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RETURN DIRECTIVE DIALOGUE – REDIAL

REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy Second Edition: Articles 12 to 14 of the Return Directive 2008/115

Madalina Moraru
Géraldine Renaudiere

REDIAL Research Report 2016/04

MIGRATION POLICY CENTRE

REDIAL

Odysseus Network — ULB
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REDIAL
REturn Directive DIALogue

Research Report

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REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy Second Edition: Articles 12 to 14 of the Return Directive 2008/115

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REDIAL – REturn Directive DIALogue

The project REDIAL **(REturn Directive DIALogue)** 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

The present Electronic Journal is one of the key products of a project entitled 'Return directive Dialogue' (**REDIAL**). The overall aim of the REDIAL Project is to facilitate horizontal judicial dialogue among judges of the EU Member States, who are involved in return procedures.[1]

The starting premise of the **REDIAL** Project is that informed horizontal and vertical judicial interactions lead to an effective implementation of the Return Directive. These, also, ensuring, at the same time, respect of the European fundamental rights, as consecrated by the EU Charter of Fundamental Rights (EUCFR), the European Convention of Human Rights (ECHR) and national constitutions. The **REDIAL** Project includes a toolkit made of: a Database comprising national, EU and ECHR landmark judgments on the interpretation and application of the Return Directive. These offer an efficient search engine for over 370 cases (at this stage); national reports showing the added value of national judgments delivered on the application of the Return Directive; European synthesis reports, one for each of the Chapters II-IV of the Return Directive, offering a comprehensive analysis of the legal provisions of the Return Directive, CJEU relevant judgments and case law of Member States; and an annotated Directive with references to the relevant case law of the Court of Justice for each provision. In addition to these tools, the **REDIAL** Project delivers a freely accessible Electronic Journal and offers a blog where academics and judges publish comments on recent jurisprudence and/or legislative amendments.

From a methodological point of view, the **REDIAL** Project relies upon close collaboration between judges and academics from the EU Member States. At the national level, judges are in charge of the selection of landmark judgments on the Return Directive, while academics are responsible for synthesizing their added value in a national report. The jurisprudence is collected in three stages following the structure of the Return Directive. Namely, the **first package** covers the provisions of Chapter II of the Return Directive (Articles 7 to 11) dealing successively with voluntary departure, removal and postponement of removal, return and removal of unaccompanied minors, and entry bans. The **second package** focused on Chapter III of the Return Directive (Articles 12-14) about procedural safeguards. The **third package**, meanwhile, will address Chapter IV (Articles 15-18) on detention for the purpose of removal.

The **REDIAL** Project is run by the Migration Policy Centre (MPC) and the Centre for Judicial Cooperation (CJC) of the European University Institute (EUI), together with the Academic Network for Legal Studies on Immigration and Asylum in Europe known as the 'Odysseus Network' coordinated by the *Université Libre de Bruxelles*. The MPC is in charge of the project's scientific coordination, while the Odysseus Network provides national expertise and its network of contacts throughout the EU, including contacts with judges.

The present issue of the **REDIAL Electronic Journal** is the second of three that will be published in 2016. The **three REDIAL Electronic Journals** deal, in order, with Chapters II, III and IV of the Return Directive. The second edition covers Chapter III of the Return Directive, establishing mandatory **procedural safeguards** to be fulfilled in return proceedings. The Journal offers an overview of national landmark cases on Articles 12, 13 and 14 of the Return Directive and highlights the outcome of judicial interactions in securing procedural safeguards and human rights during return proceedings. The selection of these cases was based on the criteria of successful judicial interactions:

[1] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally-staying third-country nationals, OJ L 348/98, 24.12.2008 (hereinafter Return Directive). The Directive does not apply in Ireland and UK. Denmark did not take part in the adoption of the Directive and is not bound by it under EU law, but decided to implement the Directive as a measure building upon the Schengen acquis in its national law. The associated Schengen countries: Norway, Iceland, Switzerland and Liechtenstein) are bound by the Directive, under their Schengen Association Agreements.

whether direct between national courts and the Court of Justice of the European Union (CJEU); indirect – referring to the CJEU and ECtHR jurisprudence; or interaction among national judgments addressing similar issues. After this short introduction (**I**), the Journal starts by offering a concise summary of the relevant preliminary rulings delivered by the CJEU with regard to procedural safeguards in return proceedings (**II**). All of them imply a direct and/or indirect judicial dialogue with the referring courts and other national courts, on key issues such as: the right to be heard (**1**); the effectiveness of legal remedies (**2**); and the need to secure basic rights pending removal/return (**3**). This part will also evaluate the impact of preliminary rulings on national jurisprudence from the referring Member State, but also from other Member States. The third part (**III**) continues with a comparative analysis of the national courts' assessment of fundamental rights as procedural safeguards in return proceedings. This includes an analysis of the balancing act carried out by national courts between **substantial and procedural rights** with family rights and national security objective **(1 and 2**) and assessing *ex officio* (or not) the respect of **procedural safeguards** by the public authorities (**3**). This section aims to discuss comparatively national jurisprudence on sensitive and difficult topics: family unity for irregular migrants, disclosure of evidence in terrorist or public security related cases, and the obligation of national courts to assess of their own motion the respect of fundamental rights by the competent administrative authorities. It does so for the purpose of evaluating: national judicial compliance with the CJEU's preliminary rulings; judicial developments in the implementation of the Return Directive, as well as identifying areas where national courts have different or even divergent approaches on how judicial scrutiny should be carried out over the implementation of the Return Directive. This last section will illustrate the essential role of national courts in the clarification of the scope and meaning of Articles 12-14 of the Return Directive.

The **REDIAL** Journal should hopefully be of interest to national and European judges specialised in migration law. However, it is also relevant to: national administrations in charge of return procedures; NGOs defending third-country nationals; specialized lawyers; and finally the European Commission and the Court of Justice of the EU.

II. European landmark cases and their impact on national jurisprudence

1. The Right to be heard during return proceedings

Article 41 EUCFR guarantees the right of every person to be heard before being subject to any individual measure that would affect him/her adversely. The Return Directive provides a detailed list of procedural safeguards granted to the third-country nationals (TCNs) subject to return-related decisions (*i.e.* return decisions, entry-ban decisions, decisions on removal, decisions on detention, etc.).[2] However, the Return Directive does not expressly refer to the right to be heard of those third-country nationals before the adoption of any such decision, nor does it specify the consequences of an infringement of this fundamental right. *Article 12 RD* expressly refers to the duty to state reasons in fact and in law, which, in practice, cannot be effectively fulfilled if the competent authority did not previously hear the TCN. On the occasion of several preliminary rulings,[3] the CJEU deduced a right to be heard for the TCNs subject to return-related decision, and established also the legal consequences of its violation within the framework of the return procedures.

It should be noted that the CJEU held that Article 41 EUCFR applies only to the EU institutions, bodies, offices and agencies of the European Union. However, the Member States are obliged to respect the right to be heard when acting within the scope of EU law, on the basis of the general principles of the rights of defence.[4]

As a counterpart to the right to be heard, the TCN is required to co-operate with the competent authorities and to provide them with all relevant information, in particular all information against a return decision being issued.[5] The CJEU, then, admitted that Member States can place restrictions on the rights of the defence. It did so since these restrictions do not constitute unfettered prerogatives. But the restrictions must correspond to the objectives of general interest pursued by the measure in question. They, likewise, must not involve, with regard to the objectives pursued, a disproportionate and intolerable interference infringing upon the very substance of guaranteed rights.

In situations of combined decisions (*e.g.* ending legal stay and return decision), the CJEU clarified that Member States are not obliged to hear the third-country national before the adoption of the return decision, as long as the individual has been effectively heard during the previous administrative procedure (*e.g.* asylum proceedings).[6] Mindful of the objective of the Return Directive, the Court held that the right to be heard should not be used for unduly prolonging return procedures.[7]

Finally, even if the right to be heard has been breached, it would render a return-related decision invalid, '*only insofar as the outcome of the procedure would have been different if the right was respected.*'[8] In another case, the Court emphasised the impact a violation of the right to be heard

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[2] See, in particular Articles 12-16 RD.

[3] C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014; G&R C-383/13 PPU, EU:C:2013:533.

[4] 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.

[5] C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014 etc.

[6] In *Mukarubega* the TCN was heard during the asylum proceedings and while in public custody; the adoption of the first return decision was taken at the same time as the refusal of the residence permit; while the second return decision was adopted at the same time as the rejection of the asylum application, without informing the applicant that following the rejection of the asylum application, the return decision could be taken at the same time.

[7] *Mukarubega*, para. 71.

