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## RETURN DIRECTIVE DIALOGUE – REDIAL

# *European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural safeguards*

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**Géraldine Renaudiere**

**Supervision by Philippe De Bruycker**

REDIAL Research Report 2016/03



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**REturn Directive DIALogue**

**Research Report**

**REDIAL RR 2016/03**

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the Judicial Implementation of Chapter III of the Return Directive  
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## **REDIAL – REturn Directive DIALogue**

The project REDIAL (**RE**turn **DI**rective **DI**ALogue) is co-funded by the European Union within the framework of the European Return Fund. REDIAL is implemented by the **Migration Policy Centre** (RSCAS, EUI) in partnership with the **Odysseus Network** (ULB – Université Libre de Bruxelles) and the **Centre for Judicial Cooperation** (EUI).

Its main purpose is to enhance the effective implementation of the Return Directive (2008/115/EC) through judicial cooperation among courts from all EU Member States. The starting premise of the Project is that judicial cooperation contributes not only to cross-fertilization of relevant national and European case-law, but also to an increase in legitimacy of judicial review of return decisions. In order to achieve its objective, the REDIAL team of experts will analyse and compare the judicial implementation of the EU Return Directive in the Member States. REDIAL is expected to become an important instrument to assist national judges and legal practitioners in the application of the Return Directive.

Results of the above activities are available for public consultation through the website of the project: <http://euredial.eu>.

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## I. Introduction

Chapter III of Directive 2008/115 (hereinafter Return Directive or RD), entitled ‘Procedural Safeguards’, lays down the requirements that have to be fulfilled for all decisions issued by the public administrative authorities and national courts of the EU States during return procedures. More precisely, return-related decisions must be issued in writing and must give reasons in fact and in law. Additionally, Member States are obliged to put in place effective legal remedies against those decisions. In case return decisions cannot be enforced due to practical or legal obstacles for removal (*e.g.* delays in obtaining the necessary papers from third countries and *non-refoulement* cases), the Return Directive requires the Member States to ensure a minimum level of conditions of stay for the third-country nationals (TCNs) concerned, covering four basic rights: 1. family unity; 2. health care; 3. schooling and education for minors; and 4. respect for the special needs of vulnerable person.<sup>1</sup>

The Court of Justice of the EU added further rules regarding, in particular, the protection of the individual’s right to be heard during return proceedings and the necessary legal remedies against violations of this fundamental right.

The [REDIAL database](#) currently includes **87 national judgments on Chapter III Return Directive**, from 17 Member States: **33 national judgments under Article 12**; **37 national judgments under Article 13**; and **17 national judgments under Article 14**.

The aim of this section is to offer a comparative overview of the national jurisprudence dealing with issues related to the application of procedural safeguards during the return procedure, including the administrative and judicial litigation phases. The present synthesis is based primarily on jurisprudence originating from eleven Member States,<sup>2</sup> which have been selected on the basis of the number and complexity of cases dealing with Articles 12-14 RD. When available, additional landmark national judgments from other Member States, dealing with similar issues, were also referenced.

The Report is structured in three main parts following the structure of the Procedural Safeguards Chapter. It starts with **Article 12** (*legal requirements during the administrative phase*), continues with **Article 13** (*legal remedies*) and there is, lastly, **Article 14** dealing with procedural safeguards enjoyed by irregular migrants awaiting return, while outside the pre-litigation and/or litigation phase.

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<sup>1</sup> See also, Return Handbook, pp. 74-75.

<sup>2</sup> Austria, Belgium, Bulgaria, Czech Republic, Germany, Greece, Italy, Lithuania, Netherlands, Poland and Slovenia.

## II. Article 12 RD – Procedural Safeguards during the Administrative Phase

Article 12 of the Return Directive provides several obligations incumbent upon the public authorities of the Member States during the return procedure. Namely, they are obliged to issue return-related decisions in *writing, give reasons in fact and in law* for their decisions, as well as *providing sufficient information about available legal remedies* to the concerned individuals. The *main elements of return-related decisions need to be translated* in writing or orally, *in a language the TCN understands*. Exceptions from the translation of return related decision(s) in the language spoken by the TCN are permitted under the strict conditions provided by Article 12(3).

### 1. Preliminary Observations: What Type of Return-related Decisions Benefit of Procedural Safeguards? (Article 12(1))

#### *EU Legal Provisions and Jurisprudence*

Article 12 RD mentions only: *return decisions, entry-bans* and *decisions on removal*, as return decisions which should be issued following the procedural safeguards set out by Article 12 RD. However, it has to be noticed that there are many other return decisions that can be issued under the Return Directive:

1. Decision granting voluntary departure – Article 7(1);
2. Decision extending the initial period of voluntary departure – Article 7(2);
3. Decision postponing removal – Article 9;
4. Decision establishing, suspending, withdrawing an entry ban – Article 11;
5. Decision establishing the detention of the TCN – Article 15(1);
6. Decision prolonging the initial period of detention – Article 15(6).

Some of these decisions are ancillary to the return or removal decisions. Some of the Member States have a one-step or two-step return procedure.<sup>3</sup> The type of return procedure, chosen by Member States, influences the number of return-related decisions that are issued. Regardless of the type and number of return-related decisions a Member State can issue, the procedural safeguards laid down by Chapter III of the RD including those set out by Article 12, have to be ensured in relation to all these decisions.

#### *Landmark National Jurisprudence*

Only a few Member States transposed the requirement to ensure procedural safeguards for all decisions issued during the return procedure as a separate legal provision. It can be mentioned that several Member States took advantage of the possibility offered by Article 6(6) of the Return Directive and follow a one-step return procedure. Namely a single administrative decision which includes return decision, voluntary departure, and entry ban, the later can also fulfil the function of a removal order.<sup>4</sup> Not all these Member States have an express legal provision stipulating that the procedural safeguards are guaranteed to all return-related decisions (*e.g. Czech Republic*). For

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<sup>3</sup> Article 6(6) allows Member States to combine several different decisions (including decisions not directly related to return) within one administrative or judicial act, provided the relevant safeguards and provisions for each individual decision are respected, see Return Handbook.

<sup>4</sup> See, for instance the Czech Republic.

instance, the last amendment of the Czech Aliens' Act<sup>5</sup> did not expressly mention that procedural safeguards guaranteed during the return procedure also apply to the administrative decision extending the period for voluntary departure.<sup>6</sup>

The fact that the Member States allocated the review of return-related decisions to different types of domestic jurisdictions: criminal, administrative, civil, has also impacted the procedural safeguards guaranteed to TCNs. For instance, detention decisions are allocated in certain Member States within the jurisdiction of criminal courts (e.g. **BE, FR**), or civil courts (**DE**), while other return related decisions that do not concern detention fall under the competence of administrative courts. While in other Member States, all return related decisions fall under the jurisdiction of one single type of court – usually administrative courts (e.g. **AT, RO, and SLO**), or specialized judiciary (**IT** – justice of peace).

The **Supreme Administrative Court of Lithuania** has addressed the specific issue of the type of return related decisions, which should benefit from procedural safeguards as set out by the Return Directive and CJEU. The Court held that procedural safeguards should be recognized for all types of return related decisions, irrespective of whether they are coercive or not. In *A.M.C. v. Migration Board of Vilnius County Police Headquarters* (No. AS-839/2014, decision of 23 July 2014), the **Supreme Administrative Court of Lithuania** confirmed that the 'decision related to return' covers both the decision on voluntary departure and the removal decision, and that procedural safeguards, including interim measures and the suspensive effect of the appeal should be recognized in relation to both these decisions.<sup>7</sup>

The **Dutch Council of State** held that while the same hearing can lead to administrative decisions on return and detention, given that the personal circumstances that are relevant before deciding on a return decision do not really differ from those that need to be taken into account by the administration before deciding on detention,<sup>8</sup> this is not the case with regard to the issuing of an entry ban. In this situation, there needs to be a separate hearing, or specific questions with regard to the issuing of an entry ban need to have been posed to the third-country national.<sup>9</sup> The **Dutch Council of State** has referred to Article 11 paragraph 2 of the Return Directive, read together with 4:8 of the General Administrative Act, in order to argue that the third-country national should be able to bring forward his or her individual circumstances to possibly shorten the duration of the entry ban by the administration.<sup>10</sup>

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<sup>5</sup> See Law No. 314/2015 of 18 December 2015. However, the general provisions of the Administrative Code would have required that procedural safeguards are guaranteed to all return-related decisions.

<sup>6</sup> Until this legislative amendment, Czech law did not provide for the possibility of extending the period of voluntary departure. The legislation provided only for a maximum period of 60 days for voluntary departure, which was the longest possible period allowed by a Member State to irregular migrants. For more details on the judicial implementation of Article 7 RD, see the *REDIAL European Synthesis Report on the Termination of Illegal Stay*, available on: [http://euredial.eu/docs/publications/european-synthesis-reports/Synthesis\\_report.pdf](http://euredial.eu/docs/publications/european-synthesis-reports/Synthesis_report.pdf) (doi:10.2870/10755).

<sup>7</sup> A similar approach was substantiated by the **Belgian Council of Alien Law Litigation** in case 126.219, judgment of 25 June 2014, discussed below.

<sup>8</sup> Council of State, 5 November 2012, 201208138/1/V3.

<sup>9</sup> Council of State, 21 December 2012, 201205275/1/V3 and 201205900/1/V3.

<sup>10</sup> Council of State, 23 July 2015, ECLI:NL:RVS:2015:2436.

## 2. The Right To Be Heard during the Pre-Litigation Administrative Procedure

### *EU Legal Provisions and Jurisprudence*

The Return Directive does not refer *expressis verbis* to the Member States' obligation to respect the right to be heard of the irregular migrant before taking an individual measure that would affect him or her and the legal consequences of breaching the right to be heard.

It was the Court of Justice of the EU, which, in its already settled case-law, has included among the procedural safeguards recognized during the return procedure '*the rights of the defence, which include the right to be heard and the right to have access to the file. These are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union. It is also true that the observance of those rights is required even where the applicable legislation does not expressly provide for such procedural requirements*'.<sup>11</sup>

According to the CJEU, the legal source of the Member State's obligation to ensure respect of the TCN's right to be heard during the return procedure is the general principle of the EU law of rights of the defence, and not Article 41 EU Charter.<sup>12</sup> The EU based right to be heard confers TCNs the opportunity of making known his/her views effectively during the administrative procedure and before the adoption of any decision liable to affect his/her interests adversely (*Boudjlida*, para. 36).<sup>13</sup> The CJEU clarified the legal nature of the obligation to hear the TCN before taking a return related decision against them in two cases referred by **French** first-instance courts.<sup>14</sup> It should be noted that, by the time the CJEU delivered its preliminary rulings, the **French Council of State** had already ruled, in similar cases, that the right to be heard should be respected by the public authorities when issuing administrative decisions on the basis of the legal nature of the general principle of EU law.<sup>15</sup> It emphasized that there is no practical difference between invoking Article 41 CFR or the right to be heard as a general principle. The **Council of State** invoked the CJEU preliminary ruling in *G and R*, whereby, '*an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different*'.<sup>16</sup> It was held that by applying for a residence permit, the applicant should have known that a potential consequence in case of refusal would be that the authorities may take a return decision. Therefore, the French Council of State upheld the return decision issued by the French authorities without previously hearing the applicant on the issue of his return.

<sup>11</sup> C-383/13 PPU, *M.G., N.R. v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2013:533, para. 32.

<sup>12</sup> The CJEU stated that: 'it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. Consequently, an applicant for a resident permit cannot derive from Article 41(2)(a) of the Charter a right to be heard in all proceedings relating to his application' (see C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44; Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33).

<sup>13</sup> 'The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'. See, *inter alia*, the judgments in *M.*, C-277/11, EU:C:2012:744, para. 87, and Case C-166/13, *Mukarubega*, EU:C:2014:2336, para. 46.

<sup>14</sup> The Administrative Tribunal of Melin sent the preliminary questions in *Mukarubega* – C-166/13, ECLI:EU:C:2014:2336; while the Administrative Tribunal of Pau sent the preliminary questions in *Boudjlida* – C-249/13, ECLI:EU:C:2014:2431.

<sup>15</sup> Council of State, Halifa, No. 370515, 4 June 2014, case commented in ACTIONES Database.

<sup>16</sup> C-383/13, *G. and R.*, ECLI:EU:C:2013:533; see, to that effect, *inter alia*, Case C-301/87 *France v. Commission* [1990] ECR I-307, paragraph 31; Case C-288/96 *Germany v. Commission* [2000] ECR I-8237, paragraph 101; Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware v. Council* [2009] ECR I-9147, paragraph 94; Case C-96/11 *P. Storck v. OHIM* [2012] ECR I-0000, para. 80.

