REDIAL PROJECT

National Synthesis Report – Austria

(Draft)

National report on the second package of the Return Directive

Articles 12 to 14 RD – Austria

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I. Article 12: Procedural safeguards

1. Judicial Interactions with European and national Courts

A. Did national courts in your country request for (a) preliminary reference(s) from the CJEU in relation to procedural safeguards and/or principles of good administration in the context of return procedures?

NO

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;
- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the constant jurisprudence developed in your country etc.)

B. Did national courts specifically refer to CJEU rulings (or to the provisions of the Return Directive as interpreted by the Court) in their judgments?

NO

If yes: which cases and which legal effect did they attribute to them?

C. Did national courts refer to the ECHR or the EU Charter in relation to the above mentioned issues?

NO

If yes: in which cases and for what purpose? (*e.g.* the right to be heard as part of the rights of defence)

D. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Article 12 RD?

NO

If yes: please elaborate further on this issue

E. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues regarding procedural safeguards?

NO

If yes: please elaborate further on this issue

2. National Jurisprudence: major trends

A. Do national courts consider *ex officio* the right to be heard by the administration during the return procedure or only if the TCN complains of violations (see, in this regard, the *G & R and Boudjlida* cases)?

Yes

If yes: please elaborate further on this issue

There is a right to be heard in Austrian administrative proceedings on the basis of Art. 24 Act on Procedures before the Administrative Courts[1], Art. 6 ECHR and Art. 47 CFR. Art. 24 Act on Procedures before the Administrative Courts stipulates that a public hearing has to take place upon application or if the Court considers such a public hearing as necessary. Art. 24 (2) 24 Act on Procedures before the Administrative Courts allows some exceptions. The discretion of the Courts, if they hold a public hearing or not, is limited by Art. 6 ECHR and Art. 47 CFR.

In every procedure where the administrative authorities or the Courts have to decide about civil rights or criminal charges the persons concerned have to be heard according to Art. 6 ECHR (Constitutional Law in Austria). As the ECtHR interpreted civil rights in a broader way than (previous) national Austrian practice, this led to a considerable extension of the right to be heard. This was influenced by the Court's interpretation of the Austrian reservation with regard to Art. 6 ECHR. In the case Eisenstecken v. Austria (application no. 29477/95), judgment 3 October 2000 the Court decided that the Austrian reservation regarding Art. 6 ECHR is invalid.

Art. 47 CFR has the rank of Constitutional Law as well and requires that a hearing takes place in all cases where any relation to EU Law is given.

Austrian Constitutional Law and Administrative Law require that orders and decisions, which reject or dismiss an application, contain reasons. These reasons have to take all the facts of the case and all assertions into account. Despite this obligation first instance orders often only contain a very short reasoning and the reasons do not refer to all the relevant facts of the case.

The requirements, especially the obligation to take all facts and assertions into account, are highlighted by a decision of the High Administrative Court.[2] The High Court states that inquiries have to be made concerning all facts of the case and all provisions on which the decision is based. The Court thus quashed a decision of the Administrative Court of Vienna as the Court did not make

[1] Act on Procedures before the Administrative Courts, Bundesgesetz über das Verfahren der Verwaltungsgerichte (Verwaltungsgerichtsverfahrensgesetz – VwGVG), FLG I 33/2013, as amended by FLG I Nr. 122/2013 and FLG I Nr. 82/2015.

[2] High Administrative Court, Ra 2014/21/0049, 24 March 2015.

findings and statements regarding the criminal convictions of the complainant, his social behavior and integration and his family life. The return decision concerned a national of Kosovo, who came to Austria at the age of 15 and already lived in Austria since 1999. Between 2006 and 2013 he was convicted four times for several drug crimes. The High Administrative Court stated that the mere listing of convictions, not based on an individual assessment of the behavior of the person, is not sufficient for a comprehensive analysis regarding the prognosis for an eventual risk for public order or national security or the assessment whether the interference into the right to private or family life is justified based on these reasons. The High Court stated that the risk assessment has to take into account the behavior of the person concerned, the analysis of all criminal convictions (the gravity of the crimes or delicts), their numbers and the details of the criminal procedure.

In addition, the High Administrative Court criticized that the Administrative Court of Vienna did not consider the favorable expert opinions of the probation officer and the psychological therapist. Furthermore, the Administrative Court of Vienna would have had to take a position regarding the assertion given by a friend of the complainant during the procedure. The friend attested that the complainant had changed his attitude and mind regarding drugs. The mere reproduction of the statements of this friend at the oral hearing is not sufficient according to the High Administrative Court.