[8] G&R C-383/13 PPU, EU:C:2013:533. 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.

would have on other administrative duties. National courts have to be aware that *'where the person concerned is not afforded the opportunity to be heard before the adoption of an initial decision […] compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision.*'[9]

In the following paragraphs, we will offer a brief overview of the preliminary references decided by the CJEU on the legal nature, scope and content of the right to be heard in return proceedings. It should be noted that these preliminary references came from French first instance courts. While the preliminary references were pending, the French supreme administrative court (Conseil d'Etat) had also delivered a decision on similar issues. The cases will be presented in chronological order, followed by conclusions on the reasons, object and effects of the preliminary references.

Mukarubega – C-166/13, Judgment of 5 November 2014, ECLI:EU:C:2014:2336

National Court requesting a preliminary ruling: Administrative Tribunal of Melun (France)

Factual context: a Rwandan national, after being denied asylum in France, was refused permission to stay and was placed in administrative detention pending removal. Before the Administrative Tribunal, the applicant claimed that her right to be heard had been infringed due to a lack of opportunity in presenting specific observations before the adoption of the first return decision. The first return decision had been taken at the same time as the refusal of a residence permit.

Legal provisions at issue: interpretation of Articles 47 and 48 EUCFR (the right to an effective remedy and right of defence) as well as Article 41 of the EUCFR (right to good administration) within the framework of return proceedings following rejections of asylum applications. In particular, must the right to be heard, as it applies within the meaning of Article 6 of the Return Directive, be interpreted as admitting the non-hearing of a third-country national subject to a return decision (the national authority contemplating the adoption of such a decision)? Given that the person being processed had already been heard in the course of the procedure for international protection.

Questions addressed by the national court: the Administrative Tribunal of Melun decided to stay the return proceedings and to refer the following questions to the Court of Justice of the European Union (CJEU):

'1. Is the right to be heard in all proceedings, which is an integral part of the fundamental principle of respect for the rights of the defence and is furthermore enshrined in Article 41 of [the Charter], to be interpreted as requiring that, where the administrative authorities intend to issue a return decision in respect of an illegally staying foreign national, irrespective of whether or not that return decision is the result of a refusal of a residence permit, and in particular in a situation where there is a risk of absconding, the authorities must enable the interested party to present observations?

2. Does the suspensive effect of the judicial proceedings before the administrative court mean that it is possible to dispense with the prior right of an illegally staying foreign national to make his observations known with regard to the proposed removal measure to be imposed on him?'

AG Opinion: M. WATHELET, 25 June 2014

[9] Case C-417/11 P, *Council v. Bamba*, ECLI:EU:C:2012:718, para. 51.

Boudjlida – C-249/13, Judgment of 11 December 2014, ECLI:EU:C:2014:2431

National Court requesting a preliminary ruling: Administrative Tribunal of Pau (France)

Factual context: After having stayed legally in France for the duration of his studies, at the end of 2012 Mr Khaled Boudjlida's stay became illegal, since he had not applied for the renewal of his last residence permit. In early 2013, after he made an application for registration as a self-employed businessman, Mr Boudjlida was invited by the police to discuss that application, the circumstances of his arrival in France, the conditions of his residence as a student, details of his family and the possibility of his departure from France. On the same date, the Prefect of Pyrénées-Atlantiques issued a decision imposing on Mr Boudjlida the obligation to leave France, granting him a period of 30 days for his voluntary return to Algeria. Mr Boudjlida challenged that decision before the French courts. Mr Boudjlida claims that he did not, before the adoption of the return decision, have the right to be heard effectively. He claims that he was not in a position to analyse all the information used in court against him, since the French authorities did not disclose that information to him beforehand and did not allow him an adequate period for reflection before the hearing. Further, the length of his interview by the police (30 minutes) was argued to be too short, particularly given that he did not have the benefit of legal assistance.

Legal provisions at issue: interpretation of Article 41 CFR (right to be heard) in the context of a return decision to be issued by competent authorities against an illegally staying third-country national.

Questions addressed by the national court: The Administrative Tribunal of Pau before which the case was brought asked the Court of Justice to clarify the extent of the right to be heard.

In particular, does the foreign national concerned have the right 'to be put in a position to analyse all the information relied on against him as regards his right of residence, to express his point of view, in writing or orally, with a sufficient period of reflection, and to enjoy the assistance of counsel of his own choosing? If necessary, must the extent of that right be adjusted or limited in view of the general interest objective of the return policy set out in the Return Directive? If so, what adjustments or limitations must be made, and on the basis of what criteria should they be established?'

Halifa, France, Council of States, No. 370515, 4 June 2014

The above-mentioned CJEU cases C-166/13 and C-249/13 were pending at the time of the French Council of State's decision. Both preliminary references were addressed by first instance administrative courts. Without waiting for the outcome of these questions, the French **Council of State** decided on the present case, assuming that enough indications were given in previous case-law of CJEU to solve the issue at stake.

Core issues

Return decision – Art. 41 EU Charter – Right to be heard

The case refers to the Return Directive and the potential violation of the right to be heard. Applicants claimed that the return decision taken subsequently was in breach of their rights and that it was, therefore, unlawful.

Facts of the case

The issue at stake was to determine if administrative authorities could issue a return decision together with a decision rejecting an application for a residence permit. In this particular case, the applicant was facing a return decision without being in a position to make specific observations.

Reasoning of the national court

The reasoning of the Council of State is based on case C-383/13, *G. and R.* (explicitly referred to by the Public Rapporteur in his opinion). As pointed out in §38 of the Judgment: '*it must be noted that, according to European Union law, 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.*'[10] It was, therefore, considered that by applying for a residence permit, the applicant should have known that a potential consequence, in the case of refusal, would be that the authorities might take a return decision.

The case was linked to the right to be heard in administrative proceedings, which is expressed in Article 41 of the EUCFR. The Council of State, nevertheless, excluded such a provision as the relevant legal source in the present case, being not applicable to administrative decisions taken by *national administrations*, even if they act in the context of EU law. It, rather, relied on the intrinsic value of the right to be heard, as one of the general principles of EU law applicable to both EU and national institutions.

Conclusions of the CJEU in Mukarubega (C-166/13) and Boudjlida (C-249/13)

1. The Return Directive does not specify whether, and under what conditions, observance of the right to be heard is to be ensured, nor does it specify the consequences of an infringement of that right; however the right to be heard of TCNs is consecrated by the **general principle** of respect for the rights of the defence.
2. Once the competent national authorities have determined that a third-country national is staying illegally in the national territory, they have to rely on provisions in national law explicitly providing for an obligation to leave the national territory and ensure that the person concerned is properly heard within the procedure relating to his/her residence application or, as the case may be, on the illegality of his/her stay. The conditions for the exercise of the right to be heard are governed by national law. The principles of equivalence and effectiveness oblige the Member State to adopt the same rules to which individuals in comparable situations under national law are subject. They must not make it impossible or excessively difficult to exercise the right to be heard.
3. The **purpose of the right to be heard** before the adoption of a return decision is to enable the person concerned to **express their point of view on the legality of his stay** and on **whether any of the exceptions to the general rule** (on the issuance of a return decision) **are applicable**. Similarly, under EU law, the national authorities must take due account of the *best interests of the child, family life and the state of health* of the third-country national concerned and respect the *principle of non-refoulement.*
4. Lastly, the right to be heard, as part of the general principle of EU law of the rights of defence, require the competent national authorities to enable the person concerned **to express his or her point of view on the detailed arrangements for his return** (such as the period allowed for departure and the question of whether return is to be voluntary or coerced), with the possibility that the period for voluntary departure may be extended according to the specific circumstances of the individual case. These might include the length of stay, children attending school and other family and social links.

[10] 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, para. 31; Case C-288/96 *Germany v. Commission* [2000] ECR I-8237, para. 101; Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware v. Council* [2009] ECR I-9147, para. 94; Case C-96/*11 P Storck v. OHIM* [2012] ECR I-0000, para. 80.

5. Where the national authorities are contemplating the simultaneous adoption of a decision determining a stay to be illegal and a return decision, those authorities need **not necessarily hear** the person concerned specifically on the return decision. At least, they need not had the person already had the opportunity of effectively presenting his/her point of view on the question of whether the stay was illegal and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision;
6. A competent national authority is **not required to warn a third-country national** that it is contemplating adopting a return decision with respect to that national, or to disclose to the said national the information that it intends to rely on to justify that decision. Nor does it need to allow for a period of reflection before seeking his or her observations. EU law does not establish any such detailed arrangements for an adversarial procedure.
7. It is, therefore, sufficient if the person concerned has the opportunity effectively to submit his point of view on the subject of the illegality of his stay and the reasons that might justify the non-adoption of a return decision. An exception must, however, be admitted where a third-country national could not reasonably suspect what evidence might be relied on against them or would objectively only be able to respond after certain checks or steps were taken with a view, in particular, to obtaining supporting documents. Further, the Court states that return decisions may always be **challenged by legal action**, so that the protection and defence of the person concerned, against a decision that adversely affects him or her, is ensured.