*Content of the right to be heard as established by the CJEU preliminary rulings in Mukarubega<sup>17</sup> and Boudjlida<sup>18</sup>*

- The TCN must be able to express his or her point of view on the legality of his or her stay and on whether any exception(s) to the expulsion are applicable in the specific circumstances of each individual case (*Boudjlida*, para. 47).
- The TCN must be given the opportunity to express his view on any facts that could justify the authorities from refraining from adopting a particular return-related decision (*Boudjlida*, para. 55).
- The TCN must be able ‘to correct an error or submit such information relating to his or her personal circumstances as will argue in favor of the adoption or non-adoption of the decision, or in favor of its having a specific content’ (*Boudjlida*, para. 37).
- In addition, national authorities must hear the TCN at least as regards the following issues: the best interests of the child, family life and the state of health of the third-country national concerned while respecting the principle of *non-refoulement* (*Boudjlida*, para. 48).
- The competent national authorities are under an obligation to enable the person concerned to express his point of view on any detailed arrangements for his return, such as: ‘the period allowed for departure and whether return is to be voluntary or coerced. It thus follows from, in particular, Article 7 of Directive 2008/115, paragraph (1) [...] that Member States must, where necessary, under Article 7(2) of the directive, extend the length of that period appropriately, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and other family and social links’ (*Boudjlida*, para. 51).

*The right to be heard does not give the following rights to irregular migrants*

- To be warned, prior to the interview, that the administration is contemplating adopting a return decision.
- To have access to information on the basis of which the administration depends for justification for that decision.
- To be given a period of reflection, *provided that the third-country national has the opportunity to present his point of view effectively on the subject of the illegality of his stay and the reasons which might, under national law, justify that authority refraining from adopting a return decision.*

The TCN has a duty to co-operate with the competent authorities and to provide them with all relevant information, in particular all information, which might justify a return decision not being issued (*Boudjlida*, para. 50). This duty is correspondent to the TCN’s right to be heard.

The rights of the defence do not constitute unfettered prerogatives and may be restricted by the Member States, provided that the restrictions correspond to the objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (*G&R*, para. 33; *Boudjlida*, para. 43). According to the CJEU preliminary rulings in *G&R* and *Boudjlida*, ‘the non-respect of the right to be heard renders a return related decision invalid only insofar as the outcome of the procedure would have been different if the right was respected’.<sup>19</sup>

<sup>17</sup> Case C-166/13, *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis*, EU:C:2014:2336.

<sup>18</sup> Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431.

<sup>19</sup> National jurisprudence on the legal remedies against violation(s) of the right to be heard will be discussed in more detail under the section dedicated to Article 13 of the Return Directive.

### *Landmark National Jurisprudence*

The CJEU preliminary rulings, in particular from the *Boudjlida case*, have had a significant impact on the judicial approaches and jurisprudence of national courts from the Member States.

#### *1. The Duty to Hear the Irregular Migrant*

The jurisprudence of the CJEU on the right to be heard led to developments in the jurisprudence of many national courts. For instance, the **Belgian Council of Alien Law Litigation (CALL)** consistently applies the right to be heard as a general principle of EU law:

*This right to be heard does not only need to be respected by EU institutions but, because it is a general principle of EU law, it must also be respected by the administration of every Member States when they adopt decisions which fall within the scope of application of EU law, even though the applicable legislation does not explicitly provide for such an obligation (see art. 51 of the Charter and the memorandum of explanations Pb.C. 14 december 2007, afl. 303). See also HvJ 18 december 2008, C-349/07, Sopropé, ro. 38 en HvJ 22 november 2012, C-277/11, M.M., ro. 86) [...] The Court has always underlined the importance of the right to be heard and its very wide working sphere in the EU legal order. Constant jurisprudence of the Court also underlines that this right to be heard applies in every procedure which may lead to a decision which affects the interests of the concerned individual (CJEU 22 november 2012, C-277/11, M.M., para. 85 and the jurisprudence mentioned there) (case 126.219 of 25 June 2014).*

Not only did the Belgian CALL adapt its jurisprudence, but it also affected the Belgian administration. For instance, it led to substantial modifications in the Aliens Office's practice. The **Belgian Aliens Office** now sends a formal letter that invites foreign nationals to express their views before the withdrawal of their right to stay.

Another positive example is provided by the Greek Report: The **Administrative Court of first Instance of Thessaloniki** often refers to the *Mukarubeja* and *Boudjlida* judgments of CJEU in its reasoning. The Court underlined that the right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect their interests. The Thessaloniki Administrative Court ordered the public authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision. (*e.g. case 717/2015, see Greek report*).

As regards the aspects or decisions in relation to which the irregular migrant has to be heard, the **Belgian CALL** has consistently held that the irregular migrant(s) have to be heard in relation to each of the return-related decisions, which the administration adopts:

- For instance, the **CALL** quashed return related decisions because the TCN was heard only as regards the withdrawal of the right to stay but not also as regards the order to leave the territory. In case *232.758/29.10.2015*, the irregular migrant was heard only during the procedure of annulling the marriage, and not separately in relation to the expulsion measure.
- In case *132.529/30.10.2014*, the **CALL** quashed the order to leave the territory since it was not adequately motivated. The Court emphasized that the administration cannot solely refer to the applicant's negative asylum decision, and ignore the individual's request for regularization of his stay on medical grounds.
- In case *233.257/15.12.2015*, the **CALL** quashed the removal decision since the TCN was heard only as regards the order to leave the territory but was not offered the chance to express his views on the entry ban, too, which was adopted at the same time with the removal order.
- In case *230.293/24.02.2015*, the **CALL** quashed the return decision issued by the administration on the grounds that it breached the right of the applicant to be heard. The

administration issued the return decision after it found out that the TCN no longer resided together with his wife, an EU citizen. However it did not invite the applicant to express his view on the discontinuation of marital co-habitation, specifically, which constituted the main reason invoked by the administration for issuing the return decision.

Following the CJEU preliminary ruling in *Boudjlida*, the **Dutch Council of State**<sup>20</sup> held that the authorities have to hear the third-country national before taking a return decision, in particular with regard to four aspects:

1. His or her legal status in the Netherlands or another Member State.
2. Whether he or she falls under any of the exceptions to the obligation to take a return decision as enumerated in Article 6 para. 4 and 5 RD.
3. Personal circumstances in the context of Article 5 RD.
4. The modalities of return, such as whether or not a period for voluntary return is granted, how long this period should be, and whether return should be in the form of removal.

On the issue of the deadline given by the administration for the interview of the TCN:

- The **Lithuanian Supreme Administrative Court** held that the administration does not only have an obligation to hear the TCN before adopting a particular administrative decision, but, in order to ensure an effective application of the right to be heard, the deadline given to the TCN cannot be very short, as it would render the right ineffective. For instance a **deadline of 2 days** for submitting additional financial documentation relevant for the regularization of stay **was considered insufficient by the Court**. The arguments of the applicant that he had not had real opportunities to submit the requested financial documents in such a short period of time and that he had not had an objective possibility to appear in person before the Migration Department to explain his case was retained by the court as proof for qualifying the deadline handed down by the administration as being unreasonably short. (*Judgment no 858/2015*)

The **Belgian, Bulgarian, Lithuanian and Polish courts** often rely directly on the Directive and CJEU jurisprudence to conclude that Article 12 procedural safeguards apply to all administrative decisions issued during the return procedure. This approach is particularly laudable, since these national courts operate in a domestic legal framework that does not include express procedural safeguards equivalent to the rights of defence detailed by the CJEU. These national courts seem to rely on the right to be heard as either a general principle of EU law or a fundamental right and the CJEU jurisprudence,<sup>21</sup> in order to remedy violations of the right to be heard of TCNs by the administration or first-instance courts. In particular, in cases where public authorities contend that the right to be heard should not be secured in relation to all return-related decisions, since national law does not offer such procedural guarantees, or it provides them only as regards certain return-related decision (*e.g.* coercive measures).

Unlike the **Belgian** and **Lithuanian** courts which expressly held the obligation of the administration to hear irregular migrants before the adoption of all return-related decisions regardless of whether they are of a coercive nature or not, **Italian legislation and jurisprudence seems not to recognize this right before the preliminary (administrative) phase of adopting the expulsion decision by the Prefect**.<sup>22</sup> In practice foreign nationals are heard by the authorities, but failing a specific legal provision, this interview is very limited, in most cases without an interpreter, so that the

<sup>20</sup> Council of State 20 November 2015, 201407197/1/V3.

<sup>21</sup> Polish courts also refer to a broadly-defined general principle enshrined in the Code of Administrative Procedure, which does not explicitly refer to the right to present arguments orally, but national courts have interpreted this in conformity with the EU based right to be heard.

<sup>22</sup> See Italian Report, p. 6.

foreigner does not necessarily correctly understand the situation. This practice is the result of the limited voluntary departure measure conferred by the Italian authorities, which in most cases of irregular stay for TCNs, finds a risk of absconding, without hearing the TCN's words.<sup>23</sup>

Some national courts are more reticent to refer to the general principle of the EU law of the right to be heard and prefer to rely on the national constitutional principle that guarantees the right to be heard.<sup>24</sup> For instance, the **German** Federal Administrative Court invoked the CJEU preliminary ruling in *Boudjlida* to justify its conclusion that the right to good administration enshrined in Article 41 Charter of Fundamental Rights is addressed to the institutions and bodies of the EU only, and cannot be invoked, therefore, against the activities of domestic authorities.<sup>25</sup> Similarly, the **French Council of State** ruled that Article 41 of the Charter does not apply to administrative decisions taken by national administrations, even if they act in the context of EU law (relying on Case C-166/13 *G. and R.*). But the Council of State recalls that the right to be heard is also a general principle of EU law. Therefore, the national court concluded that there is no practical difference between the invocation of Article 41 CFR or the right to be heard as a general principle of EU law.<sup>26</sup> On the other hand, German courts rely mostly on the general principle of domestic administrative law of *audi alteram partem*.

## 2. The Content of the Hearing/Elements to take into account (Family, Health, other Social Circumstances, etc.)

Following the CJEU jurisprudence on the right of irregular migrants to be heard during the implementation of the Return Directive, it seems that national courts are scrutinizing whether public authorities have considered the personal and family situation of the individual, the best interests of children, family life and the state of health of the third-country national before adopting return related decisions.

Interesting case law was reported particularly from **Austria, Belgium, Bulgaria and Lithuania, and Slovenia** where national courts found that the public authorities have not adequately heard the TCN(s) on these individual circumstances. More cases related to the right to be heard are discussed under the *Public Authorities' Obligation to State the Reasons in Fact and in Law*. This choice was determined by the fact that national courts commonly retained a violation of the administrative authority's obligation to state reasons of fact when the administrative hearing did not include or did not include sufficient questions regarding the private/family life and health/social circumstances of the irregular migrant. There seems to be a strong connection between the right to be heard and the administration's obligation to state reasons in facts. Since the purpose of the right to be heard is to ensure that the competent authorities adopt decisions in full knowledge of the facts and that they are able to provide adequate reasons for the decision, the national courts' choice of retaining a violation of both the right to be heard and the obligation to state reasons of fact or only of the latter seems logically justified and also supported by the CJEU jurisprudence (*Boudjlida*, para. 59).

### Circumstances to be taken into account by public authorities during the interview/hearing of the TCN:

- **The Supreme Adm. Court of Lithuania** established a positive obligation for the public authorities to hear the TCN on aspects related to his family life; children (including both biological children and children of the partner); and criminal record (causes, and conduct following up criminal conviction). The Supreme Administrative Court of Lithuania quashed in several cases the administration's return-related decisions for failure to evaluate all relevant

<sup>23</sup> The Italian limited conferral of voluntary departure is the result of Italian legislation which first made the voluntary departure subject to individual application and secondly, broadly defined the 'risk of absconding'.

<sup>24</sup> See the German Report.

<sup>25</sup> See Federal Administrative Court, Decision of 27 October 2015, 1 C 33.14.

<sup>26</sup> France, Council of State, No. 381171, 9 November 2015; see also France, Council of State, Halifa, No. 370515, 4 June 2014.

factual circumstances (including personal ones, related to the protection of private and family life, as well as the protection of the rights of minors). (*Z.K. v. Kaunas County Police Headquarters*, case No. A-2681/2012, decision of 3 September 2013; *M.S. v. Migration Department under the Ministry of Interior*, case No. A-69/2013, decision of 20 June 2013; *L.T.H. v. State Border Guard Service*, in case No. A858-2332/2011, decision of 17 October 2011).

- The **Administrative Court of the Republic of Slovenia** delivered a similar decision as regards the positive obligations of administrative authorities in the case of ‘Zidi.’<sup>27</sup> This case concerned the rejection of the application for extension of the period for voluntary departure by the administrative authority. The Administrative Court relied extensively on the standards of the right to be heard set out by the judgment of the CJEU in the case of *Boudjlida*, and quashed the administrative decision, sending the case back to the administrative authority.
- The **Bulgarian Supreme Administrative Court** held that the public authorities should hear the TCN as regards: the fact that the entire adult life of the TCN was spent in Bulgaria; his ties with his country of origin; the conduct of the TCN during his stay in Bulgaria; and the connections and relationships he had established in this time in Bulgaria. The Bulgaria Supreme Administrative Court concluded that the administrative authorities had failed to provide any reasoning for the duration of the imposed coercive measure ‘ban of entry into the country’. They thus quashed both the return decision and the entry ban (in *Michael Evgenevich Gladkih v. the Director of Regional Directorate of Border Police – Smolyan*).