B. What is the national courts approach when standard templates are issued in accordance with Art. 12(2) and (3) for decisions related to return when translation was in fact, available?

No jurisprudence on this issue.

II. Article 13: Remedies

1. Judicial Interactions with European and national Courts

A. Did national courts in your country request for (a) preliminary reference(s) from the CJEU in relation to legal remedies in the context of return procedures?

NO

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;
- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the traditional jurisprudence developed in your country etc.)

B. Did national courts specifically refer to CJEU rulings (or to the provisions of the Return Directive as interpreted by the Court) in their judgments?

NO

If yes: which cases and which legal effect did they attribute to them?

C. Did national courts refer to the ECHR or the EU Charter in relation to the above mentioned issues?

Yes

If yes: in which cases and for what purpose? (*e.g.* did the national court give priority to the right to

an effective judicial remedy (Article 47 EU Charter) instead of the right to a legal remedy enshrined in Article 13 for instance when interpreting what is an impartial and independent national administrative authority – Article 13(1) RD)

A very interesting case concerns the interpretation of Art. 47 CFR by the High Administrative Court.[3] The Court also referred to CJEU jurisprudence on financing of legal aid.[4] The cited case however neither concerned the RD nor asylum or aliens law.

The High Administrative Court quashed the decision of the Federal Administrative Court and argued that on the basis of Art. 47 CFR and on the basis of the case law of the CJEU legal aid in the return procedure is obligatory even if it is not foreseen by the national legislation.[5] The High Administrative Court stated that it is necessary to differ between procedures, where complaints are filed against detention orders and such, where complaints are filed against return decisions. As far as the application for legal aid relates to the appeal against the return decision, it is foreseen by the national legislation (Art. 52 (2) Act on Procedures before the Federal Office for Aliens Law and Asylum (BFA-VG)) that the legal adviser of the NGO, who has given legal advice to the third country national, when he or she was held in detention, is also entitled to represent the person before the Court. Therefore, there is no obligation to grant additional legal aid. The situation is different in procedures against detention orders, because in this case it is not foreseen by national legislation, that the NGO legal adviser is also entitled to represent the third country national before the Court. In this case the Court is obliged to inform the third country national and to grant legal aid. This is required by Art. 47 CFR.

Another interesting case deals with **effective remedies** and concerns the question of direct applicability of Art. 13 (1) RD. The High Administrative Court quashed a decision of the former Directorate of Security.[6] The members of the Directorate of Security were neither impartial nor independent. The Court based the reasoning on the argument that Art. 13 (1) RD requires an effective remedy to appeal against a return decisions before a competent judicial or administrative authority, composed of members, who are impartial and who enjoy all rule of law safeguards in respect of their independence. According to the Court the control by the High Administrative Court itself could not be seen as an effective remedy, because the High Administrative Court is a Court of cassation and does not have full cognition of facts and law. Only the Independent Administrative Tribunals (which were meanwhile replaced by Administrative Courts in the Federal States) met the requirements of Art. 13 (1) RD, they were seen as impartial and independent. The Court based the assessment on the fact that the period for transposition of the RD had already expired and therefore a **direct application of Art. 13 RD** allowed that the decision could be rendered by the Administrative Senate (Tyrol). At that time the national legal basis (amendment of the Aliens Act) was already adopted but not yet in force. The former Administrative Senates were seen as independent tribunals. They had full cognition of facts and law.

D. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Articles 13 RD?

YES

[3] High Administrative Court, Ro 2015/21/0032, 3 September 2015.

[4] CJEU, case C-279/09 "DEB Deutsche Energiehandels – und Beratungsgesellschaft mbH", judgment 22 December 2010.

[5] See also High Administrative Court, 2012/21/0032, 16 November 2012. Federal Administrative Court G306 2110897-1/3E, 30.7.2015, W146 2008298-1/3E, 31.8.2014, W112 2006473-1/12E, 2.5.2014.

[6] High Administrative Court, 2011/22/0097, 31 May 2011.

If yes: please elaborate further on this issue

Please see the answer to the previous question and the case referring to the question of direct applicability of Art. 13 (1) RD.[7]

E. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues regarding legal/judicial remedies?

NO

If yes: please elaborate further on this issue

2. National Jurisprudence: major trends in the Courts' approach

A. How is "decisions related to return" within the meaning of Article 13(1) interpreted?

(*e.g.* are they interpreted by national courts as including: return decisions (Article 3(4) and Article 6(1)); decisions on voluntary departure period as well as extension of such period (Article 7); removal decisions (Article 8(3)); Decisions on postponement of removal (Article 9); Decisions on entry bans as well as on suspension or withdrawal of entry ban (Article 11); Detention decisions as well as prolongation of detention (Article 15)?