Judicial dialogue and its outcome

By anticipating CJEU case law, the **French Council of State** reached the conclusion that there was no obligation for the authorities to hear the person concerned before issuing a return decision, at least when the latter is issued together with a decision rejecting an application for a residence permit. As to Article 41 EUCFR, the Council of State broadly invoked the right to be heard as a general principle applicable in cases falling within the scope of the Return Directive. Subsequently, the CJEU clarified the scope of application of Article 41 CFR: '*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*.'[11]

As for the impact of CJEU case law on the judicial approaches and jurisprudence of national courts from the Member States, the findings in the cases *Mukarubega* and *Boudjlida* led to the following developments at the national level:

The **Belgian Council of Alien Law Litigation** (CALL) consistently applies the right to be heard as a general principle of EU law. Relying on cases C-349/07, *Sopropé and* C-277/11, *M.M.,* it underlines '*the importance of the right to be heard and its very wide working sphere in the EU legal order*' (e.g. CALL, 126.219 of 25 June 2014).[12] It has also consistently held that irregular migrants have to be heard in relation to each of the return-related decisions, which the administration adopts. For instance, the TCN must be heard not only as regards the withdrawal of the right to stay (CALL, 230.293/24.02.2015), but also as regards the order to leave the territory (CALL, 232.758/29.10.2015) and he or she must have the chance to express their view on the entry ban, adopted together with the

[11] C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44.

[12] This jurisprudence also led to substantial modifications in the Aliens Office's practices. 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.

removal order (CALL, 233.257/15.12.2015).[13] See the Belgian synthesis report on the second package of the Return Directive.

As regards the connection between the right to be heard and the duty to state reasons, the **Administrative Court of first Instance of Thessaloniki** (**Greece**) often refers to the *Mukarubeja* and *Boudjilida* judgments of CJEU in its reasoning. It stresses 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. In that sense, the Court ordered the public authorities to pay due attention to the observations submitted by the person concerned. The public authorities were required to examine carefully and impartially all the relevant aspects of the individual case and to give a detailed statement of reasons for their decision (*case 717/2015*, provided by the Greek Report). A strong connection between the right to be heard and the administration's obligation to state reasons in facts is also noted by other national courts: **Austria**, **Belgium**, **Bulgaria**, **Lithuania**, and **Slovenia**. The purpose of the personal interview is to ensure that 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, then, logically justified and also supported by CJEU jurisprudence.

As regards the content of the right to be heard, the **Dutch Council of State** held, post-*Boudjlida*, that the authorities have to hear the third-country national before taking a return decision, on four aspects in particular: *1) the legality of the person's stay; 2) the possible exceptions provided by Article 6 RD; 3) the personal circumstances enumerated in Article 5 RD; and 4) the modalities/arrangement of return* (Council of State 20 November 2015, 201407197/1/V3). The right to be heard with regard to the issuing of return decisions can be guaranteed during the same hearing that is held before deciding on detention, seeing 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 (Council of State, 5 November 2012, 201208138/1/V3). This is not the case with regard to the issuing of an entry ban. There a separate hearing needs to be held, or specific questions with regard to the issuance of an entry ban need to have been posed to the third-country national (Council of State, 21 December 2012, 201205275/1/V3 and 201205900/1/V3). Other national courts, such as those of **Austria**, **Belgium**, **Bulgaria**, **Lithuania**, and **Slovenia,** also closely scrutinize, before adopting return related decisions, whether public authorities have considered the personal and family situation of the individual, the best interests of children, family life and the health of the third-country national.

According to the **Lithuanian Supreme Administrative Court**, there is also the question of the time frame: authorities should not interview the applicant within too short deadlines, deadlines that will make the right to be heard ineffective; competent authorities need to allow the applicant to prepare and gather relevant information. Lithuanian courts also expressly held the obligation of the administration to hear irregular migrants before the adoption of any return-related decisions, regardless of whether they are of a coercive nature or not.

As regards the obligation to hear the TCN, the **Supreme Administrative Court** of **Lithuania,** for instance, established a positive obligation for the public authorities to hear the TCN on aspects related to his/her family life; children (including both biological children and children of the partner); and any criminal record (causes, and conduct following up criminal conviction). SAC, *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). Similarly, the **Bulgarian Supreme Administrative Court** held that the public authorities should hear the TCN as regards: the fact that the TCN spent his entire adult life in Bulgaria; had ties with his country of

[13] The CALL statements go, therefore, further in terms of guarantees than the minimum safeguards established by the CJEU in its case law.

origin; his conduct during his stay in Bulgaria; and the ties and relationships he had established in Bulgaria etc. (SAC, *Michael Evgenevich Gladkih v. the Director of Regional Directorate of Border Police – Smolyan*).

As for the applicable legal source, some national courts prefer to rely on the national constitutional principles that guarantee the right to be heard, instead of referring to the EU Charter of Fundamental Rights, since the guarantees ensured by the domestic constitutional principles are found sufficient. 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 of the Charter of Fundamental Rights is addressed to EU institutions and bodies alone, and cannot be invoked, therefore, against domestic authorities (Federal Administrative Court, Decision of 27.10.2015, 1 C 33.14). This was also the conclusion of the **French Council of State** (see above), though it considered there was no practical difference between the invocation of Article 41 CFR and the right to be heard as a general principle of EU law.

By contrast, **Italian** legislation and jurisprudence seem not to recognize a right to be heard before the preliminary (administrative) phase in which the expulsion decision is adopted by the Prefect. In practice, the Italian authorities hear the foreign national but, failing a specific legal provision, this interview is very limited. What is more, in most cases there is no interpreter, so the third-country national does not necessarily correctly understand the situation. This practice is the result of the limited voluntary departure measure conferred by Italian authorities, which in most cases of irregular stay, finds a risk of absconding, without hearing the TCN (See Italian Report).

2. The right to effective legal remedy (Article 13 RD)

Two provisions of Article 13 RD have so far been subject to sensitive legal and judicial debate: the nature of the body before which the TCN can complain; and the suspensive effect of the legal remedy.

As provided by Article 13 RD, any irregularly staying third-country nationals is entitled to challenge all types of decisions adopted during the return procedure through available and effective remedies. This notably implies the right to review decisions related to return before a competent judicial/administrative authority or 'another competent body composed of members who are impartial and who enjoy safeguards of independence'. The second paragraph of Article 13 RD provides that this court or body shall be able to temporarily suspend the enforcement of the return-related decision, unless a temporary suspension is already applicable under national legislation. Therefore, Article 13(2) RD does not establish an automatic suspensive effect. The TCN concerned can request the suspension, the court can review it and establish whether to grant it or not.

In *Abdida*,[14] the CJEU required that the remedy provided in Article 13 RD must be determined in a manner that is consistent with Article 47 EUCFR, which recognises a right to an effective judicial remedy. Since Article 13 RD does not exclusively grant a right to an effective judicial remedy, a domestic legislation that implemented this provision by way of providing a legal remedy only before an administrative body might be considered to be in violation of Article 47 EUCFR.[15]

[14] See para. 45.

[15] CJEU, para. 45: 'None the less, the characteristics of such a remedy [Article 13 Return Directive] must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection (see, to that effect, judgments in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 59), and provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.' See in this regard the **Austrian** High Administrative Court: in compliance with Art. 47 CFR, legal aid in the return procedure is obligatory even if it is not foreseen by the European and/or national legislation (Ro 2015/21/0032, 3 September 2015). The same applies to the competent authority that needs to be impartial and independent in the meaning of Article 47 CFR and 13 RD (Ro 2011/22/0097, 31 May 2011).

As regards the suspensive effect of a remedy, Article 13(2) RD recognises a margin of discretion to Member States over whether to recognise suspensive effect automatically or by individual application. ECtHR case-law requires automatic suspensive effect in cases in which there are substantial grounds for believing that the person, if returned, will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR:[16] the risk of torture or inhuman or degrading treatment upon return. Following this jurisprudence of the ECtHR, the CJEU established in the *Abdida* case that Article 13 RD, read in conjunction with Articles 5 and 9 of the Return Directive, and Articles 19(2) and 47 EUCFR oblige the reviewing body to grant automatic suspensive effect to the appeal/remedy in case of a risk of *refoulement* to a country where he/she will be exposed to ill-treatment.