On the issue of what should be the adequate content of the return-related decision:

- The **Supreme Administrative Court of Lithuania** stated that return-related decisions must contain main facts, arguments and evidence, as well as the legal basis on which the administrative authority has based its administrative act; presentation of the motives shall be adequate, clear and sufficient. It connected this norm to the principle of legal certainty. In this case, the Court considered that the respondent failed to establish and evaluate all circumstances relevant for the adoption of the decision related to his right to reside in the EU, as the decision did not contain any supporting arguments and motives. (case No A<sup>492</sup>-2624/2014, decision of 5 November 2014)

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<sup>27</sup> Case of I U 136/2016-6 (Zidi) from 5 February 2016.

### 3. The Right to Have Access to the Files<sup>28</sup>

The CJEU noted the right of the individual to have access to administrative files as part of the general principle of EU law of the rights of defence. Article 12(1)(2) of the Return Directive provides specific circumstances when Member States can establish limitations to the administration's obligation to provide information on reasons. In particular, for the purpose of safeguarding national security, defence, public security and for the prevention, investigation, detection and the prosecution of criminal offences.

The **Regional Administrative Court (RAC) in Warsaw** (*No File IV SA/Wa 1074/14*) had to assess whether the non-disclosure of information, and the prohibition of the right of access to the files of the irregular migrant subject to a return decision and entry ban was in conformity with the national legislation and the Return Directive. *In casu*, the person concerned was not informed of the essence of the grounds on which a return decision was taken. The classified documents that constituted the basis of the decision were also not disclosed to the person concerned. However, the court accepted this evidence, even if it had not been disclosed to the individual. In this case, neither the alien nor the lawyer could have had access to relevant documents that were considered to be under protected as State secrets. The RAC relied in its judgement on the Judgement of the **Polish Supreme Administrative Court** (*File No II OSK 2293/10*), in which the relevant documents were not presented either to the party or to his lawyer because of the need to keep them confidential. The RAC took the restrictive view that the confidentiality of the documents, though it limits the principles of fair trial and equality of arms between the parties in the proceedings, is nevertheless legally founded. First of all, due to the fact that the right to a fair trial is not an absolute right and the principle of *non-refoulement* will not be violated if the TCN is returned. The Court emphasised that, *in casu*, the removal of the appellant did not entail a violation risk of the 'basic human rights of the alien', in case of a return to the country of origin. In support of his reasoning, the RAC invoked the joined cases of the CJEU (*C-402/05P and C-415/05P Judgment of the Court (Grand Chamber) of Yassin Abdullah Kadi and Al Barakaat International Foundation*, ECLI:EU:C:2008:461). Finally, the RAC concluded that this restriction is in line with Articles 12 and 13 of the Return Directive.

### 4. Legal Assistance during the Administrative Phase of the Return Procedure

#### *EU Legal Provisions and Jurisprudence*

The Return Directive confers on irregular migrants a right to be represented by a lawyer when being heard. But this is only after the adoption of a return decision and solely when an appeal has been brought, in order to challenge such a decision, before a competent judicial or administrative authority, in the conditions laid down by Article 13 RD.

Nevertheless, the CJEU found that a TCN may always have recourse, at his or her own expense, to the services of a legal advisor even before the adoption of a return-related decision, in the context of the administrative phase of the return procedure (*Boudjlida*, para. 65). The Court subjected the right to have recourse to a legal advisor at the TCN's own expense with the requirement that 'the exercise of this right must not affect the due progress of the return procedure nor undermine the effective implementation of the Directive' (*Boudjlida*, para. 65).

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<sup>28</sup> More national landmark cases are discussed below under the section – *Limitation of the Information Provided Based on National Security Exception (Article 12(1)(2))*. Here only one case touching precisely on the issue of the fundamental right of access to administrative files is discussed.

### *Landmark National Jurisprudence*

The presence of a legal advisor accompanying the TCN during the administrative phase can be extremely useful, especially when domestic legislation permits the simultaneous adoption of return related decisions: *e.g.* decisions concerning residence status, expulsion, and entry ban. The French preliminary references submitted in the *Mukarubega* and *Boudjlida* cases, showed, *inter alia*, the consequences of TCNs not fully understanding the return procedure and their rights during the administrative phase. According to French law, simultaneous decisions on the legality of residence and expulsion can be adopted. Therefore, the renunciation to the right to have a period of reflection could lead to a return or removal decision of the TCN, as happened, in fact, in the *Boudjlida* case. The presence of a legal advisor could prevent misunderstandings by the TCNs of the return procedure and of the legal consequences of their actions. However, according to the CJEU, TCNs do not have a right to legal aid before the adoption of the return decision. They only have a right to hire, at their own expenses, a legal advisor who could join them during the administrative phase of the return procedure.

The right of TCNs to be adequately informed of the steps and phases of the return process and the rights they enjoy during this phase is protected not only within the EU legal order. In *Conka v. Belgium*, the ECtHR established the principle of honest communication by the administration.<sup>29</sup> The ECtHR jurisprudentially developed principle of honest administrative communication seems to have a similar substantive scope of application as the EU right to good administration, with the difference that the application of the ECtHR principle is not limited to EU institutions or bodies, but it applies to national public authorities as well. In cases where the TCN does not afford to hire a legal advisor during the administrative phase of the return procedure, the *ECHR principle of honest communication* seems to ensure that TCNs are protected against false or disingenuous information from the administration. These could lead to the expulsion of the TCN without the TCN having had access to relevant facts that could have led to the regularization of his/her stay or application of certain exceptions from return or removal.

Therefore, legal assistance during the administrative phase could ensure that the return procedure is carried out in accordance with the EU and ECHR pre-requisites, avoiding flawed administrative decisions and thus, also, the prolongation of the return procedure.

## **5. Public Authorities' Obligation to State the Reasons in Fact and in Law**

### *EU Legal Provisions and Jurisprudence*

According to Article 12(1)(1) RD, the Member States are required to give reasons in fact and in law for all decisions issued during the return procedure. The CJEU clarified that the obligation to state reasons required the public authorities to provide sufficiently specific and concrete information to allow the person concerned to understand why his application is being rejected. Similarly to the right to be heard and access to files, the obligation to state reasons in fact and in law is also a corollary of the principle of respect for the rights of the defence (see preliminary ruling of the CJEU in *M.*, EU:C:2012:744, para. 88).

There seems to be a strong connection between the right to be heard and the administration's obligation of motivation in law and in fact. The CJEU held that among the positive obligations stemming from the right to be heard is also the administration's obligation to give 'a detailed

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<sup>29</sup> 'In the Court's view, [any exception to the right to liberty] must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5'.

statement of reasons for their decision’ (see the judgments in *Technische Universität München*, C-269/90, EU:C:1991:438, para. 14, and *Sopropé*, EU:C:2008:746, para. 50).

### *Landmark National Jurisprudence*

The **Supreme Administrative Court of Lithuania** referred to the principle of good administration embodied in Art. 41 (1) of the EU Charter as covering the right of every person: to be heard before applying any individual unfavourable measure against him; to familiarise themselves with the case respecting the lawful confidentiality and professional, as well as business secrets; and the duty of the administration to justify their decisions. According to the Court, these provisions of the Charter should be taken into account as an additional source of legal interpretation when interpreting Art. 8 of the Law on Public Administration.

REDIAL gathered jurisprudence dealt with the following aspects of the motivation of return-related decisions:

1. lack of motivation in fact – no referral to concrete facts;
2. insufficient factual investigation;
3. inadequate/disproportional balance between the public interests of the State and the TCN FRs.

#### *1. Lack of Factual Circumstances*

Return-related decisions which lack factual circumstances are generally considered by national courts as invalid/unlawful on grounds of violation of the positive obligation to provide reasons in fact incumbent upon public authorities. As a legal source of the administration’s obligation to provide motivation in fact, national courts commonly refer to the national legislation transposing the Return Directive together with general domestic principles of administrative law or civil procedural law: this has been the case in, for example, **Germany, Italy, Poland and Romania**. Authorities also refer to the Directive itself, and the EU general principle of good administration or the right to be heard: *e.g. Belgium, Bulgaria, Greece, Lithuania and Slovenia*.<sup>30</sup>

*The issue of the appropriate legal basis for taking the TCN’s family life into consideration when issuing return-related decisions:*

- The **Supreme Administrative Court of Lithuania** held that, even if the national legislation does not expressly require the administration and national courts to take the TCN’s family life into consideration when issuing return-related decisions, *the duty of the consistent interpretation of national law with EU law does impose such an obligation*. Furthermore, the obligation to assess family-related facts exist regardless of the type of return-related decisions, namely whether they are voluntary departure measures or removal orders. (*L.T.H. v. State Border Guard Service*).

The same Court referred to recital 6 of the preamble of the Return Decision, as well as Articles 5 and 14 of Directive 2008/115. These provide that Member States must take due account of both the best interests of the child and of family-life, as well as establishing the obligation to adopt each decision on a case-by-case basis employing objective criteria, which go beyond the mere fact of illegal stay. After pointing out that the applicant lawfully resided in Lithuania for several years, that his wife was granted temporary permission to remain in Lithuania until 2017 and that both she and their daughter were granted subsidiary protection in Lithuania, the Court ruled that, by issuing a removal order, the administration had failed to properly evaluate all

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<sup>30</sup> Recently, the Administrative Court adopted a ruling on 6 April 2016 (I U 362/2016-7, Welson), where it quashed the administrative decision due to lack of factual circumstances in the contested decision.

relevant circumstances related to the protection of family life. The court, therefore, quashed the contested administrative decision. (*Z.K. v. Kaunas County Police Headquarters*).

## 2. *Insufficient Evidentiary Support (Factual Investigation) or Legal Reasoning*

Mere referral to illegal stay is generally considered by national courts to be insufficient evidence in support of removal orders taken by the administration. National courts commonly require the administrative authorities to provide additional relevant facts as supportive evidence justifying the implementation of return-related decisions by use of force.

*The Bulgarian cases* – *Nalbandian* (case No.13704/2010), *Gladkih* (case No.11574/2011), *Ibrahim* (case No.7103/2011) and *Daminov* (case No.5004/2012) show that administrative authorities are required to carry out a more careful examination of the relevant facts especially where there are family ties, health problems, and proof of social integration and especially when the administration plans to adopt removal orders.

### On the issue of family considerations and sufficient motivation for return-related decisions:

In *Ibrahim*, the same Court found that the authorities had presented the relevant facts in the grounds of its decision, thus formally complying with the legal requirements of Article 12(1) Return Directive. But the court went on to note that these were not adequately discussed, nor were any factual or legal conclusions presented on the basis of these facts. The authorities had simply limited themselves to mentioning them.

The facts of:

- marrying a Bulgarian citizen;
- having two children;
- the applicant's voluntary presentation to the competent authorities on the day of his marriage (i.e. the eve of New Year celebrations);
- the full cooperation of the third-country national, who did not create any obstacles to resolving the issue of his stay in the country.

These facts were all irrelevant for the administrative authorities when making their decision. In spite of all evident family ties and social integration in Bulgaria and the TCN's proven collaboration with the authorities, the latter adopted a removal order and entry ban against the appellant. The authorities had provided no reasoning for the duration of the imposed measure. It was thus unclear for the Bulgarian Supreme Administrative Court what justified the imposition of the maximum length of the five-years entry ban. The removal order and entry ban were, thus, held to be unlawful.

In *Nalbandian*, an Armenian citizen married to an Armenian woman who later became a Bulgarian citizen and with whom the appellant had two children, was given a removal order and a ten-year entry ban following a negative decision on his asylum application. This was, in spite of the fact that his wife was Bulgarian and unable to work: and Mr. Nalbandian was issued a removal order on the basis of the applicant's lack of the necessary means of subsistence and compulsory insurance required for his period of stay in the country. The **Bulgarian Supreme Administrative Court** found that the administration did not bring sufficient evidence to support the proportionality of a ten-year entry ban, and also lacked an adequate observation of 'the applicant's fundamental rights'. This led the Court to hold the removal order and attached entry ban as being 'unlawful'.

In *M.S. v. Migration Department under the Ministry of Interior*, the **Supreme Administrative Court of Lithuania** had to assess whether the evidence gathered by the administration regarding the family life of an irregular migrant was sufficient to support a removal order and entry ban. The Supreme Administrative Court pointed out that the administration did not carry out an assessment of all the circumstances relating to the social and economic connections of the applicant with Lithuania.

The Court pointed out that there was no evidence in the case file regarding the termination of the marriage between the applicant and his spouse, having Lithuanian nationality, or evidence that the marriage in question was fictitious. Additionally, the fact that the three children were not his biological ones or that he had not legally adopted them was not sufficient to reject the existence of family ties. The Court noted that the administration had an obligation, stemming from the principle of good administration, to substantiate its removal decision and to evaluate all the relevant facts. Since the respondent had failed to do this, the Court annulled the part of the contested decision related to the removal of the applicant, as well as the part related to the entry ban.

