals.[97] Likewise, the ninth report of the *Secrétariat général du comité interministériel de contrôle de l'immigration* shows that 17, 80 per cent of the failed removals in 2011 resulted from annulments of the procedures by the JLD and the CAA because of two main reasons: the irregularity of the

[97] See Conseil d'Etat, Rapport public 2012, La Documentation française, 2012, 12 : 'le contentieux des étrangers continue de progresser. L'entrée en vigueur de la loi n° 2011-672 du 16 juin 2011 … a ainsi conduit, au second semestre de l'année 2011, à une augmentation de 50 % du contentieux des mesures d'éloignement, par rapport au second semestre de 2010. Une hausse de près de 15 % du contentieux hors éloignement est également constatée'.

placement in police custody (*garde à vue*) (29,19 %) following the decision *El Dridi* of 28 April 2011 and the irregularity of the conditions of immigrants' arrest (15,19 %) that has impacted 2 691 removal procedures. The rulings of the administrative judges (TA and CAA) on the procedures of *reconduites à la frontière* represented ca 6, 67 per cent of the failed removals. The *Secrétariat général* has identified two main reasons too: the non-compliance with the Return Directive (amounting for 487 annulments), and procedural irregularities that have resulted in the annulment of 419 removal procedures.[98]

Moreover the effectiveness of the standards of protection and procedural safeguards has to be assessed in light of the French conception of separation of powers combined with Article 66 of the Constitution and the *réserves constitutionnelles de compétence* respectively granted to the judicial and administrative judges. Besides, there have been substantial changes to the institutional framework, resulting in the extension of the competence of the administrative judge, notably with the procedure of *référé* in 2000, alongside changes to the policies governing immigration detention. This results in a complex legal framework whereby both the administrative authority and the administrative judge remain the primary actors of immigration detention in line with the administrative nature of this regime. The *Loi Besson* has further blurred this framework postponing the control of the JLD from the second to the fifth day of detention alongside the extension of the legal period of detention. Lastly, the legal limbo also results from the intricate rules pertaining to the distinct but connected procedures of *retenue* and *rétention administrative* one the one hand, and their respective control on the other. This setting impacts the control of the decision to detain on the one hand, and the review of the detention on the other. More specifically this questions the effectiveness of the control of the *juge judiciaire*, the 'natural guardian of the individual freedom' according to the wording of Article 66 of the Constitution, who is regarded as an 'obstacle' to the removal of irregular immigrants by the Government.[99]

In the framework of the French conception of the separation of powers[100], the Article 66 of the Constitution states that 'the Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute'. As a consequence, this judge is meant to ensure the respect of administrative detainees' rights and should accordingly have a primary competence precisely because an individual's freedom is at stake. Article 66 C hence includes a '*réserve constitutionnelle de compétence judiciaire'* entailing that the contentious matters involving individual freedom fall within the judicial jurisdiction, while only the administrative judge

[98] *Les chiffres de la politique de l'immigration et de l'intégration. 2011*, December 2012, La Documentation française, March 2013. See notably p.76.

[99] See Comité interministériel de contrôle de l'immigration, rapport de décembre 2009, p.94 quoted by La Cimade, analysis of the draft law. http://www.gisti.org/IMG/pdf/pdl_besson_analyse_2010-09-08_cimade.pdf.

[100] See as an illustration, decision 80-119 DC, 22 July 1980, Validation d'actes administratifs, considérant 6: «Considérant qu'il résulte des dispositions de l'article 64 de la Constitution en ce qui concerne l'autorité judiciaire et des principes fondamentaux reconnus par les lois de la République en ce qui concerne, depuis la loi du 24 mai 1872, la juridiction administrative, que l'indépendance des juridictions est garantie ainsi que le caractère spécifique de leurs fonctions sur lesquelles ne peuvent empiéter ni le législateur ni le Gouvernement ».