In conclusion, though medical cases cannot be interpreted as falling under the ambit of subsidiary protection, the CJEU recognised that such cases may fall under the ambit of Articles 5 and 9 of the Return Directive and, thus, third-country nationals should be protected against removal/return to the country of origin by Articles 19(2) and 47 EUCFR. A TCN suffering from a serious illness, whose return to the country of origin might expose him or her to a risk of grave and irreversible deterioration in terms of state of health should benefit from an effective remedy with automatic suspensive effect for the return/removal procedure.[17]

Moussa Abdida – C-562/13, Judgment of 18 December 2014, ECLI:EU:C:2014:2453

National Court requesting a preliminary ruling: Labour Court of Brussels (Belgium)

Factual context: Mr. *Abdida*, a Nigerian national diagnosed with HIV, applied for leave to remain in Belgium for medical reasons. In line with the Belgian law transposing the Qualification Directive and settled practice, the State refused to issue an order for him to leave the country. When appealing against this decision, Mr. *Abdida* was not granted with an appeal having suspensive effect. In addition, during the litigation procedure, Mr. *Abdida* had his basic social security and medical care withdrawn. He complained at the lack of suspensive remedies and social rights pending litigation, which determined the Brussels Employment Court to refer two questions to the CJEU.

Legal provisions at issue: Articles 13 and 14 RD; Articles 3 and 13 ECHR; Articles 19(1) and 47 EUCFR (in addition, Articles 1, 3, 4, 19(2) which were relevant as regards the entitlement to social rights pending removal.

Questions addressed by the national court: In accordance with International and EU law, should Member States provide for a remedy with suspensive effect, in respect of the administrative decision, refusing leave to remain and ordering the person to leave the territory to an applicant who 'suffers from an illness which is of such a kind as to entail a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no adequate treatment for that illness in his country of origin'?

AG Opinion: Y. BOT, 4 September 2014

Conclusion of the CJEU: First, the CJEU restated that TCNs suffering from serious illness cannot be recognised refugee or subsidiary protection status under the Qualification Directive merely because they will not benefit of appropriate treatment in the country of origin. The CJEU then went on to consider whether an assessment of prohibition on *refoulement* is required under the Return Directive. Citing the ECtHR jurisprudence in *N v. UK*, the Court affirmed that, in exceptional cases, the removal of a third-country national suffering from a serious illness to a country in which appropriate treatment is not available may infringe the principle of *non-refoulement*. On the basis of

[16] See, *inter alia*, ECtHR, judgments in *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012 etc.

[17] C-562/13, *Abdida*, ECLI:EU:C:2014:2453, 18 December 2014.

Article 52(3) EUCFR, the standards of protection of human rights which have an equivalent in the EU Charter should also be read in the content of corresponding EUCFR rights. Therefore the interpretation of Article 3 ECHR by the ECtHR in *N v. UK*, should be included under the ambit of Article 19(2) EUCFR and Article 5 RD. In cases where the return of a TCN may lead to serious and irreparable harm, the Court submits '*that a third-country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of' non-refoulement in both the Return Directive and the Charter (Articles 19(2) and 47)*. (§ 50)

Even when national legislation does not automatically recognise suspensive effect to an appeal challenging a return decision, this kind of effect should be granted by the courts if removal might expose the applicant to a serious risk of grave and irreversible deterioration in his or her state of health.

Additionally, where an application raises these issues, Member States are required to provide under Article 14 (1)(b) RD 'for the basic needs of a third-country national suffering from a serious illness where such a person lacks the means to make such provision for himself,' though they remain free to determine the form in which provisions for the basic needs of the third-country national concerned are to be made (§ 60-62).

Follow-up: Belgian jurisprudence

Following the CJEU preliminary ruling in *Abdida*, the **Belgian** Council of Aliens Law Litigation (CALL) changed its jurisprudence. The Council recognised an automatic suspensive effect to appeals against orders 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). A suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium (CALL, 159.427, 28 December 2015). See Belgian report.

Already since the *M.S.S. v. Belgium and Greece* ruling from the ECtHR, the CALL grants in practice an automatic suspensive effect to requests on suspension against orders to leave the territory, provided that such a request is introduced within the legal time-limit to introduce a request for annulment. Whilst the Constitutional Court (1/2014, 16 January 2014) welcomed this jurisprudence, it also stressed the need for a legislative amendment codifying this suspensive effect *de facto* recognised by the jurisprudence under the legal provision setting out the right to an effective remedy.

On 10 April 2014, a legislative amendment was brought to the Aliens Law, whereby an automatic suspensive effect was recognised to the request for suspension; the later must be introduced within ten days from the notification of the order to leave the territory. Before its entry into force, another Belgian Labour Court (Liège) addressed a preliminary question to the CJEU on the effectiveness of the remedy of the appeal in multiple asylum applications proceedings. The Court answered in *Tall* (C-239/14) that, yes, Member States had discretion in choosing to confer a full examination and suspensive appeal in accelerated asylum procedure, where the applicant submits new asylum application without presenting new evidence. However, regardless of the type and number of asylum applications submitted, the follow-up return proceedings need to offer an appeal with suspensory effect, 'when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, in the meaning of Articles 19(2) and 47 EUCFR.'

Judicial dialogue and its outcome

The issue of the suspensive effect of appeals in asylum and return procedures has been the subject of a fruitful judicial dialogue between the Belgian Labour Courts and the CJEU. This ultimately affected not only on the jurisprudence of these courts, but also on the practice of the **Council of Aliens' Law Litigation** (CALL) and was endorsed by the **Belgian Constitutional Court**. In addition to consistent judicial interpretation and adaptation, vertical and horizontal judicial dialogue also led to legislative amendments. Following the explicit request of the Belgian Constitutional Court, the legislator was forced to codify the suspensive effect of remedies in legislative provisions. The repeated preliminary references sent by the Belgian Labour Courts, asking for the recognition of minimum uniform procedural guarantees for appeals in administrative proceedings, have also forced the CJEU to re-consider its previous case law *Samba Diouf*, C-69/10[18] and *M'Bodj*, C-542/13, so as to reinforce the status of Article 47 EUCFR, especially when Article 19(2) EUCFR is at stake, and to ensure compliance with the ECtHR jurisprudence on exceptional *non-refoulement* of seriously ill TCNs (*N v. UK*) and the suspensive effect of remedies (*Hirsi Jamaa and Others v. Italy*).

On 22 March 2016, the **Supreme Court** of **Estonia** found that in cases where there is a need to protect a person´s private and family life, the suspension of the removal order might also be an appropriate measure to ensure the efficiency of a legal remedy. In case of the expulsion of a complainant to a State, where he/she does not have any contacts and a place to live, his/her participation in the proceedings is essential for ensuring the respect of the complainant's private and family life. However, in its reasoning, the Court neither referred to the Return Directive nor to the corresponding case law of the CJEU on Article 13 or 9 RD. Instead, it cited abundant case law from the ECtHR about Article 13 ECHR and emphasised the need for the appeal to have a suspensive effect when the execution of the measure concerned would run counter to the provisions of the Convention and that the effects would be potentially irreversible for the applicant. In its judgment, the Supreme Court of Estonia went further than the minimum requirements established by the CJEU. While *Abdida* is a case where the violation of a non-derogeable right (risk of ill-treatments in a medical case) was at issue, in this case, the relative human right of family life was the matter at hand. Following a proportionality assessment, the Court found that the immediate removal of the TCN concerned would entail a disproportionate restriction, amounting to an almost absolute denial of the right to family life. This was held to be by the domestic court precluded by the ECHR.

Other national courts did not wait for the CJEU's judgments in *Abdida* and *Tall;* they opted for a proactive approach and offered suspensive remedies for foreigners facing expulsion, either as a rule or under specific circumstances:

The **Czech Supreme Administrative Court** grants, in practice, suspensive effect (even to cassation proceedings) 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 interests (SAC 1 Azs 160/2014-25, 19 November 2014). According to the **Czech Constitutional Court**, a judicial review should be afforded to applicants when the suspensive effect of appeals in removal proceedings is denied, even though at first, the Senate of the Court claimed it was a question of preliminary nature, unlikely to be reviewed by administrative courts. (CC, I.ÚS 145/09, 21 February 2012).

In **Italy**, a judicial practice emerged in the absence of explicit provisions from the Consolidated Text on Immigration regarding the suspension of expulsion orders during appeal proceedings. Referring to a previous judgment from the **Constitutional Court** (CC, 161/2000), some lower courts

[18] The CJEU considered, indeed, that Member States were not required by EU Law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure. This does not deny the applicant for asylum the right to an effective remedy, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in any action brought against the final decision rejecting the application.