The **Supreme Court of Lithuania** quashed the first instance judgment and the decision returning an Australian based on the lack of sufficient evidence that his Austrian residence permit had expired (*R.A.K. v. Vilnius County Police Headquarters and the State of Lithuania*). According to the Court, the right to be heard would require the administration to obtain concrete information on the expiration of the applicant's Austrian resident permit, and not mere general information on the conditions on the basis of which residence permits issued by Austria are held to expire.

According to the **Dutch Council of State**, if the third-country national has brought forward individual circumstances according to which an entry ban should not be issued, or its duration should be shortened, the authorities are obliged to respond to these arguments. At the very least, the authorities need to give reasons in fact and law why the arguments of the third-country national do not result in them refraining from issuing an entry ban, or the shortening of its duration.<sup>31</sup>

The **justice of peace of Torino** (n. 12579.2013) annulled a return decision on the basis of the TCN's right to family life. Interestingly, the judge argued that the TCN's right to recognition of his biological child would be harmed by the execution of the expulsion order. Secondly, the unborn child's right to that recognition (protected by the UN Convention on the Rights of the Child) would be violated. Thirdly, the judge quashed the contested decision for vagueness of motivation (excessively brief in fact and law) since the specificities of the case must be assessed in detail, especially when humanitarian reasons might be applicable.

As far as the prohibition of *refoulement* is concerned, the requirements are more stringent. The **Italian Supreme Court**<sup>32</sup> established the scope of the judge's obligation of assessment, in accordance with Article 19 of the Consolidated Text. As pointed out 'according to the consolidated line of decisions of legitimacy, the trial court, with regard to international protection, is required to conduct an extensive and rigorous factual investigation, based on the critical examination of the evidence offered by the party as well as on exercise of investigation powers/duties *ex officio* (*Cass. SU 17318 of 2008*), such an assessment concerning legal claims pertaining to field of human rights' (*Cass. SU 19393 of 2009*); 'the prohibition of expulsion or return envisaged by legislative decree no. 286 of 1998, Art. 19, para. 1, falls undoubtedly within the area of international protection (*Cass. 10636 of 2010*), and as a consequence the Justice of the Peace has an obligation to examine the real danger, claimed by the appellant, of being subjected to persecution or to inhuman or degrading treatment if returned to their country of origin, as such provision sets a humanitarian measure of negative character, which gives the recipient the right not to be sent into a context of high personal risk, if this condition is positively assessed by the court' (*Cass. 3898 of 2011*).

In light of the above, the **Italian Supreme Court** noted that the contested measure lacked a concrete assessment of the evidence offered by the appellant, and that omission cannot be remedied with a mere reference, without any indication of the reasons for the decision,. The Court held that it was unclear whether the rejection was due to the nature of the factual circumstances, as they had already been the subject of the order issued by the Commission, or of the lack of evidentiary support. In the latter case, where the facts can support the prohibition of expulsion pursuant to Article 19, and,

<sup>31</sup> See for example Council of State 17 October 2012, ECLI:NL:RVS:2012:BY0824.

<sup>32</sup> See decision no. 4230 of 2013.

consequently, integrate at least the conditions for issuing a permit for humanitarian reasons, **the Justice of the Peace has a duty to exercise his/her power of cooperation and investigation.**

In case 116.000/2013-12-19, the **Belgian CALL** held that the motivation of the order to leave the territory refers only to the denial of the request for family reunification. It does not explain why such a decision should imply that the applicant's stay in Belgium becomes irregular. Therefore, it annulled the order to leave the territory for insufficient motivation in fact.

In certain cases, national courts quashed return-related decisions as incomprehensible. For instance, the **Czech Supreme Administrative Court** quashed the decision of the first instance court, agreeing with the applicant that the removal decision was incomprehensible. The SAC held, *inter alia*, that the removal decision must specify in its justification exactly what behaviour on the part of the third-country national formed the grounds for removal. This must include all necessary details of that behaviour, in order to check whether the invoked conduct falls or not under the specific provisions set out in the national legislation on the stay of third-country nationals on the territory of the Czech Republic. The SAC quashed the removal decision as not being properly justified (*Case No. 7 As 98/2010 – 67*).

When assessing whether the administration adequately fulfilled its obligation to state reasons, national courts require identification of concrete and detailed reasons and arguments. A quite high level of details of the motivation in fact is requested from the administration in cases where return decisions are issued following *refusal to prolong residence due to the TCN's failure to invest or to develop local business* (LT, RO).

For instance, the **Romanian Court of Appeal of Bucharest** was requested to decide on the legality of a return decision issued against a Chinese citizen following refusal of the prolongation of his residence permit due to a failure to invest 50,000 Euros in a transfer of technology. The Court quashed the return decision on grounds that the administration violated 'its essential duty of exercising an active role for the effective implementation of laws'. In particular, it did not consider the overall economic situation evoked by the alien, and did not request the submission of accounting documents. It also did not provide 'answers in a predictable way and duly reasoned in order to provide both the third-country national and the Court with the effective possibility to review the reasons that led to the refusal of the extension of residence'. The Court observed that the administrative authority's formal analysis of the documentation submitted by the applicant was in breach of the principle of proportionality under Article 6 of the ECHR and Article 53(2) of the Constitution, as the applicant was put in the position of losing both his assets acquired in Romania and his family life, as he claimed to be living with his wife and child (*Judgment no 1607/08.06.2015*).

In regard to the issue of whether criminal convictions can constitute of themselves sufficient factual evidence to support a removal order, the **Austrian High Administrative Court** has departed from regional administrative courts and established clear guidelines on the evaluation of the criminal record and conduct of the TCN by the administration. The mere listing of convictions, with no concrete discussion of the crime and the circumstances of these crimes, were considered insufficient to uphold a risk of absconding. In addition, the Court required that the motivation, in fact, also include the opinion of the probation officer and of the therapist. The Court emphasised that evidence needs to be assessed and conclusions presented. Mere reproduction of the statements of friend(s) participating as witnesses during the oral hearing is not sufficient (Case No. 2014/21/0049, judgment of 24 March 2015).

### *3. Striking the Right Balance between the State's Interest in Ensuring National Security and its Right to Expel, and the Irregular Migrant's Fundamental Rights (in particular the right to family life and the right to health)*

Several national courts held that illegal stay in itself no longer justifies the establishment of a national security interest sufficient to justify limitations on the TCNs' fundamental rights, in particular the right to family and private life.

The **Italian Supreme Court** held that the Directive requires public authorities to find a ‘proper balance between the Member State’s right to the preservation of a system of security and control of migration and the core of human rights related to the application of the principle of *non-refoulement* and the right to health and family life of the TCN throughout the entire return procedure’. The Court had to assess whether the administration had struck an appropriate balance between the TCN’s right to private and family life (Art. 8 ECHR) with the public interest in expulsion. The appellants were mother and daughter, the latter born and raised in Italy and, then, an adult, and the mother having moved from Kosovo to Italy in 1991 with her husband (since deceased) without ever leaving the country, and staying regularly in the initial period. The Supreme Court held that a correct balance between the right of the State and the applicants’ right to respect for private and family life was not established. (*Judgment 15362/2015*) It follows from this ruling that after the entry into force of the Return Directive, the return decision cannot be taken under the simple consideration of illegal residence. It needs, rather, to be taken on a case-by-case basis, for which the administration must give due consideration to fundamental rights such as the right to a private and family life, but also to the interests of the child and the health of the foreigner.

Both the **Italian Supreme and Constitutional Court** held that, pursuant to Art. 13, para. 2 bis, when adopting an expulsion order in case of irregular entry and stay, against the foreigner who has exercised his/her right to family reunification, under Article 29 Consolidated Text, the nature and the effectiveness of family ties of the concerned person, the duration of his/her stay in the country and the existence of family, cultural and social ties with their country of origin must be taken into account. These issues are also relevant should the concerned person have family ties in Italy (see Constitutional Court, decision no. 202/2013). Therefore, these considerations must be integrated in the written reasons, in fact and in law, of the expulsion order.

In Order no. 1217/2015,<sup>33</sup> the **Italian Supreme Court** quashed the judgment of the first instance court concerning the removal of an Albanian citizen. The first instance decision issued by the justice of the peace had considered the administrative expulsion lawful, based decisively on criminal records. The Supreme Court (with a reasoning less focused on supranational instruments of interpretation) quashed the decision, since the appellant’s current family situation had not been considered sufficiently. According to the Court, the justice of the peace had not taken any account of the family situation of the applicant, which was regarded only in theory but not in practice. Therefore, the exploitation of the criminal record of the appellant as an impediment to his stay, despite the relevance of family, cultural and social ties pursuant to Article 13, para. 2, was deemed incorrect in law.

In two similar cases affecting family unity the Judge emphasized that, given the irreproachable conduct of the appellants during their stay in the country, and their positive inclusion in the socio-economic context of the country, expulsion cannot be considered as a necessary act, falling between those for whom the administration has a good margin of discretion. As a consequence it was necessarily a well-articulated motivation and not generic as it had been in the cases in question.

The **Tribunal of Torino** (*judgment n. 15171.2012*) annulled a return decision issued against a Chinese national as the family life of the applicant had to prevail against public policy, in the absence of actual social dangerousness. In thwarting the balance in favour of the family life, the Court took note of the fact that the TCN had three children (all minors) born in Italy, which he recognised after he was issued with the Return Decision.

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<sup>33</sup> See Supreme Court, Order no. 1217 of 22 January 2015.

## 6. Limitation of the Information Provided on the basis of the National Security Exception (Article 12(1)(2))

### *EU Legal Provisions*

The obligation to give factual reasons can be limited by national law, ‘in particular in order to safeguard national security, defense, public security and for the prevention, investigation, detection and prosecution of criminal offences’ (Article 12(1)(2)).

### *Landmark National Jurisprudence*

The **Lithuanian Supreme Administrative Court** (case No. A662-1575/2013, judgment of 21 January 2013) noted that a decision need not be based only on the information which constitutes a state or official secret, i.e. classified information. In the view of the principle of fair hearing of the case established in Article 6 of the ECHR, the court stated that:

*such cases where data held to be state secret and which have not been declassified are the only evidence that is used to substantiate the case, and are not made accessible to one of the parties of the case in the judicial process, create preconditions for violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms, first of all, from the point of view of the right to fair hearing of the case (Article 6 of the Convention). [...] correct balance should be ensured between private interests of an individual and the public interest in accordance with the criteria established by the Constitutional Court, the CJEU and the judicial institutions of the European Union.*

The Court concluded that it is not possible to base the limitation to give factual reasons only on the secrecy of the evidentiary materials.

## 7. Translation

### *EU Legal Provisions*

Member States must translate the main elements of the decision upon request, including information on the available legal remedies, in a language which the person concerns understands or can be presumed to understand (Article 12(2) RD).

### *Landmark National Jurisprudence*

Certain Member States have not adequately transposed the provisions of Article 12(2) RD. For instance, even if **Czech law** enshrines a fundamental right to an interpreter,<sup>34</sup> the Czech Report mentions that national courts came to the conclusion that such a right does not cover the entire proceeding, but only those parts where the administrative authorities orally communicate with the foreigner, which means that the foreigner does not have the subjective right to translation of official documents (including the decisions on the merits). The **Regional Court in Brno** (case No. 32 A 61/2015), held that aliens do not have a right to receive translated decisions from the administration. The principle of good administration requires only that aliens are permitted to hire, at their own costs, an interpreter who would translate the decision. The reasoning of the Czech Court was based on the case law of the Constitutional Court, according to which aliens who are subject to administrative or judicial proceedings do not have the right to receive translated decisions, when they do not understand it, since the constitutional right to an interpreter does not go so far as conferring on aliens a right to

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<sup>34</sup> Article 37(4) of the Charter of Fundamental Rights and Freedoms and further in Article 16(3) of the Administrative Procedure Act.

receive translated decisions of administrative authorities. The Court did not refer to Article 12 of the Return Directive. However, Opinion No. 46 of the Advisory Group of the Ministry of the Interior for the Administrative Code stipulated that when the proceedings is initiated *ex officio* (e.g. in case of expulsion) the applicant must be, according to Article 37(4) of the Czech Charter of Fundamental Rights, assigned an interpreter for free who will translate the decision on its merits to the applicant. This Opinion was upheld by the Supreme Administrative Court in Judgment No. 6 A 17/2000 of 27 January 2004; and, more recently, in Judgment No. 2 As 99/2012.

The legislation of other Member States seems to be more favorable than the minimal rules laid down by the Return Directive. Lithuanian legislation requires that return related decisions need to be translated in full and not only the main elements as required by the Directive. But in practice this is not always observed.<sup>35</sup> While in Portugal, the translation of public documentation usually involves two translators: from the language of the TCN into English and from English into Portuguese.