There is no jurisprudence. "Decisions on return" are not explicitly mentioned in the Aliens Police Act and there is no academic opinion published on the issue. It would be justified to argue that the term "decisions related to return" within the meaning of Art. 13 RD covers return decisions (Article 3(4) and Article 6(1)), decisions on the voluntary departure period as well as the extension of such period (Article 7), removal decisions (Article 8(3)), decisions on postponement of removal (Article 9) and decisions on entry bans as well as on suspension or withdrawal of entry bans (Article 11). Detention decisions are not interpreted to be "decisions related to return". There are special remedies in detention cases.

B. Have national courts ever applied different or alternative legal remedies, than those provided by the domestic implementing legislation, in order to ensure effective protection of the EU Return Directive procedural safeguards and/or EU fundamental rights of the individual?

(*e.g.* the right of every person to have recourse to a legal adviser prior to the adoption of a return decision, *de facto* suspensive effect, extension of deadlines for appeals and other remedies, etc.)

Yes.

The case discussed above as an answer to question 2. C. regarding Article 13 RD serves as an example.[8]

If yes: please elaborate further on this issue

C. What legal remedy is considered or applied by national courts in case of violation of the right to be heard by the administration? (*e.g.* when the administration did not pay due attention to the observations by the person concerned and did not carefully and impartially examine all the relevant aspects of the individual case; or when the administration did not give reasons for its decisions)

National courts do not have to decide about remedies. They have to decide when remedies are filed.

[7] High Administrative Court, 2011/22/0097, 31 May 2011.

[8] High Administrative Court, 2011/22/0097, 31 May 2011.

The jurisprudence referring to some issues raised in this question is analysed above as an answer to question 2.A.

D. Did national courts explicitly refer to considerations and objectives of efficiency/effectiveness of the return procedures when considering legal remedies and weighing the interests at stake?

NO

If yes: to which extent do these considerations impact on the procedural safeguards legally guaranteed to the applicants (*e.g.* his or her right of defense, right to information, right to legal representation and assistance, right to legal remedy etc.)

E. Do national courts afford free legal assistance for irregular migrants within the judicial phase of the return procedure?

YES

If yes: in which conditions? Can the lack of free legal assistance be a legitimate reason for quashing the judgment of the first instance within the appeal procedure?

See the case mentioned and explained above (Article 13: Remedies, 1.).[9]

F. Do national courts consider the availability of interpreters as one of the factors which affect the accessibility of an effective remedy (see, *Conka v. Belgium* Judgment of 5 February 2002 of the ECtHR, No. 51564/99)?

No jurisprudence.

If yes: please elaborate further on this issue

G. How do national courts interpret the notion of "competent […] administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence"? (Is an appeal before the hierarchical superior administrative authorities considered an effective legal remedy within the meaning of Article 13(1) RD or is this interpretation incompatible with Article 47 EU Charter?)

Effective remedy requires that the decision is made by an impartial and independent body. The members must be impartial and enjoy all rule of law safeguards in respect of their independence.[10]

[9] High Administrative Court, Ro 2015/21/0032, 3 September 2015.

[10] High Administrative Court, 2011/22/0097, 31 May 2011.

III. Article 14: Safeguards pending return

1. Judicial Interactions with European and national Courts

A. Did national courts in your country request for (a) preliminary reference(s) from the CJEU in relation to safeguards pending return?

NO

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;
- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the traditional jurisprudence developed in your country etc.)

B. Did national courts specifically refer to CJEU rulings (or to the provisions of the Return Directive as interpreted by the Court) in their judgments?

NO

There is **no case law referring to Art. 14 RD**.

If yes: which cases and which legal effect did they attribute to them?

C. Did national courts refer to the ECHR or the EU Charter in relation to the above mentioned issues?

NO

If yes: in which cases and for what purpose?

D. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Article 14?

NO

If yes: please elaborate further on this issue

E. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues regarding safeguards pending return?

NO

If yes: please elaborate further on this issue

2. National Jurisprudence: major trends in the Courts' approach

A. How do national courts interpret the following social needs of the irregular migrants pending return: "basic emergency health care" and "essential treatment of illness"; "access to the basic education system"; "special needs of vulnerable persons are taken into account"? What are the legal remedies in case the access of the TCN has been impaired by the administration?

There is no jurisprudence.

If yes: please elaborate further on this issue

B. Did national courts explicitly refer to considerations and objectives of efficiency/effectiveness of the return procedures when considering safeguards pending return and weighing the interests at stake?

NO

If yes: please elaborate further on this issue