(*e.g.* Court of Aosta, 17 October 2012) admitted the possibility of suspending the execution of removal orders 'under special and exceptional circumstances' after having identified 'the most suitable instruments, within the Italian legal system' to suspend the enforcement of the challenged order. 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. This was so as not to undermine the legal prerequisite for pre-removal detention or the effectiveness of ongoing administrative procedures (SC, 11442, 23 May 2014 and 15414, 5 December 2001). That being said, since the judgment in *Khailifa and Others v. Italy*, the ECtHR made it clear that a general exclusion of the suspensive effect of remedies against expulsion is contrary to Article 13 ECHR and does not satisfy the criterion established in *De Souza Ribeiro*.[19]

However, even where the suspensive effect of remedies is provided for by the Law, it is be up to national courts to establish whether the legal requirements are met in each individual case, before effectively suspending an order to leave the territory. While in **Lithuania** suspension can be granted at any stage of the procedure, the adoption of *interim measures* is subject to a prior assessment by the courts on whether the applicant has sufficient grounds to claim for suspension, notably alleging strong social, family or economic ties and relations with the country (SAC, AS822-768/2013, 9 October 2013). In **Slovenia**, conditions for issuing *interim measures* (amounting to suspension of the order to leave the territory by the courts) are rather strict: the applicant must show that the execution of the return decision would cause damage to the applicant, which would be difficult to repair; the court must, through the principle of proportionality, take into account the protection of general interests. On the issues 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 **Slovenian Administrative Court**.

3. The requirement of ensuring the basic rights of irregular TCNs pending return/removal (Article 14 RD)

The last Article of Chapter III RD on procedural safeguards covers third-country nationals whose removal has been formally or *de facto* postponed (Article 9 RD - type of situations). It also deals with those who have been granted a voluntary departure period. Article 14 RD requires the Member States to ensure a list of minimum basic rights: *family unity; emergency health care and essential treatment of illness; access to education; and the special needs of vulnerable persons to be taken into account*. Although Article 14(1) RD refers to these as principles to be taken into account, the CJEU clarified in *Abdida* that these should be understood as 'requirements' and not mere principles (para. 60).

3.1 Access to emergency health care and essential treatment: judicial dialogue and its outcomes

Following preliminary questions addressed by the **Brussels Labour Court** to the CJEU, the substantive and temporal scope of access to medical care and social assistance rights provided by Article 14 RD was clarified. In the *Abdida* case, the CJEU held that a seriously ill TCN keeps his/her right to medical and social assistance pending the examination of the appeal against the refusal of a permit to stay for medical reasons. Therefore, access to essential health care cannot be made dependent on the payment of fees. Furthermore, in order to ensure emergency health care and essential treatment of illness under Article 14(1)(b) RD, Member States are required to concomitantly ensure other basic needs of the third-country national concerned (para.60). The precise means and forms of securing access to these other basic social needs were left by the CJEU to the discretion of the Member States.

[19] The ECtHR stated in this case that the effectiveness of the remedy for the purposes of Article 13 required imperatively that the complaint should be subject to close and independent scrutiny and that the remedy should have automatic suspensive effect, in respect of: (a) complaints concerning a removal measure entailing a real risk of treatment contrary to Article 3 and/or of a violation of the person's right to life safeguarded by Article 2 of the Convention; and (b) complaints under Article 4 of Protocol No. 4.

Following the positive answer of the CJEU, various cases emanating from **Belgian Labour Tribunals** confirmed that seriously ill foreigners keep their right to social assistance pending the examination of their appeal before the CALL against the refusal of a permit to stay for medical reasons. The introduction of such appeals is not on their own a sufficient condition to keep social benefits pending the appeal. Serious illness must also be shown.[20]

On the other hand, in the **Netherlands**, the preliminary ruling in *Abdida*, though cited by applicants, has not led to the desired change in jurisprudence. The preliminary ruling in *Abdida* was mostly relied upon by TCNs in order to challenge the judgments of the **Dutch Council of State**, which conditions the access to shelter, food and clothing to the TCN's cooperating in his/her return. The Dutch practice shows an endeavour to ensure that the recognition of access to social benefits does not endanger the objective of the Return Directive. The **Dutch Council of State** and **Central Board of Appeals** subjected the provision of shelter and basic means of subsistence of irregular migrants to the condition that TCNs cooperate in their return. This duty is not expressly provided by national legislation, but it 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. This prioritizes the objective of ensuring an effective return procedure to ensuring the protection of the fundamental rights of the migrants.[21]

It is interesting to note that, while there has been a lot of litigation concerning the social rights of irregular 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 EUCFR). 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 was 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.[22]

3.2 Access to education

Certain national courts have shown particular consideration for 'the best interests of the child' during voluntary departure and postponement of removal: access to education being interpreted as a primordial aspect of the best interests of children. Citing relevant EU legislation and jurisprudence, 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. Therefore, access to education was considered not only to be a principle, but a minimum human right, which, alongside the non-derogeable rights or *de facto* or technical reasons, can lead to postponement of removal (Article 9 RD).

[20] See more on this line of Belgian jurisprudence in the Belgian Report.

[21] 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.

[22] 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.

III. National Courts' Assessment of Fundamental Rights as procedural safeguards in return proceedings: a comparative analysis

1. Family unity within the ambit of the Return Directive based procedural safeguards

Article 14 of the Return Directive refers to family unity as a basic principle that should be respected by the competent national authorities during the voluntary departure period and postponement of removal of the third country nationals concerned. However, 'family unity' is a more general principle, which, according to Article 5(1)(b) RD, should be respected in the implementation of all Return Directive provisions. The protection of family unity is then restated in other specific provisions of the Directive, as grounds for the prolongation of the voluntary departure period (Article 7(2)), as a pre-requisite when returning minors (Article 10), and, also within the ambit of the detention of irregular migrants (Article 17). Furthermore, 'family unity' is a fundamental right enshrined in the two European bill of rights: ECHR (Article 8) and EUCFR (Article 7). Therefore, family unity, as part of the human right to family life, is a fundamental right that should be respected throughout all return-related proceedings, and not only in the limited cases provided by Article 14 RD.

Given the importance the CJEU has allocated to the EU Charter in the implementation of the Return Directive (see the *Mukarubega*, *Boudjlida*, *Abdida* cases), Article 7 EUCFR should be taken into consideration as a common parameter of legality for the national decisions adopted in the implementation of the Return Directive. The necessity of securing effective legal remedies for the violations of the right to family life in expulsion cases has been highlighted also by the ECtHR in a case where the jurisprudence of the **Spanish Constitutional Court** was challenged as being in violation of Articles 8 and 13 ECHR. The **Spanish Constitutional Court** decided that the right to family and private life (although recognised by Article 8 ECHR) 'has no constitutional guarantee under Article 18 (1) of Spanish Constitution' for a third-country national who was going to be expelled on grounds of Article 57 (2) of the Immigration Act 4/2000: expulsion is applicable if an individual is sentenced to a crime punishable by a penalty of more than one year in prison. The third-country national exhausted all Spanish remedies, and then presented a claim to the ECtHR on grounds of infringement by Spain of her right to a private life. In order to avoid a negative judgment against Spain, the Spanish Advocate of the State proposed before the ECtHR to remove the expulsion order and pay her 19.104,73 Euros. Moreover, the Spanish Advocate of State agreed to take ECtHR case law into account before applying Article 57(5) of Immigration Act 4/2000 in future cases. The ECtHR accepted the Spanish declaration.[23]

Some of the domestic REDIAL jurisprudence shows that national courts can be an effective guarantor of family unity and life by way of requesting: the competent authorities to hear the TCN on this particular issue; and an assessment of the individual facts showing that family unity has been taken into consideration in all return-related decision. Furthermore, when national courts have found a violation of the obligation to assess family-related facts, they have annulled the administrative decision. The jurisprudence submitted from the **Bulgarian** and **Lithuanian Supreme Courts** are such examples of domestic courts that have included family unity and life in their usual assessment of the administration's exercise of the duty to state reasons. The ECHR and EU Charter are cited, alongside constitutional provisions, as support for their positivist judicial approach.

The **Supreme Administrative Court** of **Lithuania** held that, even if 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

[23] See the Spanish Report on the second package of the Return Directive.

family-related facts exists 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 the Return Directive. These provisions were interpreted as imposing an obligation upon the competent authorities to take the best interests of the child and of family-life into account. The applicant, the court noted, had lawfully resided in Lithuania for several years; his wife was granted temporary permission to remain in Lithuania until 2017; and both she and their daughter were granted subsidiary protection in Lithuania. The Court, then, ruled that, by issuing a removal order, the administration had failed to properly evaluate the protection of family life. The Court, therefore, quashed the contested administrative decision (*Z. K. v. Kaunas County Police Headquarters*). Article 8 of the ECHR, and previous jurisprudence of the ECtHR finding Lithuania in violation of this article[24] were cited as decisive arguments for the Supreme Court's finding that the absence of a specific hearing on family unity issues violates the administrative duty to state reasons and the right to family life.