According to Belgian courts, it seems that the standard of review they apply depends on whether the concerned foreigner had a sufficient understanding of the administrative decision in order to appeal it before the judge. According to the criminal section of the Court of Appeal ('Chambre des mises en accusation'): 'Neither the Language Law, the Aliens Law, nor the ECHR provide that the administration must adopt the contested decision, which was written in Dutch and in French, in the language of the alien's choosing (in this case English)'.

The Dutch Council of State interpreted the right to a translator as part of the fundamental right to be heard. This case concerned a third-country national from Guinea, who had argued that the right to be heard in his case was not respected as the hearing had taken place in French (with the help of a translator), a language that he was allegedly not sufficiently proficient in. The Council of State looks at the official report of the hearing, noted that the third-country national has made specific declarations, and not mentioned anything about problems with language, and concludes that there are no indications that his command of French was insufficient for answering the questions posed. Thus the right to be heard was ultimately held to have been respected.<sup>36</sup>

## 8. Exception: Use of Standard Form/Templates

### *EU Legal Provisions*

As an exception, Member States can, instead, supply information regarding return-related decisions by using a standard form, rather than translating the decision, where persons have entered irregularly and have not subsequently obtained authorization to stay. (Article 12(3))

### *Landmark National Jurisprudence*

Member States generally permit the use of standard form for the translation of return-related decisions. Certain national legislation provides higher standards of protection of the right of the TCN to be informed in a language that he/she understands than the Return Directive. For instance, Article 311 of the **Polish Act on Foreigners** permits the use of standard forms, in case a foreigner has crossed or attempted to cross the border in breach of legal regulations (illegal entry of the territory). In such a situation a return decision can be issued by using a template. However, under Polish law using a template for a decision does not discharge the administration from the obligation to inform a foreigner in writing in a language he/she understands about the legal basis, about the contents of the decision

<sup>35</sup> Study on Return and Removal of Third-Country Nationals, National report, Vilnius, 2015, available on: [http://www.redcross.lt/files/Return\\_study\\_final\\_2015\(2\).pdf](http://www.redcross.lt/files/Return_study_final_2015(2).pdf), p. 91.

<sup>36</sup> Council of State, 23 July 2015, ECLI:NL:RVS:2015:2436.

*and whether and how an appeal against the return decision may be filed (Article 311(2) Act on Foreigners).* Polish legislation seems thus to ensure that misunderstandings of the content of the return decision issued by means of a standard form do not occur, by requiring individual information. This might have happened due to the facts that the ‘general information’ required under Article 12(3), the last sentence of the Directive is replaced by the obligation of individual information required under Article 311(2) of the Polish Act on Foreigners.<sup>37</sup>

In **Bulgaria** no translated standard templates have been introduced. Instead, orders for return/removal/entry ban/detention are to be notified to their addressee with the help of an interpreter. In the *Arevik Shmavonyan* case (No.13731/2011), the third-country national had signed the order in question under a blank statement in Bulgarian certifying that the order was served to her ‘in a language that I speak’. The order did not specify the language Mrs. Shmavonyan spoke. The **Bulgarian Supreme Administrative Court** found that such a statement does not constitute necessary and sufficient proof that the notification to the addressee was made in a language she knew.

In **Italy**, a landmark jurisprudential change occurred in 2012 as regards the legitimacy of using standard forms only in French, English and Spanish in order to communicate to TCN(s) the return-related decisions issued by the administration. Until 2012, the Italian Supreme Court consistently held that the administration’s statement of the impossibility of finding a translator in the language of the TCN was sufficient for admitting a translation in only one of the above-mentioned three languages. In its *decision no. 3676/12*, the **Italian Corte di Cassazione** adapted its doctrine to the Return Directive requirements and required the administration to issue standard forms that could allow the filling in of additional individualized information, in more official languages than EN, FR and ES.

The Italian public authorities are currently required to issue information sheets in more official languages than the EN, FR and ES, and to include individualized information in the standard form. However, in the event that the reasons for expulsion are not standard, the Court still considers the mere statement of the administration not finding a translator speaking a language understood by the TCN to be a legitimate exception. In this case, a translation of the reasons is needed. Nevertheless the use of one of the three official languages (FR, EN, or ES) is still considered sufficient to fulfil the requirement of informing the TCN of the return-related decision issued in their name.

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<sup>37</sup> According to the REDIAL Polish Report.

### III. Article 13 RD – Legal Remedies

Article 13 RD is a key provision of the Directive as it enshrines the right of irregular migrants to have an effective remedy against all types of decisions adopted during the return procedure.<sup>38</sup> The common standards and guarantees set out in the Return Directive with regard to the review of return decisions, removal orders, entry bans etc. must be interpreted in conformity with fundamental rights as general principles of EU law, as well as international law, including refugee protection and human rights obligations.<sup>39</sup>

#### 1. Paragraph 1 – Appeal or Review before an Impartial and Independent Authority

##### *EU Legal Provisions*

As a corollary of the effectiveness of legal remedies guaranteed by the Directive, third-country nationals shall be afforded the possibility to review decisions related to return before a competent judicial or administrative authority or ‘another competent body composed of members who are impartial and who enjoy safeguards of independence’. Article 13(1) RD, directly inspired by the CoE Guidelines on forced return,<sup>40</sup> thus admits reviews and appeals before any sort of authority (administrative or judicial), provided that it is composed of impartial members, who enjoy safeguards of independence. Article 47(2) CFR, by contrast, provides for a right to ‘effective legal remedy’ before an ‘independent and impartial’ tribunal<sup>41</sup> previously established by law, which seems to exclude independent administrative authorities.

##### *Landmark National Jurisprudence*

The very issue of ‘impartiality’ has notably been raised by the Austrian (AT) and Portuguese (PT) courts; while the former referred to the type of competent authority in charge of reviewing decisions related to return, the latter emphasised the need for similar safeguards and guarantees when *issuing* the initial decision under exceptional circumstances:

- **(AT) High Administrative Court, 2011/22/097, 31 May 2011:** ‘impartiality’ is closely connected to the body’s composition, in which the members ‘enjoy all safeguards of independence’. In the Court’s view, members of the Directorate of National Security, the body of second instance competent at the time, did not fulfil this requirement. On the contrary, the only appeal guaranteeing the applicant an *effective* remedy in the meaning of Article 47 CFR was the one brought before the Independent Administrative Tribunals (now called the Federal Administrative Courts). Although return decisions could be challenged later on before the HAC, the Court recalled that its jurisdiction was similar to a Court of Cassation, performing a judicial review without a full cognition of facts and law, and that this sole remedy was insufficient in the meaning of Article 13 RD.
- **(PT) Supreme Administrative Court, 0489/14, 30 July 2014:** the nature of the body matters not only for reviewing proceedings but also for issuing the initial decision ordering return or removal. According to the SAC, although the administrative authority has a general

<sup>38</sup> As for detention orders and possible extensions, procedural safeguards and judicial guarantees seem to be specifically governed by Article 15 RD, though both provisions can be perfectly read and applied in conjunction.

<sup>39</sup> Article 1 RD.

<sup>40</sup> CoE, Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, 2005, 5.1.

<sup>41</sup> Emphasis added.

competence for issuing an expulsion decision, the fact that the complainant had a minor child in Portugal exceptionally required, in line with the Directive and the Portuguese Constitution, a decision taken by a court.

By comparison, in the Czech Republic (CZ), Poland (PL) or Italy (IT), the key issue debated by courts is rather the availability of remedies and irregular migrants' right to 'judicial' review:

- **(CZ) Constitutional Court, Pl. ÚS 26/07, 9 December 2008:** the Court annulled the provision of the Aliens Act that generally precluded the judicial review of removal decisions issued against *irregularly staying* TCNs. Although the Court acknowledged the wide autonomy given to Member States (MS) in this matter, depriving irregular migrants of their right to a remedy would not only breach their fundamental rights (ECHR), but also clearly contradict Article 47 CFR as well as the Czech Constitution. In addition, the Court considered that all foreigners should receive the same judicial protection against expulsion, irrespective of the nature of their stay on the MS territory. Given the significant impact of removal decisions on individuals, only courts would be able to guarantee this kind of effective and independent review.<sup>42</sup>

That being said, in CZ, as in PL, a prior review of return-related decisions is performed by higher administrative authorities, respectively the *Alien Police Service Directorate* and the *Head of the Office for Foreigners*, before possible appeals to domestic courts. This 'combined' system has never been considered as being problematic by the judiciary, given that effectiveness and impartiality are here guaranteed as a whole, *via aggregate of available remedies*.<sup>43</sup>

In IT, the law provides for a more *hybrid* system according to the type of decision adopted.<sup>44</sup> Whether the Prefect issues an expulsion order, with or without forced escort to the border; the Justice of the Peace intervenes in the process in a different way: either acting as an appeal body for expulsion decisions of the first category or as an authority called to validate the forced removal decisions within 48 hours.<sup>45</sup> As stressed in the Italian report, the Justice of the Peace is not a professional judge and his status is quite controversial in terms of impartiality and independence.<sup>46</sup>

- However, as a sort of counterpart, the Court of Cassation stated on several occasions (**17407, 30 July 2014**) that even in proceedings where the *Justice of the Peace* is called upon to validate the removal, he must always assess, first and foremost, whether the expulsion decision 'does not present serious and manifest irregularities'. This means a *prima facie* assessment. As for the remedies available to *challenge* the decision, the Italian Court of Cassation remains the instance of last resort, *e.g.* for inadequate judicial reasoning on the basis of Article 360 of the Civil Procedure Code; misapplication of a rule of law; lack of discussion by the courts of crucial facts yet explicitly presented by the parties etc. In practice, however, it should be considered that since, as a general rule, the appeal against the measure does not have a suspensive effect and, therefore, the foreigner is expelled, the cases brought before the Supreme Court are few.

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<sup>42</sup> In case Pl.ÚS 27/97, 26 May 1998, the Constitutional Court already found the same practice in violation with the Czech Charter of Fundamental Rights and Freedoms.

<sup>43</sup> *E.g.* in the CZ legal system, the initial return decision is issued by the *Regional Police Directorates* and can be appealed before the *Alien Police Service Directorate*, whose decisions are then subject to review from national courts. The author also refers in his report to ECHR case law *Kudla v. Poland*, 30210/96, stating notably, that '*even if a single remedy does not by itself entirely satisfy the requirements of Article 13 of the Convention, the aggregate of remedies provided for under domestic law may do so*'.

<sup>44</sup> *E.g.* Article 18 of the Legislative Decree 150/2011.

<sup>45</sup> In specific circumstances, ordinary courts can also be in charge of the review such as for expulsions following rejected residence permits or in cases of *deferred refusals* (corresponding to irregular border crossing situations).

<sup>46</sup> In practice, it is, indeed, up to the police authorities to provide, whenever possible and depending on availability, the necessary support and a suitable place for the *Justice of the Peace* to conduct the validation process.

Finally, according to Croatian (**HR**) law, decisions on return issued to an alien staying illegally – or for a short time – on the territory can be appealed immediately, without passing through administrative review first.<sup>47</sup> Decisions terminating the legal stay of foreigners, being issued at the same time as the return, are subject to a single legal remedy – as a package.<sup>48</sup>

## 2. Paragraph 2 – Suspensive Effect of Remedies and Extent of the Review

### a. *Suspensive Effect of Remedies*

#### *EU Legal Provisions*

Although Article 13 RD does not provide for an automatic suspensive effect of legal remedies,<sup>49</sup> the competent entity must have, when circumstances require, the power to suspend return-related decisions temporarily, unless such powers already exists in national law (in practice when the legal challenge of the decision automatically suspends its enforcement).

#### *Landmark National Jurisprudence*

With regard to this issue, national courts of four EU countries have adopted a proactive approach in the absence of/ despite existing legal provisions (**BE, CZ<sup>50</sup>, IT, LT, NL<sup>51</sup>**).

- In **BE**, following the *M.S.S.* judgment of the ECtHR,<sup>52</sup> the General Assembly of the **CALL (56.204, 17 February 2011)** became aware of the need to improve the effectiveness of remedies against return and started a practice of granting a suspensive effect to suspension requests introduced by applicants, in accordance with the Belgian procedure;<sup>53</sup> when there is a well-founded fear that return could violate the claimant’s fundamental rights and that the request is made within the time-limit granted to claim for annulment, the request for suspension before the Council is deemed automatically suspensive (**CALL, 151.686, September 2015**), although it does not imply the certainty of a positive outcome.<sup>54</sup>

Whilst the Constitutional Court (**1/2014, 16 January 2014**) welcomed this judicial practice, it also stressed the need for a proper legislative change, in order to guarantee the right to an

<sup>47</sup> See Croatian ‘synthesis note’ on the second package of the Return Directive.

<sup>48</sup> Pursuant to Article 114 of the Aliens Act, legal remedies against return decisions are considered as an integral part of a prior decision from the Administrative authority, e.g. on expulsion or rejecting an asylum application.

<sup>49</sup> The rationale behind that is that there must be some safeguards against the risk of an eventual abuse of the possibility to appeal. As expressly noted in recital 36 of the Asylum Procedures Directive 2013/32/EU, where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a full new examination procedure (*res judicata* principle).