has the power to cancel, reform[101] and control the legality[102] of the administrative decisions involving the prerogatives of the public authority (*prérogatives de puissance publique*). As the 'natural' judge of the Administration, the administrative judge controls the legality of the administrative decisions and rule on the responsibility of the author of these acts. However, if the measures impacting one's individual freedom have an administrative nature, two constitutional principles of competence are in conflict: the judicial competence (*bloc de compétence judiciaire*) grounded on a substantive criterion (*critère materiel de l'atteinte à la liberté individuelle*); the administrative competence grounded on the institutional criterion (*critère organique de l'auteur de l'acte*). *The Conseil Constitutionnel* has answered to this possible conflict of competence addressing the aimed effectiveness of the principle of proper administration of justice: it has recognized the possibility for the administrative jurisdiction to ensure the safeguard of the freedoms too insofar as *'la bonne administration de la justice commande que l'exercice d'une voie de recours appropriée assure la garantie effective des droits… cette exigence … peut être satisfaite aussi bien par la juridiction judiciaire que par la juridiction administrative'*.[103]

a. Bail

French law does not provide for it. Fines are however possible.

b. Automatic review of detention order

In France, the question of the automatic review of the detention order has to be addressed in light of the share of competence of the administrative and judicial judges on the one hand, and the connected procedures of *retenue* and *rétention administrative* on the other. There is a legal void since the reform of 16 June 2011 when the French law-maker decided that the first judge to control the legality of the process of detention was the administrative judge.

There is not any automatic review of the detention order in France, which is decided by the administrative authority alone. As a result of the French principle of separation of powers, the ordinary judge is not competent to control the legality of the administrative decisions, and therefore the decision of detention. The administrative decision of detention is valid for five days and only the administrative judge may intervene during this period. This judge may review the formal legality of the decision of detention, assess whether the decision is reasonable in light of the facts of the case, and control if the administrative authority has not exceeded her/his powers. Nevertheless, the highest

[101] See the decision 86-224 DC, 23 January 1987, Conseil de la concurrence, considérant 15: 'Considérant que (...), conformément à la conception française de la séparation des pouvoirs, figure au nombre des "principes fondamentaux reconnus par les lois de la République" celui selon lequel, à l'exception des matières réservées par nature à l'autorité judiciaire, relève en dernier ressort de la compétence de la juridiction administrative l'annulation ou la réformation des décisions prises, dans l'exercice de prérogatives de puissance publique, par les autorités exerçant le pouvoir exécutif, leurs agents, les collectivités territoriales de la République ou les organismes publics placés sous leur autorité ou leur contrôle'.

[102] See Decision 89-261 DC, 28 July 1989, *Loi Joxe,* considérant 25.

[103] See Decision *Loi Joxe,* considérant 29.

administrative court in France, the *Conseil d'Etat*, only analyses the interpretation of the law and the compliance with it, but not the interpretation of the facts. Moreover, the administrative judge does not have the power to control the *retenue* of an immigrant since the French legal system does not allow the former to control the legality of the activity of the judiciary police, even if the detention has resulted from the administrative police custody. The *Conseil d'Etat* has not addressed this issue yet, but lower courts have ruled against controlling the *retenue* of an immigrant,[104] in line with the French tradition of separation of the two orders of jurisdiction that has existed since King Louis XIV. Indeed, the administrative judge being the judge of the placement in detention or the home detention, the administrative jurisdictions consider that they do not have to rule since the judicial decision 'replaces' the administrative one. With the postponing of the control of the JLD to the fifth day of detention, the administrative judge is the one who is to control the merits (*le bien-fondé*) of the deprivation of liberty, whereas the case-law of the *Conseil Constitutionnel* attributes such a competence to the judicial judge.

The JLD only examines the opportunity of the extension of the detention period and the regularity/conformity of the judicial procedure (*procédure judiciaire*). The judge controls that the detainee has been fully informed of her/his rights and has been able to exercise them effectively, at the moment of the notification of the decision of her/his placement in detention or in waiting zone.[105] The judge will also control the regularity of the proceedings preceding the placement in detention: arrest, police custody and administrative custody (*interpellation, garde à vue* and *retenue)*. The JLD must rule within 24 hours following the *saisine* by the administrative authority (L. 552-1 CESEDA). So the 'guardian of the freedoms' is involved only if and when the *Préfet* request the authorization to extend the detention within the five days of her/his initial decision. If the *Préfet* fails to do so within the legal period, the detainee has to be set free. Moreover, only if the conditions of the detention itself in the detention facility are illegal can the ordinary judge set a person free during the first days of detention (see section on conditions of detention). Lastly, there are numerous examples of immigrants removed from France before the *Préfet* asked the JLD to extend the detention. The *Cour de Cassation* has a rooted position that prevents the *juge judiciaire* from interfering during the first

[104] See CAA Bordeaux 2 November 2012 n°11BX03046.