The **Bulgarian Supreme Administrative Court** was confronted with a more complex issue. It was asked whether a hearing on family-life issues and the presentation of relevant facts related to family life in return-related decision is sufficient to comply with the principle of good administration, right to family life and the Return Directive. The Court held that, although the competent authorities formally complied with the legal requirements of Article 12(1) Return Directive, these facts were not adequately discussed, nor were any factual or legal conclusions presented on the basis of these facts.

The cases – *Nalbandian* (case No.13704/2010), *Gladkih* (case No.11574/2011), Ibrahim (case No.7103/2011) and *Daminov* (case No.5004/2012) – show that the **Bulgarian Supreme Administrative Court** places considerable weight on the human right to 'family unity and ties'. *In casu*, it required that the competent administrative authorities carry out a more careful examination of the relevant facts. They were to do so especially where there are family ties, health problems, and proof of social integration and especially when the administration plans to adopt irreversible removal orders. For more details on these cases, see the Bulgarian report.

2. Limitations to procedural safeguards based on the national security considerations

The scope of disclosure of evidence in return proceedings and the extent to which the objective of national security can justify derogations from the administrative duty to state reasons in fact and law, and access to fair trial and effective remedy is a sensitive topic. It came up before many domestic courts. **Croatian, Dutch, Lithuanian, Polish, Romanian and UK** courts are just few of the jurisdictions which have dealt with such cases. The **UK Court of Appeal** decided to address preliminary questions to the CJEU in order to clarify the requirements of Article 47 EUCFR as regards disclosure of evidence in cases involving individual threats to national security. In particular, the **UK Court of Appeal** asked the CJEU whether the domestic legislation, which prohibited disclosure of the essence of the grounds invoked by the administration in national security cases, conformed to the principle of effective judicial protection as set out in Article 47 EUCFR.[25]

The CJEU held that public authorities need to prove that State security would in fact be compromised by full disclosure of the evidence to the person concerned. Furthermore, national courts must have the possibility of requesting full disclosure to the person concerned of the grounds on which the contested decision was taken, if it finds the limitation to disclosure was not justified and proportionate. If that authority does not authorise their disclosure, the court must proceed to examine the legality of such a decision on solely the basis of the grounds and evidence which have been disclosed. (para. 63)

[24] *Borisov v. Lithuania*, Appl. No. 9958/04.

[25] C-300/11, *ZZ v. Secretary of State for the Home Department*, ECLI:EU:C:2013:363.

The CJEU unequivocally held that 'it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him.' (para. 68)

The CJEU generally recognises procedural autonomy to the Member States to lay down the applicable procedural rules. However, it also held that national courts have an obligation to balance the requirements of State security with the requirements flowing from the right to effective judicial protection. Furthermore, national courts are the final guarantors of the individual's right to be informed of at least the essence of the grounds of the decision taken by the public authorities. In case this right was violated, national courts have to ensure appropriate remedies for the failure to comply with that obligation to inform.

These conclusions, which have been set by the CJEU in immigration cases, are not consistently followed at the national level. While the **Lithuanian Supreme Court** is fairly cognisant of these rules, though the assessment is done under the ambit of Article 6 ECHR, **Romanian and Polish** courts are sensitive to national security concerns. The Polish first instance courts are in a more difficult position, as they are obliged to follow the approach of the **Polish Supreme Administrative Court**, which favours national security over fundamental rights.

The **Regional Administrative Court of Warsaw** (RAC) decided to follow the guidelines set by the **Polish Supreme Administrative Court**, which are not fully in line with the CJEU conclusions. The RAC 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 national legislation and the Return Directive. In *casu*, the person concerned was not informed, even in outline, 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. In this case, neither the alien nor the lawyer would have had access to relevant documents that were considered to be under the protection of the State's secrets. The RAC relied in its judgement on the Judgement of the Polish Supreme Administrative Court (14 December 2011, 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 confidentially of the documents, though it limits the principles of fair trial and the 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 the removal of the appellant did not entail a risk of violation of the 'basic human rights of the alien', as a result of return to the country of origin. In support of his reasoning, the RAC invoked the CJEU judgment in *Yassin Abdullah Kadi and Al Barakaat International Foundation*, without however mentioning the CJEU's more recent and relevant judgment in C-300, 11, *ZZ*. It concluded that this restriction is in line with Articles 12 and 13 of the Return Directive.

On the other hand, the **Lithuanian Supreme Administrative Court** (case No. A662- 1575/2013, judgment of 21 January 2013) emphasised that a decision cannot be based only on the information which constitutes a state or official secret, i.e. classified information. In cases where the only evidence used to substantiate the case is data held to be state secrets, and which have not been declassified, The Supreme Administrative Court held that it risks violating the right to a fair hearing provided by Article 6 of the ECHR. The Court held that a 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. Much as the CJEU had done in the *ZZ* case, the Court concluded that it is not possible to base the limitation to give factual reasons on the secrecy of the evidentiary materials alone.

3. Assessing (ex officio) the respect of procedural Fundamental Rights by public authorities

Paragraph 1 of Article 13 RD only states that the competent reviewing authority or body 'shall have the power' to review decisions related to return. The Directive does not explicitly require the courts to raise some elements *ex officio* (be they procedural or on substance) unless they have been brought before the court by the parties involved in the proceedings.

Mainly depending on the Member State's legal order and judicial organisation, national judges of several EU countries control *ex officio* all elements of the lawfulness of return-related decisions, irrespective of the arguments of the parties: *e.g.* **Slovenian**, *Welson*, I U 362/2016-7 from 6 April 2016. The **Czech Supreme Administrative Court** requires that the right to a fair trial and respect of private and family life are taken into account by the courts of their own motion: In its judgment no 1 Azs 160/2014 the SAC concluded that:

> 'When reviewing the return decision of the competent administrative authorities, the harm that the applicant might face, is evident from the very nature of such decision. This applies at least in terms of ensuring the right to a fair trial and the right to respect for private life. The Court must take this into account even in a situation when the applicant in his/her application for suspensive effect does not highlight any specific facts of his case nor does he propose any evidence to prove those facts.'

Bulgarian courts, for instance, raise *ex officio* all elements of language, competences or even the adequateness of the legal basis (SAC, *Arab Medjdi v. the Director of Directorate of Migration*, 14207/2012).

By contrast, **Italian** and **Dutch** national courts do not have judicial competence to consider elements of lawfulness *ex officio*, except when it relates to public order considerations: this concept is narrowly understood in the Netherlands as relating to the proper conducting of the procedure, *e.g.* the observance of legal time-frames.[26] Nevertheless, when the prohibition of *non-refoulement* is at stake the requirements are more stringent and the investigative powers of the judge, are extended. In such cases, the **Italian** Justice of the Peace must exercise a 'full and effective review' of the initial decision. This goes beyond a simple administrative assessment on the part of the Justice of Peace: *e.g.* the Justice of Peace 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; SC, 4230.2013, 25 February 2013). The **Dutch** administrative judge must, for his part, conduct 'an extensive and rigorous factual investigation, based on the critical examination of the evidence offered by the parties' and perform duties and investigation powers *ex officio* (*Cass., SU 17318, 2008*) when it comes to legal claims pertaining to the field of Human rights (*Cass., SU, 19393, 2009*, see Italian Report). Concretely, within the area of international protection, the judge has to examine the real danger, claimed by the appellant, of being subject to persecution or to inhuman and degrading treatment if returned to his or her country of origin […].'

With regard to the (procedural) right to be heard – part of the EU general principle of the rights of defence – the CJEU has recently been asked whether EU law requires Member States to consider it as a plea pertaining to public policy. It would, thus, likely be raised by the courts *ex officio*, even in appeals on a point of law. The *Benallal* case (C-161/15), though concerning the free movement of EU workers, deals with this specific question and provides some useful insights about the judicial implementation of the EU principle of the rights of defence at the national level, in the light of the Member States' procedural autonomy.

[26] See NL CONTENTION Report.

Bensada Benallal, C-161/15, judgment of 17 March 2016, ECLI:EU:C:2016:175

National Court requesting a preliminary ruling: Council of State (Belgium)

Factual context: Mr *Bensada Benallal*, a Spanish national was authorised to reside in Belgium as a salaried worker. One year later, the Immigration Office (IO) withdrew the applicant's residence authorisation and ordered him to leave the country. He submitted an application to the Belgian Asylum and Immigration Board, claiming that the IO's decision was vitiated by a deficient statement of reasons. That application being rejected, Mr. *Benallal* brought an administrative appeal on a point of law to the Council of State. He claimed that the Immigration Office ought to have given him the opportunity to set out his views before it adopted its initial decision. The Asylum and Immigration Board should, he argued, have taken the view that the administrative proceedings might have had a different outcome had he been in a better position to put forward his grounds of defence.