<sup>50</sup> NB: The case law mentioned below concerns the suspensive effect *before the Supreme Administrative Court* (the higher administrative court and a second-instance court in these matters); the suspensive effect *before the regional courts* is yet explicitly stipulated by law.

<sup>51</sup> In NL, despite the lack of an explicit legal provision, the suspensive effect of remedies mainly occurs on the basis of mutual agreements made between the Judges and the administrative in given individual cases.

<sup>52</sup> ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, § 293

<sup>53</sup> ‘Requête en suspension d’extrême urgence’.

<sup>54</sup> A similar procedure applies in Portugal; suspension of appeals must explicitly be requested by the applicant (as a ‘precautionary protection’). However, a legal difference is made between negative and positive acts issued by the administration: only decisions with a highly negative impact on the TCN are likely to be suspended by second instance courts.

effective remedy entailed not only in practice but also in law.<sup>55</sup> Since this judgment, the Aliens Law provides for the automatic suspensive effect of the request for suspension within ten days of the notification of the order to leave the territory.<sup>56</sup> Additionally, following the recent CJEU judgment *Abdida*<sup>57</sup> an automatic suspensive effect should also be available to appeals against any order to leave the territory when the applicant's illness is that serious that a removal might amount to a *refoulement* prohibited by Article 3 ECHR (**CALL, 156.951, November 2015**).<sup>58</sup> The suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium (**CALL, 159.427, 28 December 2015**).<sup>59</sup>

- **(CZ) Supreme Administrative Court (SAC), 1 Azs 160/2014-25, 19 November 2014:** there is, in principle, no suspensive effect for cassation proceedings before the SAC (that is the second instance level after administrative courts and an extraordinary remedy). However, it can be exceptionally granted when, upon request, the applicant shows that (1) the decision issued would cause far greater harm to him/her compared to other applicants placed in a similar situation, (2) that the suspensive effect would not breach any important public interest. In practice, the SAC is more generous towards foreigners facing expulsion than other claimants and almost always grant suspensive effect in such cases, unless public interests would be threatened by doing so.

As for the possible lack of suspensive effect of appeals in removal proceedings, the **(CZ) Constitutional Court** quashed a decision from the Supreme Administrative Court in case **I.ÚS 145/09, 21 February 2012**. Subject to imminent expulsion, the applicant had here challenged before lower courts the lack of a suspensive remedy against the decision's enforcement. Being dismissed on the grounds that he challenged a preliminary decision (not subject to judicial review under Czech Law),<sup>60</sup> he submitted a claim to the SAC, then to the Constitutional Court. The latter confirmed that according to Czech Law only final decisions were judicially reviewed. However, decisions on excluding the suspensive effect of appeals in removal proceedings could not be seen as a question of preliminary nature, so that applicants should be afforded a judicial review against this particular aspect.<sup>61</sup>

- **(IT) Court of Aosta, 17 October 2012:** the Court also addressed the issue of the possible suspension of expulsion orders during appeal proceedings. In the absence of explicit provisions from the Consolidated Text on Immigration, it relied on a previous Constitutional Court's judgment (**CC, 161/2000**) acknowledging 'under special and exceptional circumstances' the possibility of suspending the execution of removal orders;<sup>62</sup> calling for appellate courts to

<sup>55</sup> ECtHR, *Čonka v. Belgium*, App. 51564/99, §75. Unlike NL and DE, the Belgian practice has been legally implemented in the Aliens Law to ensure the applicant greater certainty and predictability. In the CC's view, the suspensive effect of appeal should not rely on personal calls between the administration and the national courts, but should be written into law.

<sup>56</sup> Loi du 10 avril 2014 portant des dispositions diverses concernant la procédure devant le Conseil du Contentieux des étrangers et devant le Conseil d'État, Mon. B., 21 mai 2014.

<sup>57</sup> CJEU, C-562/13, *Abdida*, ECLI:EU:C:2014:2453.

<sup>58</sup> According to the Supreme Court of Estonia, automatic suspensive effect should also be granted in cases where Article 2 ECHR and Protocol 4 – on collective expulsions of foreigners – are at stake.

<sup>59</sup> Here for humanitarian and medical reasons, according to Article 9ter of the Aliens Law.

<sup>60</sup> Act on Proceedings before AC.

<sup>61</sup> In principle, administrative appeals have a suspensive effect in Czech law. Only in special circumstances, can the Police deny it. The legal question in this case was whether such a denial in special circumstances was subject to judicial review before administrative courts; the first senate of SAC said no and the Constitutional Court quashed its decision. In the meantime, the Grand Chamber of SAC (Judgment No. 7 As 26/2009, § 58) unified the SAC's divergent case law and held that such decisions are subject to judicial review.

<sup>62</sup> Following this judgment, several Italian courts considered that there should be a precautionary protection suspending the expulsion decision under exceptional circumstances: e.g. Italian Supreme Court, 15414/2001 and lower courts case law that recalled principles and general tools of the civil trial applied precautionary suspensive measures in similar cases.

identify ‘the most suitable instruments, within the Italian legal system’ to suspend the enforcement of the challenged order.

So according to the Court, the present case could be seen as a *prima facie* emergency case: another (professional) judge was, indeed, directly involved, as an appeal was lodged by the TCN before the competent Juvenile Court to obtain a special permit to stay with his minor child (that had mental and physical health problems). Even if the sole consideration for family unity was not likely to suspend the expulsion, the Court, in any case, decided to grant suspension on an exceptional basis.<sup>63</sup>

By contrast, subsequent judgments from the Italian Supreme Court reduced the scope of this so-called ‘*precautionary protection*’ by limiting judicial power to very special and exceptional circumstances, so as not to undermine the legal prerequisite for detention or the effectiveness of administrative procedures (11442, 23 May 2014 and 15414, 5 December 2001).

In any case, since the ECtHR judgment in *Khailifa v. Italy*,<sup>64</sup> no general exclusion of suspensive effect of remedies against expulsion is admitted. This would contradict the essence of Article 13 ECHR and the constant European case-law.<sup>65</sup> Applicants should therefore have the right to effective remedy, not only in the context of criminal proceedings, and if necessary according to circumstances, to benefit from a suspensive effect on the enforcement of their expulsion.<sup>66</sup>

The Lithuanian system is an example of suspensive effects of remedies provided by Law, but it needs to be assessed by the judges on a case-by-case basis:

- **(LT) Supreme Administrative Court, AS822-768/2013, 09 October 2013:** suspension of the order to leave the territory can be granted by national courts on the basis of Article 71 of the Law on administrative proceedings, through the adoption of *interim measures*, at any stage of the procedure, when it would otherwise impede the enforcement of the courts’ decision. On several occasions, Lithuanian courts thus suspended the return decision as an *interim measure* (even one that are not yet coercive) when the applicant had sufficient grounds to claim for suspension, notably in cases of strong social, family or economic ties and relations with the country.<sup>67</sup>
- Similarly, under **Slovenian (SL)** law and court practice, suspension of the order to leave the territory can be granted based on the initiative of the applicant by national courts under conditions regulated in Article 32 of the Administrative Dispute Act, through the adoption of interim measure, at any stage of the procedure. However, the conditions for issuing interim measure are rather strict: the applicant must show that the execution of the return decision would cause difficult to repair damage to the applicant and the court must, through the principle of proportionality, take into account also protection of general interests. In respect of the burden and standards of proof, the case-law of the Supreme Court on interim measures is more stringent than the case-law of the Administrative Court.

(Contd.) \_\_\_\_\_

(Italian report on the second package of the Return Directive). But failing a proper provision in that regard, this is left to the judge’s discretion.

<sup>63</sup> This case is also a good example of how the quality of independence affects the quality of remedy and protection of the individuals.

<sup>64</sup> ECtHR, App. 16483/12. According to the Court, the Italian expulsion decrees that any appeal brought before the Justice of the Peace would have by no means suspensive effect did not satisfy the requirements of Article 13 RD.

<sup>65</sup> See e.g. Gebremedhin [Gaberamadhien], N. 25389/05, *Čonka v. Belgium*, no. 51564/99, De Souza Ribeiro, 22689/07 etc.

<sup>66</sup> It might be noted that Austria has a reverse logic: the suspensive effect of remedies is the rule in administrative procedures, while judicial exceptions are only justified in cases involving public policy considerations.

<sup>67</sup> In the present case, the applicant had lived in Lithuania since he was five, with his parents, spoke only Lithuanian, had a business in Lithuania etc. The order to leave was taken because the applicant failed to renew his permission to stay in Lithuania after the expiry of the previous one.

By contrast, in **DE** the controversial discussion among the courts is not about the *suspensive* effect of remedies. It is about the adequate time frame to appeal against the return decision before the *concrete deportation* of the applicant (which does not guarantee as such the right to remain until a final decision taken by the Court.<sup>68</sup> **Administrative Court of Berlin, 12 S 113/13, March 2014**) The same is true with entry bans: in line with the Return Directive, the person concerned shall be notified of the decision and the duration to give them enough time in advance to use effectively the possibility of appeal under Article 13 Return Directive, while he or she is still present in Germany (**Higher Administrative Court of Baden-Württemberg, 11 S 2303/12, 19 December 2012**).

#### *b. The Extent of (Judicial) Power*

##### *EU Legal Provisions*

The competent authority or body referred to in paragraph 1 shall have the power to review decisions related to return.

##### *Landmark National Jurisprudence*

In several countries (**BG**<sup>69</sup>, **DE**, **SL**<sup>70</sup>) the national judge controls *ex officio* all elements of lawfulness of return-related decisions, irrespective of the arguments of the parties.

By contrast, in **EE**, the *ex officio* power partly applies to return decisions; *e.g.* when no voluntary departure is given, in cases where detention is applied (as it concerns privation of liberty), and generally when the fundamental rights of the claimant are affected by the measure.<sup>71</sup>

In **IT**, the Justice of the Peace is required to review the balance of interests reached by the administration, not to carry out a full review. Despite a wide margin of discretion, the Prefect cannot '*fall outside the scope*' when adopting decisions related to return, that have to remain 'necessary' according to circumstances.<sup>72</sup> Powers are, however, more extensive when the violation of the prohibition on *refoulement* is involved. As recalled by the Italian Court of Cassation, in this case the Justice of the Peace must exercise a full and effective review<sup>73</sup> of the initial decision, going beyond a simple administrative assessment. In case **4230.2013, 25 February 2013**, the Supreme Court emphasised the investigation and *ex officio* powers of the Judge when ensuring protection against *refoulement*: his assessment cannot be limited to a mere reference to a rejected asylum application by the territorial commission, without raising the very reasons leading to it.

As for (substantial and procedural) breaches revealed by the judicial review, legal consequences are not the same in all Member States.

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<sup>68</sup> As pointed out in the DE report, the suspensive effect of remedies provided by the Return Directive should be read in conjunction with the Dublin regulation, according to which the transfers intra-EU have no automatic suspensive effect in EU law.

<sup>69</sup> *E.g.* the language used, the competence of the body issuing the decision, the lack of legal basis (but controversies among the courts), etc.

<sup>70</sup> SL, Welson I U 362/2016-7 from 6 April 2016.

<sup>71</sup> In NL, Judges have no *ex officio* power with regard to administrative decisions. On the contrary in AT, Judges are required to raise some elements of the decisions (*e.g.* related to family life, best interest of the child etc.) even if not mentioned or discussed by the administration. Otherwise, Administrative Judgments can be quashed by the Supreme Court.

<sup>72</sup> Justice of the Peace of Turin, 8 July 2013.

<sup>73</sup> The Justice of the Peace must also hear the applicant before rendering its decision. While there is no legal provision describing the way the hearing must take place, the effective protection of the applicant and his right to a defence must be guaranteed (excluding for instance dual track procedures, in which validation is based on papers only, giving then the possibility for the applicant to appeal).