[105] Note that following the reforms, the JLD considers the particular circumstances of the placement in detention of 'an important number of foreigners' to control the moment of the notification of the decision, the communication of the rights and their effective application (art. 52 of the Law – L. 552-2 CESEDA). See Article 38 of the bill of the Law of 2011 modifying Art. L. 552-2 CESEDA: *Notification et exercice des droits en rétention*, http://www.senat.fr/rap/l10-392/l10-39230.html last retrieved 22 February 2013.

'La première modification de l'article L. 552-2 vise à préciser que le juge doit s'assurer que l'étranger a été « dans les meilleurs délais possibles suivant la décision de placement, pleinement informé de ses droits et placé en état de les faire valoir à compter de son arrivée au lieu de rétention', et non plus 'au moment de la notification de la décision, pleinement informé de ses droits et placé en état de les faire valoir'.

La deuxième modification concerne le cas particulier de la notification des droits lorsqu'un nombre important d'étrangers est placé simultanément en rétention. Le 3° de l'article 31 a en effet précisé que la notion de « meilleurs délais » devait être appréciée « compte tenu du temps requis pour informer chaque étranger de ses droits ». Par coordination, il est nécessaire de prévoir que le juge doit tenir compte de ces circonstances particulières dans l'appréciation des délais.'

days of detention (2 days before the Law of 2011; 5 days since then). [106] As a result, the TCN may be brought before a judge within a maximum of 7 days from the beginning of her/his detention (art. 44 and 51 of the law, Articles L.551-1 and L. 552-1 CESEDA). So, even if an immigrant is detained on illegal grounds by the police (ethnic profiling for instance), this may never be controlled by a judge if the immigrant is removed before the judicial judge intervenes. The report of the five NGOs assisting immigrants in detention facilities (La Cimade, Assfam, Forum des Réfugiés, France Terre d'Asile et l'Ordre de Malte) has underlined the impact of the new provisions and concluded that in 2011, 25,3 per cent of people removed from France after a period of detention never got to see a JLD. Besides, 73, 6 per cent of the families have spent less than 5 days in detention in 2011.[107] This means that huge violations of fundamental rights may go unchecked and people deprived of their freedom on illegal grounds have no effective remedy against this. The postponing of the control of the JLD, guardian of the regularity of the procedure and the respect of the rights and fundamental freedoms, by the law of June 2011 seriously questions the respect of the *principes fondamentaux des lois de la République*.

Lastly, in absence of an automatic review of detention orders, it is worth mentioning that the law creates an urgent administrative remedy against the decision of placement in detention or the 45-day home detention. The appeal must be lodged within 48 hours and the ruling is by a single-judge court without *rapporteur public* in 72 hours. If there are additional measures such as an OQTF, a refusal of stay permit, an issue regarding the country of destination or a prohibition of return and for how long, or if there is pending decision, the administrative judge rules on all the issues. The law does not explicitly provide that the appeal against the placement in detention has a suspensive effect on the measure of removal, if the TCN is detained on the ground of a removal measure immediately enforceable. As a result, as we saw earlier, the foreigner may be detained and removed before the ruling of the judge. Nevertheless, the new possibility of an urgent appeal (remedy without any suspensive effect though) before the administrative tribunal against the placement in detention has led to set free 11, 3 per cent of the families after the reform, compared to 7, 2 per cent before. However, the complex framework of the contentious jurisdiction limit the effective benefit of the legal protection knowing, besides, that the foreigner has often to challenge the various measures and decisions within 48 hours and may not command the French language. Likewise, the single-judge court without *rapporteur public* may sometimes have to rule simultaneously on six administrative decisions as underlined by the GISTI.

[106] Cass. civ. 1, 5 December 2012, n. 11-30548. This may impair the objective of the Directive, which requires that the judicial review (whether made by the judicial or administrative judge) of the lawfulness of detention intervene 'as soon as possible'.

[107] http://cimade-production.s3.amazonaws.com/publications/documents/70/original/Rapport_retention_2011.pdf?1353516787, last retrieved February 2013.