Legal provisions at issue: Articles 41 and 51 of the Charter, the right to be heard before expulsion

Questions addressed by the national court: 'Does the general principle of European Union Law upholding the rights of the defence, including the right of an individual to be heard by a national authority before any decision is taken by that authority likely adversely to affect that individual's interests such as a decision ending that individual's residence authorisation, carry in the legal system of the European Union an equivalent importance to that held by the rules of public policy in the Belgian legal system, and does the principle of equivalence require that a plea can be raised for the first time before the Council of State hearing an appeal in cassation based on breach of the general principle of EU law of the right to a fair hearing as is permitted in the national law for pleas based on public policy?'

AG Opinion: P. Mengozzi**,** 13 January 2016 (FR Only)

Conclusion of the CJEU: After having recalled the principles of equivalence (adopting rules that are not less favourable than those governing similar domestic situations) and effectiveness (not making it excessively difficult or impossible to exercise the rights conferred by EU law) applicable in the absence of Union rules on procedural law, the CJEU relied on the procedural autonomy of Member States. With regard to the first aspect (deemed problematic according to the AG), the Court argued that if the Council of State (hearing an appeal on a point of law) traditionally recognizes the right to be heard as a plea based on national public policy, which may be raised for the first time before it, then the principle of equivalence requires that, in the same proceedings, a similar plea alleging infringement of EU law may also be raised for the first time before that same court at the stage of an appeal on a point of law. However, this must be determined by national courts. The CJEU specifies that respect for the rights of the defence (including the right to be heard) is a fundamental principle of EU law – which has to be secured in all proceedings initiated against a person, which is liable to culminate in a measure adversely affecting that person. This must be guaranteed even in the absence of any rules governing the proceedings in question.

Follow-up at national level: not released yet. (See in this regard, L. Leboeuf, *Droit d'être entendu et ordre public. Le rappel du principe d'équivalence*, EDEM Newsletter, March 2016)

Unlike the AG, the CJEU seems quite reluctant to provide clear indications as to whether and how Member States should assess the compliance of the administrative proceedings with the right to be heard. This is true of all stages of the procedure, including cassation complaints. While the practice of the Belgian Council of State is to consider similar procedural infringements as pleas based on national public policy, to be raised *ex officio* by the administrative courts, this is not the case in the Netherlands. Here the observance by the authorities of the right to be heard in return proceedings shall be assessed by the court only if the third-country national explicitly brings forward this argument.

4. Judicial consequences of procedural breaches: the right to be heard

As we have seen above, the CJEU reaffirmed, on several occasions, how the rights of the defence are among the fundamental rights forming an integral part of the EU legal order, formally enshrined in the Charter of Fundamental Rights of the European Union. However, the Court has held that these rights do not constitute 'unfettered prerogatives': not only can they be restricted. They can also be variably applied in relation to the specific circumstances of each particular case. In the Court's view, any infringement of those rights or irregularities committed in the observance of the rights of the defence in the course of the administrative procedure do not necessarily impact the *lawfulness of the decision* taken by the public authorities.

G. and R., C-383/13, Judgment of 10 September 2013, ECLI:EU:C:2013:533

National Court requesting a preliminary ruling: Council of State (*Raad Van State*, Netherlands)[27]

Factual context: G. and R. were placed in detention by the Dutch authorities under a removal procedure. They each lodged judicial actions challenging the decisions to extend their respective detention. By judgments of 22 and 24 May 2013, the Rechtbank Den Haag, court of first instance, found that the rights of the defence had been infringed, but rejected their actions, on the grounds that the infringement in question did not give rise to the annulment of the extension decisions. G and R lodged appeals against those judgments before the Raad van State (Council of State). According to that Court, the rights of the defence were infringed, since the interested parties were not properly heard, under the conditions provided for by national law, before the adoption of the extension decisions. The ruling specifies that, under national law, the courts determine the legal consequences of such an infringement by taking into account the interests served by the extension of detention. Additionally, they are not required to annul a decision on extension of detention adopted without the interested party being heard beforehand, if the interest served by keeping the party concerned in detention is considered to be a priority.

Legal provisions and principles at issue: Article 15(2) RD, right to be heard;

Questions addressed by the national court: in Dutch law, if a national court holds that a detention decision must be annulled, the competent authorities cannot adopt a new decision and the concerned party must be immediately released. The Raad van State, thus, decided to stay the proceedings and to make a request for a preliminary ruling from the Court of Justice: 'can national courts determine the legal consequences of an infringement to the rights of the defence by taking into account the interests served by the extension of detention and, therefore, not annulling an extension decision adopted without the interested party being heard beforehand?';

AG views: M. Wathelet, 23 August 2013

Conclusion of the CJEU: according to the CJEU, even if the referring court has established that the decision on prolongation of detention infringed the right to be heard, this breach does not systematically render the decision unlawful. Accordingly, it does not automatically require the release of the third-country national concerned. Before concluding on the 'unlawfulness' of the decision concerned, the referring court must assess whether, in the light of the actual and legal circumstances of the case, the outcome of the administrative procedure at issue 'could have been

[27] Council of State, 5 July 2013, 201304861/1/T1/V3 and 201305033/1/T1/V3.

different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end'.[28] In that respect, the Court recalls that the directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Likewise, the use of coercive measures should be expressly subject not only to the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and the objectives pursued.

In the **Netherlands**, before the implementation of the Return Directive, violations of procedural requirements in the detention procedure led to a balancing of interests. The seriousness of the violation of a procedural requirement was balanced with the interest that was served by continuing detention; if procedural rules are breached, this will not result in the court automatically declaring the detention unlawful. Instead, the judge will engage in a balancing exercise, through which the judge assesses the seriousness of the breach of procedure and to what extent the detained TCN's interests are infringed, against the wider interests served by the detention. For instance, the use of an unregistered interpreter at the hearing (taking place before detention is ordered) did not result in unlawful detention, as the TCN concerned had not explicitly stated whether and how he had been disadvantaged. In its assessment, the Council did take account of the grounds for detention (*Council of State 3 July 2012, 201204997/1/V3*). The same balancing act was engaged in a case in which a detained TCN had not been able to speak with her lawyer alone. The Council of State considered the grounds for detention on the one hand (*inter alia* her refusal to cooperate), and the fact that she had not made clear whether and what negative consequences she had suffered as a result of the procedural breach; and it concluded that the detention was not unlawful (*Council of State, 9 January 2012, 201111225/1/V3*). This rule applied to all kinds of procedural breaches, including breaches of procedure that taint the arrest prior to the detention (See CONTENTION Dutch report).

Following the CJEU judgment, the **Council of State** has ruled that the principles formulated in *G. and R.* also apply 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 court should determine whether this has deprived the third-country national of the possibility to bring 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 (Council of State, 24 June 2014, 201309226/1/V3).

According to Art. 36 of the Czech Code of Administrative Procedure, which expressly recognises the right of the parties of the proceedings to express their views and to comment on the findings of the administrative authority before the decision is adopted, a violation of this right would be a reason for the court to annul the return decision and the administrative authority would have to adopt a new one. However, so far, the issue of the adequate remedy for violation of the right to be heard has not been decided by Czech courts. Other national courts seem, meanwhile, to have integrated the CJEU's findings in their own jurisprudence regarding legal consequences of procedural flaws:

In **Greece**, 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*, see report).

In **Belgium**, explicit reference is made by the CALL to *G. and R.* to argue that 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*, see Belgian report).

[28] To that effect, inter alia, Case C-301/87 *France v. Commission* [1990] ECR I-307, para. 31; Case C-288/96 *Germany v. Commission* [2000] ECR I-8237, para. 101; Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware v. Council* [2009] ECR I-9147, para. 94; Case C-96/*11 P Storck v. OHIM* [2012] ECR I-0000, para. 80.

IV. Conclusions: successful judicial interactions securing procedural safeguards in return proceedings

The main objective of the Return Directive is to ensure an effective return of those TCNs who are staying illegally in the EU. In ensuring this objective, return proceedings have to ensure respect for a list of procedural safeguards as set out in Articles 12-14 of the Return Directive, which are the result of tough trilateral (Commission, European Parliament, Council) negotiations. As highlighted, especially in the second part of the Journal, these provisions allow a certain margin of discretion to the Member States. This has given rise to legislation, administrative practice and consequently also to national jurisprudence which varies between the EU countries. The increase in litigation aiming at ensuring procedural safeguards and substantive human rights has also developed as a result of the EU Charter, being better known among domestic legal practitioners. As shown by the post-*Abdida* Belgian jurisprudence, Articles 19(2) (*principle of non-refoulement*) and 47 (*right to an effective judicial remedy*) EUCFR have been used to: 1) fill gaps in domestic legislation: all too often there was no provision for a suspensive effect of appeal in return-related cases: and 2) as a parameter of legality for national legislation on access to social benefits pending removal.