Violation of the right to be heard, for instance, leads to the annulment of the return decision in **CZ**, followed by the subsequent obligation for the administration to adopt a new decision; in Greece (**EL**), even if the administration did not hear the applicant, the Court does not necessarily annul the return decision when it might harm the objective of *effectiveness* pursued by the Return Directive: instead, it orders the administration to hear the person again and suspends the return/removal waiting on the issuance of a new decision (**Court of Thessaloniki, 717/2015**). In **BE**, if the right to be heard has been breached when issuing the return decision, national courts may annul the decision only if the TCN can *show grounds that might have led the administration to adopt a different decision if the hearing had taken place* (**CALL, 128.272, 27 august 2014**). In **NL**, before the implementation of the Return Directive, violations of procedural safeguards in the detention procedure led to a balancing of interests, where the seriousness of any violation of a procedural requirement was balanced with the interest that was served by continuing detention.<sup>74</sup> Following the CJEU ruling in *G. and R.* (C-383/13),<sup>75</sup> the **Council of State** ruled that the principles formulated by the Court also applied in the procedure that regulates the taking of a return decision by the administration: if the right to be heard has not been observed by the administration, the courts should determine whether this has deprived the third-country national of the possibility of bringing forward circumstances which could have led to a different decision. If this is not the case, the judge hearing the appeal against the return decision will not quash it. It should be underlined that this applies only if the third country national brings forward this argument in the procedure, and not on the basis of an *ex officio* control.<sup>76</sup>

### 3. Paragraph 3 and 4 – Access to Justice: Legal Representation and Linguistic Assistance

#### a. Legal Advice and Representation

##### *EU Legal Provisions*

To defend their rights, third-country nationals must have the possibility of obtaining legal advice and/or representation during the judicial phase. Paragraph 4 specifies in which cases and under which conditions Member States have to cover the costs for such legal assistance. In practice, Member States must provide legal aid and representation free of charge to irregular migrants under the same conditions as the ones provided by the Asylum Procedures Directive;<sup>77</sup> they *may* for instance subject free legal advice and representation to conditions of tangible prospect of success of the appeal; insufficient resources of the claimant; aid limited to first instance appeal procedures etc. When a decision not to grant free legal assistance and representation is taken by the competent authority, Member States shall ensure that the applicant has the right to challenge this decision, though the applicable legislation does not provide for such a procedural requirement.<sup>78</sup>

##### *Landmark National Jurisprudence*

- **(AT) High Administrative Court, RO 2015/21/0032, 03 September 2015**: referring to Art. 47 CFR and the ECJ relevant case-law, the Court argued that providing legal assistance is mandatory in any procedure, although it is not foreseen by the national legislation. In the present case, the applicant requested legal aid in the context of his appeal against pre-removal detention. Unlike for return decisions, Austrian legislation does not entitle legal advisors of

<sup>74</sup> See for more the contention database and related [country report](#) by Galina Cornelisse in cooperation with John Bouwman.

<sup>75</sup> Requested by the Dutch Council of State in decisions of 5 July 2013, 201304861/1/T1/V3 and 201305033/1/T1/V3.

<sup>76</sup> See NL, Council of State, 24 June 2014, 201309226/1/V3.

<sup>77</sup> See now Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, art. 20 and 21 (recast).

<sup>78</sup> Return Handbook, p. 73.

NGO's to assist and represent applicants before the courts when challenging detention orders. In such circumstances, applicants should, therefore, have the right to legal aid from the State; Federal Administrative Courts must also inform the TCNs of such particularity and grant them legal assistance and representation in accordance with Art. 47 CFR.

- **(IT) Constitutional Court, 439/2004:**<sup>79</sup> foreigners to be expelled benefit from a derogatory regime compared to the common rules of law; unlike other applicants, legal aid is freely granted to them without any particular income requirement. Also, if the person is devoid of a defender, a public defender is appointed by the court to ensure the technical defence of the applicant.<sup>80</sup> According to the Italian Constitutional Court, 'this choice appears neither unreasonable nor damaging to the principle of equality of treatment given the peculiarities of the process of expulsion of foreigners and the need not to place any obstacle to the pursuit of this goal'.
- **(CZ) Supreme Administrative Court, 30 June 2015, 4 Azs 122/2015:** in its case law, the SAC had a quite proactive approach with regard to free legal assistance during administrative proceedings. It declared inadmissible the legislative deficiency in the Aliens Act, with regard to transposition of Article 13(3) RD. There is, indeed, no legal provision in Czech law guaranteeing free legal aid or representation to foreigners, making claimants unsure as to whether they can benefit from any assistance and, if so, when.<sup>81</sup> When a foreigner is detained or placed in reception centres, there are generally very short deadlines to appeal or to lodge an action before the administrative court. In the absence of such legal provisions, the SAC urged the authorities to do as much as possible to achieve the goals of the Return Directive, *e.g.* by making sure that prison facilities are visited by lawyers weekly.

The SAC also acknowledged that a lack of legal aid and assistance might be a serious reason for missing the deadlines for appeal proceedings. In accordance with Article 41 of the Administrative Procedure Act, the Court declared this circumstance as a valid excuse *for a waiver of a missed deadline* (regardless of the applicant's conduct or own negligence) and quashed the judgment of the first instance administrative court.

That being said, the right to free legal assistance in **CZ** law is, as in **DE** or **EE** law, conditional:

- **(CZ) Supreme Administrative Court, 1Azs 5/2003-47:**<sup>82</sup> the presiding judge appoints a legal representative to any applicant who submits a motion if 1) the person meets the requirements to exempt themselves from court fees and 2) proves that such representation is *necessary for the protection of his/her rights*. As for the second condition, it is to be appreciated by the court according to the circumstances of the case, *e.g.* taking into account whether the person speaks and understands Czech and whether he or she is familiar with the Czech legal system.

The resolution adopted by the president can be subject to a cassation complaint before the Supreme Administrative Court.

- **(DE) Administrative Appeal Court of Hesse, 3 B 823/12:** the legislator defines the conditions to be met by the applicants to be granted free legal aid and assistance.<sup>83</sup> As with other proceedings, German rules do not provide legal aid without examining the persons' need and whether the decision (on his or her application) has a chance of success. No special rules

<sup>79</sup> See Italian report on the second package of the Return Directive.

<sup>80</sup> NB: Only lawyers registered as legal aid defenders by the competent Councils of the Order can be appointed (*difensore d'ufficio*).

<sup>81</sup> In practice it is quite hazardously ensured and dealt with by NGOs and related associations.

<sup>82</sup> NB: the present case refers here to free legal assistance during judicial proceedings.

<sup>83</sup> Administrative Appeal Court of Hesse, 3 B 823/12.

apply to foreigners,<sup>84</sup> who also need to specifically request legal aid.

- **(EE) Court of Appeal of Tallinn, 3-14-52318, 28 April 2015:** the Court was asked whether the merits of the case (and its chances of success) should be examined when deciding on granting free legal assistance for return proceedings, or if the assessment was limited to financial situation of the applicant alone. Although Article 13(4) of the RD allows Member States to apply both criteria, the Estonian law on expulsion states that ‘an alien shall have the right to receive legal aid from the state for appealing the precept to leave, the decision on the expulsion or prohibition on entry applied in the precept to leave, in the case the alien has no sufficient funds to cover legal expenses’. The Court of Appeal thus concluded that only the question of sufficient resources is relevant when considering the appointment of free legal representation to a person who wishes to contest his or her expulsion. It also added that the applicant could not be deemed able to represent themselves (even with the help of the court) if they cannot write or read.

## *b. Interpreters*

### *EU Legal Provisions*

In addition to legal representation, third-country nationals should be granted *linguistic* assistance any time it is necessary to effectively exercise the procedural rights afforded to them pursuant to Article 13 RD. Besides the obligation to provide for a translation of administrative decisions (see Article 12(2) *supra*), Member States are also obliged to offer available assistance from interpreters when circumstances so require.<sup>85</sup>

### *Landmark National Case-law*

In **PL** and **BG**, national courts make the connection between interpreters and the administrative obligation to issue initial decisions in a language that the person understands:

- **(PL) Regional Administrative Court in Warsaw, V SA/WA 150/06, 29 August 2006:** the failure to provide linguistic safeguards at the early stage of the procedure is likely to lead to an additional interview from the administration.
- **(BG) SAC, Arevik Shmavonyan, No. 13731/2011, 9 November 2011:** the Court repealed a ruling from a first-level judge declaring the applicant’s appeal inadmissible, though lodged after the preclusive term of 14 days, because adequate translation had not been provided in the first place: the removal order was given with a general statement that the applicant could understand the language chosen, without any proof that this was, in fact, the case. Additionally, there was no record of the evidence that the decision was communicated in the presence of an interpreter, as required by Articles 3 and 14(2) of the Code on Administrative Procedure.<sup>86</sup> Therefore, the first instance court had drawn incorrect conclusions that the applicant understood the content of the order. The Supreme Administrative Court quashed the first instance judgement and remitted the case to consider the appeal.

That being said, the right to benefit from linguistic assistance might in practice have a limited scope:

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<sup>84</sup> Cf. general rules on legal assistance in the German administrative Court procedure Act.

<sup>85</sup> In this context it should be recalled that in the case of *Conka v. Belgium* (Judgment of 5 February 2002, No. 51564/99) the ECtHR identified the availability of interpreters as one of the factors that affect the accessibility of an effective remedy. The rights of third-country nationals to receive linguistic assistance should be granted by Member States in a way that provides the person concerned with a concrete and practical possibility to make use of it (*‘effet utile’* of the provision).

<sup>86</sup> ‘Persons who do not speak Bulgarian language can benefit from their native – or another designated by them – language. In these cases an interpreter is appointed’.

- In **LT** (**SAC, n. A 888/2010**<sup>87</sup>), the right to be assisted by an interpreter during the trial does not amount, in practice, to an automatic translation of all procedural documents issued by the courts into the language that the person understands.
- In **BE**, the Aliens Law provides for all foreigners to be assisted by an interpreter before the CALL, as a right. However, the Criminal section of the Court of appeal (**CMA, n. 2212, June 2013**) ruled ‘that neither European nor Belgian law provide that administration must adopt a decision in the language chosen by the Alien’ (here in English) especially in cases where the alien, assisted from the beginning by a lawyer, could use the remedies provided by law against the said decision.

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<sup>87</sup> See Lithuanian report on the second package of the Return Directive.

#### IV. Article 14 – While Waiting to be Returned – Safeguards and Guarantees

In cases where return-related decisions cannot be enforced for practical or legal obstacles (*e.g.* delays in obtaining the necessary papers from third countries and *non-refoulement* cases), the Member States shall ‘ensure that the following principles are taken into account as far as possible’:

1. family unity;
2. emergency health care and essential treatment of illness;
3. minors’ access to basic education; and
4. ‘special needs of vulnerable persons are taken into account’

Furthermore, TCNs must be given written confirmation of their position.

In addition to the rules set out by the Return Directive, the CJEU confirmed in the *Abdida* case<sup>88</sup> that the public authorities of the Member States are required, on the basis of Articles 5, 13, 14(1)(b) RD and Articles 19(2) and 47 of the CFR to ensure emergency health care and the essential treatment of any illnesses to the TCN during the postponement of removal of TCN.

##### 1. Family and Social Life, Health Conditions, *Non-Refoulement*, Best interest of the Child, Education – Which Impact on the Removal and/or the Return Decision?

Few national judgments have been reported by the national judges and legal experts on the implementation of Article 14 (less than half compared to Articles 12 and 13).

**Czech Republic.** The Czech legal order has quite detailed provisions on safeguards pending return. This provision (Art. 176a) contains an exhaustive list of medical conditions when a foreigner is entitled to receive free health care during for the period of voluntary departure. In accordance with Art. 176a, a foreigner will be provided urgent and basic medical treatment in connection with the mandatory quarantine and in conditions that

- present immediate danger to life,
- may result in sudden death due to deepening of pathological changes,
- without urgent provision of medical services will cause permanent pathological changes,
- endanger themselves or their surroundings, or
- are related to pregnancy and childbirth (with the exception of abortion).

Furthermore, the amendment brought to the Aliens Act by Law No. 314/2015 allows for the possibility of applying for an extension of the period for voluntary departure for reasons that include the stay of the minor children of the foreigner in compulsory education and the existence of other family or social ties in the territory.

**Germany.** There is no domestic case law on the matter for the simple reason that most third-country nationals subject to return decisions are covered by rather extensive provisions of the German Act on Reception Conditions for Asylum Seekers.<sup>89</sup> This act – notwithstanding its name – applies to those without leave to remain in the same way as it applies to asylum seekers. The German Report mentions as a possible cause for the lack of national jurisprudence on Article 14 the fact that the

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<sup>88</sup> Case C-562/13, *Abdida*, ECLI:EU:C:2014:2453.

<sup>89</sup> *Asylbewerberleistungsgesetz*, available on: <http://www.gesetze-im-internet.de/asylblg/>.

guarantees provided by the German Act on Reception Conditions for Asylum Seekers mostly exceed the minimum provisions enshrined in Article 14 Return Directive.

With regard to family unity no decisions are reported either (Administrative Appeal Court of Baden-Württemberg of 19 December 2012, 11 S 2302/12 reported in the database mentions the provision only in passing). This may be explained by the fact that the vast majority of deportation orders are made with respect to asylum seekers entering irregularly from a competent EU Member state into Germany. The provisions on modalities of return, resp. transfer to the competent EU Member State of the Dublin Regulation No.604/2013 are applicable in this case according to the jurisprudence of the Federal Administrative Court. It should be mentioned, however, that with respect to family unity and the safeguard of minors, very similar provisions apply with respect to the return procedure pending return under the constitutional duty of the protection of family and children.

## 2. Minor's Access to Education

The **Administrative Court of first Instance of Thessaloniki** (*case No. 299/2015*) has taken into account the best interests of the children of the applicant, in order to suspend the enforcement of the return decision for some months in order to permit minors to complete their year's studies in their primary school class.

## 3. Family Unity/Life

Family unity/life as a legitimate consideration for extending voluntary departure or postponing removal (Art. 5 RD) and objective to be ensured/respected by public authorities during postponement/suspension of return (Art. 14 RD):

- The **Lithuanian Supreme Administrative Court** (*M.S. v. Migration Department under the Ministry of Interior*, case No. A<sup>822</sup>-69/2013) referred to Articles 5(1) and 14(1)(a) of the Directive as a legal basis for the obligation of the administration to take into account family life and obligations related to the *non-refoulement* principle. The Court did not refer to the specific jurisprudence of the CJEU, but mentioned that it took account of this practice and concluded that: a) even if a person's stay on the territory of the country were illegal, the EU does not establish an unconditional imperative to expel him or her; b) while deciding on expulsion, all relevant factual circumstances shall be evaluated (including personal ones, related to protection of private and family life, as well as the protection of the rights of minors) (emphasis added). The Court seems to pay increased attention to family unity in cases of return, and also of striking a fair balance between the State's interests and the best interests of the child. (the Supreme Administrative Court in its decision of 17 October 2011 in administrative case *L.T.H. v. State Border Guard Service* (No. A<sup>858</sup>-2332/2011) (*Amrollahi v. Denmark, Hokkanen v. Finland, Kosmopoulou v. Greece*)).
- The **Administrative Court of Slovenia** had to assess whether the administration's refusal to extend voluntary departure based on absence from the domestic law of circumstances as grounds for extension of voluntary departure was legitimate. These circumstances included: marriage, children and pending procedure for temporary residence. The Ministry of Interior, as the second instance administrative authority, argued that the reasons for an extension of the voluntary period should be 'objective' and outside the sphere of the applicant. The Ministry added that the applicant did not provide any substantial evidence to prove the existence of genuine family life. Before the Administrative Court, the applicant relied on Article 8 of the ECHR and on principle of *non-refoulement* based on alleged discrimination of Roma in Kosovo. The **Administrative Court of Slovenia** held that the duty to apply national law in conformity with Articles 5(a), 7(2) and 14(1)(a) RD in conjunction with Arts. 7 (family life), 24(2) and (3) of the Charter (best interests of the child) requires the administration to take into

account aspects that are not simply 'objective and outside the sphere of the applicant'. Otherwise, it would be in clear contradiction of Article 7(2) of the Returns Directive, which provides that all reasons mentioned are linked to the sphere of the person involved. Furthermore, the right to family unit, which is subject to the principle of proportionality, should be ensured during the entire return procedure, suspension or postponement of the return procedure.

#### 4. Access to Social Benefits

In a case concerning a TCN, who did not respect an order to leave the territory, and who was living in an illegal squat, the **Brussels Labor Tribunal** awarded social assistance as a temporary measure. They did so as the applicant could not execute the order to leave the territory because her child had been taken into custody by social protection services. Requesting that she abandon her child in Belgium would amount to a violation of Article 8 ECHR. Therefore the applicant's request for emergency measures and grant of social benefits was approved as a temporary measure.<sup>90</sup>

The **Dutch Council of State** and **Central Board of Appels** subject the provision of shelter and basic means of subsistence of irregular migrants to the condition that TCNs cooperate in permitting their return. This duty is not expressly provided by national legislation, but has been deduced by the national courts. Access to social benefits is thus conditional upon the cooperation of third-country nationals in the return process, which essentially prioritizes the objective of ensuring an effective return procedure to ensuring the protection of the fundamental rights of the migrants.

#### 5. Basic Emergency Care and Medical Assistance

In the *Abdida* case, the Brussels Labor Court asked the CJEU whether the appeal against a refusal of a permit to stay for medical reasons has a suspensive effect; and whether a seriously ill foreigner keeps his/her right to medical and social assistance pending the examination of the appeal against a refusal of a permit to stay for medical reasons.

Following the positive answer of the CJEU, various cases emanating from Labor Tribunals judge that seriously ill foreigners keep their right to social assistance pending the examination of their appeal as well as during the postponement or suspension of the return/removal of the TCN.

For instance, one applicant, a Moroccan national who did not execute an order to leave the territory, requested social assistance. He argued that he could not execute the order to leave the territory because of his health condition. The Brussels Labor Court held on the basis of the CJEU preliminary ruling in *Abdida* that public authorities are required to carry out a factual examination of the case:

- refer to/ask for a medical assessment;
- assess whether the applicant's state of health is such that he cannot return to Morocco;
- ask whether the applicant get adequate healthcare in Morocco.

Ultimately the Court suspended the removal of the TCN and granted access to social assistance. (case *Trav. Bruxelles (16è ch.)*, 13 février 2015, R.G. 14/12.433/A, judgment of 13 February 2015).

In the **Netherlands**, the preliminary CJEU ruling in *Abdida* was relied on mostly by TCNs in order to obtain medical care during their stay pending removal;<sup>91</sup> or to challenge the judgments of the **Dutch**

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<sup>90</sup> Trav. Bruxelles (réf.), 23 janvier 2015, R.G.15/1/C, judgment of 23 January 2015.

<sup>91</sup> District Court The Hague, 19 May 2015, ECLI:NL:RBDHA:2015:6452, available on: <http://deemlink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:6452>.

**Council of State**, which conditions the access to shelter, food and clothing to the TCN's cooperating in his/her return.<sup>92</sup>

It is interesting to note that while there has been a lot of litigation concerning the social rights of irregularly staying third-country nationals in the Netherlands, there has been very little reliance on the CJEU case of *Abdida* and Article 14 of the Return Directive (and Article 1 of the Charter). This may be due to the fact that, though irregularly staying immigrants do not have the right to social benefits (on the basis of Article 10 paragraph 1 Aliens Act), an exception is made when it concerns necessary medical care (see also Article 122a of the Health insurance Act) and education for minors. There is, for example, a judgment by the **Hague District Court** in which it ruled that as the third-country national was able to get the necessary medical care during his – albeit illegal – stay in the Netherlands, an appeal to *Abdida* was irrelevant.<sup>93</sup>

#### *What Constitutes Essential Emergency Health Care?*

The Corte di Cassazione (**Italian Supreme Court**)<sup>94</sup> had to assess whether the removal of an HIV positive Tunisian, who was denied the renewal of a residence permit on grounds that the treatment could be continued in the country of origin, could be postponed, and access to HIV-related medicines secured in Italy.

The Justice of the peace confirmed the expulsion of the TCN, affected by HIV and initially treated in Italy for his infection, on the condition that:

- a) a dozen packages of antiretroviral drugs not on the market in Tunisia, was made available to the foreigner, and
- b) The Italian embassy in Tunis will issue a special visa to enter Italy for medical treatment, in case he needed to undergo medical treatment in Italy.

The Corte di Cassazione quashed that judgment on the grounds that the 'fundamental right to health of the citizen' includes:

- a) emergency care +
- b) emergency medicine +
- c) all other services essential for life.
- d) Intake of a retroviral medicine cannot be an 'essential care'.

#### *Assessing Availability of Medical Care in the Country of Origin*

Higher Administrative Court of **Baden-Württemberg**<sup>95</sup> had to assess the issue of whether a Turkish national, subject to a long time issued removal order, would receive necessary medical care in Turkey, if returned, or whether the removal order should be suspended and he would be given access to medical care in Germany.

<sup>92</sup> Council of State 6 November 2015, ECLI:NL:RVS:2015:3415 and ECLI:NL:RVS:2015:4001; Central Board of Appeal, 6 November 2015, ECLI:NL:CRVB:2015:3803; Central Board of Appeal, 15 November 2015, ECLI:NL:CRVB:2015:3803.

<sup>93</sup> District Court The Hague, 19 May 2015, ECLI:NL:RBDHA:2015:6452, available on: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:6452>.

<sup>94</sup> See Case No. 14500.2013, judgment of 10 June 2013.

<sup>95</sup> See Case No. 11 S 2303/12, decision of 19 December 2012.

The Turkish citizen was issued with a removal order in 2003. The deportation had still not been completed by 2012. In 2004 he underwent a surgery on a brain tumour (benign) and since then, he had become severely disabled (degree of disability 50).

He submitted a medical certificate stating that since his surgery affected his capacity to control his 'emotional' reaction, this would affect his ability to cope with the threat of deportation.

The doctor argued he would favour the suspension of deportation. The applicant himself says that, in the event of deportation, he would commit suicide.

**Higher Administrative Court of Baden-Württemberg** developed the following test to establish whether removal should be suspended and the applicant be conferred access to medical care according to Art 14 RD:

- individualised medical report attesting that the applicant is able to travel and to be transported in physical / general medical terms and in psychiatric terms;
- an examination of whether the applicant will be able to procure the necessary medicine, albeit under a different name;
- proof from the German Embassy in Ankara that the applicant's illness can be adequately treated in Turkey;
- availability of necessary neurological and psychiatric clinics with the appropriate specialists are available in the provincial town of the applicant or nearby.

**Higher Administrative Court of Baden-Württemberg found no reason to** postpone the deportation for the following reasons:

- the applicant's disease and his suicidal thoughts were taken into account. A monitoring of the entire deportation process will be carried out by a doctor and by security personnel;
- the applicant was also to be received by a doctor in his home country.

## Conclusions

The jurisprudence collected by the REDIAL project tackled numerous issues related to securing procedural safeguards during return proceedings, such as: the types of decisions related to return (and subject to these guarantees); motivation (content, types of act, right to good administration); prior consideration to family and private life and balance of interests; right to be heard (content, types of act, effects); use of standard forms and templates in specific circumstances; free legal aid and assistance; interpreters; translation of decisions in a language understandable/spoken by the applicant; appeals, remedies and suspensive effect; the consequences of procedural breaches; the right to health care of the applicant pending voluntary return/removal; impartial supervising bodies/judicial or administrative review; and disclosure of documents and confidentiality.

Landmark domestic judgments have clarified that ‘procedural safeguards’ should be ensured for all types of return-related decisions, irrespective of whether they are coercive or not.<sup>96</sup> The **Belgian CALL**, for instance requires that the right to be heard is recognized in relation to each of the return-related decisions adopted by the administration, including in relation to withdrawal of the right to stay but also the order to leave the territory. The individual assessment of all the circumstances raised by the applicant has been generally recognized by national courts. But there is also a positive obligation of the administration to carry out *ex officio* an assessment of circumstances that might indicate a risk of ill treatment, if the TCN is returned.

National courts have deduced from general principles of administrative or civil procedural law, but also directly from the general principles of EU law of good administration, and Article 12 RD, a positive obligation of the administration to provide reasons in fact and in law. Based on the EU general principles, EU Charter and Return Directive, national courts require the administration to take family life issues into account, even in the absence of express domestic provisions stipulating such an obligation.<sup>97</sup> The mere referral to illegal stay and/or entry, or criminal convictions, without an individual assessment of the concrete circumstances, is generally considered by national courts to be insufficient evidence in support of the removal orders taken by the administration.

Although standard forms are widely considered as acceptable practice to inform the TCN of return-related decisions, courts require additional safeguards ensuring that the TCN is receiving the necessary information. Certain jurisdictions require the forms to allow the filling in of individualized information.

Effectiveness of the appeals and remedies against return-related decisions is also frequently addressed by national courts. In this matter, numerous references are made to human rights law standards, mostly to the CFR and the ECHR. While the very impartiality or independence of the reviewing authorities is rarely called into question, there seems to be a consensus that a judicial review should be available in any case, at least as an ultimate remedy against expulsion. Whether or not appeals and reviews have a suspensive effect is mainly left to the Member States’ discretion. Nevertheless, several national courts adopted, in their case-law, a more generous approach on suspension towards foreigners (compared to other applicants), given the serious implications of an

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<sup>96</sup> In *A.M.C. v. Migration Board of Vilnius County Police Headquarters* (No. AS-839/2014, decision of 23 July 2014), the Supreme Administrative Court of **Lithuania** confirmed that the “decision related to return” covers both the decision on voluntary departure and the removal decision, and that procedural safeguards, including interim measures and the suspensive effect of the appeal should be recognized in relation to both these decisions. A similar approach was substantiated by the **Belgian** Council of Alien Law Litigation in case 126.219, judgment of 25 June 2014, discussed below.

<sup>97</sup> The **Supreme Administrative Court of Lithuania** held that, even if the national legislation does not expressly require the administration and national courts to take into consideration the TCN’s family life aspects when issuing return-related decisions, the duty of consistent interpretation of national law with EU law does impose such an obligation. Furthermore, the obligation to assess family-related facts exist regardless of the type of return-related decisions, namely whether they are voluntary departure measures or removal orders (*L.T.H. v. State Border Guard Service*).

administrative expulsion for third-country nationals and their family. As for legal aid and linguistic assistance provided during the judicial/litigation phase, most national courts tend to apply the common rules and principles of their domestic administrative law rather than explicitly relying on the provisions of the Return Directive.

As to safeguards pending return/removal, family life and access to emergency health are mandatory requirements. When they are not considered return-related administrative decisions can be annulled. The situation is more nuanced as regards access to the social benefits of irregular migrants pending removal. It seems that only Belgian courts have an established practice recognizing this right based on the *Abdida* judgment of the CJEU.