The *Mukarubega* and *Boudjlida* preliminary rulings showed that return proceedings are, in practice, closely linked to other migration-related proceedings, such as asylum, or visa/residence procedures. In many cases, the return decision is inextricably linked to the procedure governing requests for international protection status. The return decision following the rejection of the application for asylum or subsidiary protection. The Return Directive allows Member States to combine several different decisions (such as the decision ending legal stay, return, removal and/or entry ban) into one single administrative or judicial decision, as long as the relevant safeguards provided for by the Return Directive are respected.[29] In such circumstance, the question is how to best ensure respect of return-specific procedural safeguards: before each return-related decision, or is it sufficient to be heard during the administrative proceedings preceding one of the combined decisions?

This issue has come up before French courts, in cases where foreign nationals were issued removal orders without being heard before these decisions were handed, they had only been heard previously during asylum or residence-related proceedings. Therefore, these individuals were not heard on specific issues related to the return proceedings. Some French courts objected to this, with some ruling that the public administration had to hear foreigners before issuing removal orders on the basis of the general principle of rights of defence (Tribunal administrative of Lyon). Other French courts considered, meanwhile, that the hearing held in other migration-related proceedings is sufficient if the foreign national had had the opportunity to express his or her views on the legality of their stay. The **Conseil d'Etat** had not yet had the occasion to express its point of view on these divergent judicial opinions, and two first instance courts decided to address preliminary references to the CJEU in order to clarify the content and legal status of the right to be heard in return proceedings.

The *Mukarubega, Boudjlida, G. and R.* cases show the difficulty of striking a fair balance between the right to be heard before the adoption of a return-related decision and the objective of combating illegal immigration which might be jeopardise by unduly prolonged return procedures.

The CJEU preliminary rulings show that the Court took the concerns raised by national governments into account, as well as their assurances that it is sufficient to hear the TCN in an administrative procedure. This need not necessarily be a hearing before the return-related decision, so long as the return decision is taken soon after this administrative hearing. Therefore, if the third-country national has been duly heard within the context of one of the procedures, it is not necessary to be heard again before the adoption of a return decision, provided that both decisions are closely linked in terms of content. The CJEU showed flexibility on the procedural aspects of the hearing: e.g. the type of proceedings in which the hearing should be made; the length of time before a return/removal decision is taken; the length of

[29] See Article 6(6) RD.

time given over to an interview. So a hearing from before the removal order was valid, and also one earlier in the return or migration-related proceedings. However, the CJEU was strict with the content of the hearing. The CJEU set a list of issues related to the personal situation of the foreign national, which have to be part of the hearing preceding the return/removal order.

- The competent national authorities are under an obligation to enable the person concerned to express his or her point of view on the detailed arrangements for their return, such as the period allowed for departure and whether return is to be voluntary or coerced. (para. 51 Mukarubega)
- 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 an individual case (*Boudjlida*, para. 47);
- The TCN must be given the opportunity to express a view on any facts that could justify the authorities from refraining from adopting a particular return-related decision (*Boudjlid*a, 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 two preliminary rulings of the CJEU (*Mukarubega* and *Boudjlida*) clarified most of the contentious issues pending before the French courts, namely: legal status and content of the right to be heard, on which the CJEU set general principles to be followed in all return related proceedings. While on the procedural aspects of the implementation of the right to be heard (e.g. timing and duration), the CJEU delivered an outcome judgment framed on the specific circumstances of the case, without setting general principles. Taking into account the specific facts in *Mukarubega* and *Boudjlida*, an interview of 50, respectively 30 minutes, and an interview held during residence related proceedings (*Boudjlida*), or 3 months before the adoption of the return decision (*Mukarubega*) were considered to fulfill the standards of the right to be heard. However, the CJEU did not generally establish the legitimacy of these procedural aspects, the judgment is limited to the specific circumstances of the case, meaning that in order circumstances, these procedural arrangements of the hearing might not fulfill the standards of the general principle of the rights of defence.

The two preliminary references sent by **French** courts[30] could be seen as an example of successful judicial discourse for the clarification of the legal status of the right to be heard. The CJEU finally ended the legal debate regarding the application of Article 41 EUCFR as a legal basis for the right to be heard. The conclusion was to apply the right to be heard to the Member States acting within the scope of EU law, on the basis of the general principle of the rights to defence, which directly applied in return proceedings, though it is not expressly provided for by the Directive.

[30] *Mukarubega* and *Boudjlida*.

The prudent judicial position of the CJEU has not led to generalised minimalist domestic judicial approaches. The **Belgian** and **Lithuanian** jurisprudence discussed in Part II have unequivocally held that the right to be heard should be ensured before all return-related decisions. National courts in that case went well beyond the minimum safeguards guaranteed by the CJEU's case-law. Another example is the recognition by domestic courts of a suspensive effect of an appeal in removal cases based on the need to respect the right to family life. The Supreme Court of **Estonia**, cited abundant case law from the ECtHR on Article 13 ECHR and emphasised the need for the appeal to have a suspensive effect when the execution of the measure concerned would run counter to the provisions of the Convention and the effects would be potentially irreversible for the applicant. The Court also found that the immediate removal of the TCN concerned would entail a disproportionate restriction, amounting to an almost absolute denial of the right to family life, which is precluded by the ECHR.

While the CJEU preliminary rulings seem to be generally followed in national judicial practice, some national courts continue to have diverse approaches with regard to particularly sensitive issues: in the context of increasing terrorist-related cases, the findings of the CJEU in *ZZ* seem to have been only partially followed. Although not citing the *ZZ* preliminary ruling, the **Lithuanian Supreme Administrative Court** reached a similar result based on an Article 6 ECHR proportionality-based assessment. The **Polish** Supreme Administrative Court, meanwhile, cited the *Kadi* judgment in going against the *ZZ* minimum standards of ensuring disclosure of at least the essential grounds of the administrative decision.[31] The legal consequences of the violation of the right to be heard varies from jurisdiction to jurisdiction: unlike Greek and Belgian Courts which rely upon *G. and R.*, in the Czech Republic, a violation of the right to be heard by the competent authorities can lead to the automatic annulment of the return decision, according to the domestic legislation. It remains to be seen how this provision would be applied by the courts.

Finally, other national courts continue to operate within a purely national legal framework of citations. Articles 12-14 of the Return Directive, EU Charter, or relevant jurisprudence are not mentioned by **Spanish** courts. Only the Spanish legislation implementing the Directive, and occasionally Article 24 (1) of the Spanish Constitution[32] are referred to. Sometimes Article 13 of the ECHR is jointly quoted with Article 24 (1) of the Spanish Constitution. Nevertheless, neither Articles 12, 13 and 14 of the Return Directive, nor Article 47 of the EU Charter have been quoted by Spanish courts. The reason might be that no challenges have been lodged before national courts regarding national legislation or administrative practices; however, this hypothesis does not seem to be tenable given the so-called 'hot returns'[33] in Ceuta and Melilla. The Spanish Law 4/2015 on the Citizen Security introduced an additional provision to the Spanish Immigration Act adding a new concept of 'refusal at the border' to be applied only at Ceuta and Melilla borders with Morocco.[34] Any third-country national irregularly entering Spanish territory through the fences of Ceuta and Melilla will be immediately handed over to the Moroccan authorities. Spanish academics[35] have already pointed out deficiencies in this procedure as regards the right to be heard, the right to receive a written decision, legal assistance, and interpreters. The Spanish Minister of Interior promised a protocol to be applied in such cases, but so far nothing has been done.

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[31] See *supra*, Limitations to procedural safeguards based on national security, public order objectives (2).

[32] '*All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.*'

[33] The term 'hot returns' refers to the illegal expulsion of persons on the spot and without carrying out the legally established procedures or meeting the international obligations.

[34] '1. Foreigners that are detected on the border of the territories of Ceuta or Melilla while trying to overcome the defensive features of the border to irregularly cross the border can be rejected to prevent the foreigners from entering Spain illegally. 2 In any case, the rejection will be realised by respecting the international and human rights regulations of which Spain is a party'.

[35] See Spanish Report.

In spite of the standards developed by the CJEU and ECtHR on procedural safeguards which need to be followed with the Return Directive, there is still considerable discretion left to member states in carrying out return proceedings: not least, hearing procedures, and the legal consequences for violation of the right to be heard. In order to reach similar human-rights standards and procedural safeguards across the Member States horizontal judicial dialogue is one of the primary instruments of judicial and policy coherence. Horizontal judicial dialogue, whether by taking inspiration from foreign domestic judgments, or through exchanges of ideas during meetings and workshops (such as CONTENTION, REDIAL thematic workshops) can lead to adjustments in such inconsistencies and innovative legal developments.