**REDIAL PROJECT**

**National Synthesis Report – Bulgaria**

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## Article 7 RD: Voluntary Departure

Judicial review regarding provision of period for voluntary departure has taken **place in relation to the appeal of the lawfulness of the return decision itself**. In all three cases, published in the REDIAL database, lack of a period for voluntary departure has been invoked by the third country national as a ground for unlawfulness of the return decision.

As a preliminary issue, it might be worth clarifying the type of return decision appealed by third country nationals in Bulgaria. According to Article 3 (4) of the Return Directive, '**return decision**' means an administrative or judicial decision or act, *stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.* According to Article 3 (5), '**removal**' means the enforcement of the obligation to return, namely the physical transportation out of the Member State. The return decisions in Bulgaria always contain 'orders for removal', because they are '**orders for coercive taking to the border**' as they are named. That is, by definition and title, these orders do not envisage a possibility for voluntary return. According to Article 39b of the Law on Foreign Nationals in the Republic of Bulgaria (*Закон за чужденците в Република България*), the orders for 'withdrawal of the right to residence in Bulgaria' and the orders for 'coercive taking to the border' shall provide for a period for voluntary departure of between seven and thirty days. However, with regard to the most common orders, the orders for coercive taking to the border, in practice this legal provision is not applied. As a matter of established administrative practice, no period for voluntary departure is given. In practice, very few return decisions issued in Bulgaria reach the court for judicial review of their lawfulness. Often they are served without language translation of their content (including the preclusive term of 14 days for appeal) and their addressees lack knowledge of their rights, including the right to have a period for voluntary departure.

Two of the judgments published in the REDIAL database have the potential to challenge this practice (cases of Dorofeev and Hamada). However, one of the judgments rather discourages those attempts (case of Salar Zangenhe).

In the case of *Dorofeev*, Court Decision of 12/12/2011, the Supreme Administrative Court (SAC) noted that, inter alia, a period for voluntary departure was not given to the third country national to whom 'coercive taking to the border' was imposed. The Court found that by itself this fact is **'a violation of the material requisites of the law'** and makes the order for coercive taking to the border of Mr. Dorofeev unlawful. In this relation SAC explicitly invoked Paragraph 36 of the Judgment of the CJEU in Case C-61/11, El Dridi.

Mr. Dorofeev had served a punishment of imprisonment for crimes under the Penal Code with a cumulative penalty of three years and six months. However the authority that issued the return decision had not provided any reasons in it for refraining from granting a period for voluntary departure and had not made a statement that, for example, the third country national posed a risk to the

public security. For that reason the Court ruled that the lack of a period for voluntary compliance was in violation of the law.

In the same way, in the case of Mr. *Hamada*, Court Decision of 07/03/2012, SAC found that the order for coercive taking to the border was unlawful, because it did not define a period, during which the foreign national had to leave the country voluntarily. The Court specifically pointed that in the order there were no motives stated for the inability to give a period for voluntary leave, there was no reference to any of the grounds provided in national law for refraining from granting a period for voluntary departure.

In relation to Paragraph 4 of Article 7 of the Return Directive, the Law on Foreign Nationals in the Republic of Bulgaria, Article 39b (4), reads that a period for voluntary departure **shall not** be granted when the foreign national '**poses a threat to the national security or the public order**'. The Bulgarian law has not transposed the rest of the grounds for refraining from granting a period for voluntary leave under Article 7 (4) of the Return Directive such as, for example, the risk of absconding. In the Dorofeev case SAC noted this difference between Article 7 (4) of the Return Directive and its transposition into Bulgarian law and found it compatible with the Directive. "Since the national lawmaker provided as a basis for non-allotment of the period for voluntary departure only the danger for the national security or public order, the Court found, that precisely these circumstances, if pointed out and duly proven, would be a basis for non-allotment of the period for voluntary compliance with the measure."

In both cases of *Dorofeev* and *Hamada*, the appellant third country nationals had already resided continuously in Bulgaria. However in the case of *Salar Zangenhe*, SAC Decision of 10/01/2011, Mr. Zangenhe had just entered Bulgaria irregularly and had no personal identification documents. At the interview conducted, he stated that his ultimate goal was to reach the United Kingdom of Great Britain and Northern Ireland. In the case of *Salar Zangenhe* SAC reached a different conclusion. The Court stated that although "the assignment of a period for voluntary departure is an irrevocable and therefore mandatory requisite' of the order for coercive taking to the border, on "the condition that Salar Zangenhe **does not possess valid identification documents**, he could not voluntary leave the country". In view of this fact, the court found that the inclusion of an assignment of a period for voluntary compliance in the return order is pointless and therefore, in this specific case, **non-granting of a period for voluntary departure was not a 'substantial' violation of the law**.

Apparently, Article 7 (4) of the Return Directive does not include 'non-possession of valid identification documents' as a ground exempting the authorities from the obligation to provide a period for voluntary departure. The Court's conclusion in the *Zangenhe* case **runs in contradiction with the recent CJEU judgment in case C‑554/13, Zh. And O.**, according to which the elements that serve as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union, must be interpreted strictly (para.48).

In view of the proximity in time of both types of court decisions adopting a differing approach, one cannot identify a steady trend in the Bulgarian court jurisprudence. This uncertainty is enhanced by the lack of more recent case law on the matter. It remains to be seen what will be the influence of CJEU judgment of 11 June 2015 in case C‑554/13, Zh. And O. on the Bulgarian case law.

## Article 8 RD: Removal

As noted above, return decisions in Bulgaria always contain 'orders for removal', because they are '**orders for coercive taking to the border**' as they are named. Their name and content reveal the aim of the Bulgarian authorities: coercive and immediate taking to the border.

In three out of the five cases uploaded in the REDIAL database **respect for the right to family life** has been the core argument in finding a removal order unlawful.

In the case of *Ashot Nalbandyan*, SAC Decision of 13/06/2011, the Court raised as an issue whether a return decision in the case shall be issued in the first place. Mr. Nalbandyan's wife was a naturalized

Bulgarian citizen and his children were also in a procedure for acquiring Bulgarian citizenship. The court found that neither the administrative authority, nor the court of first instance had discussed the impact which the measure would have on the family life of the appellant third country national. They did not take into consideration that as a result of the measure the right to family life of the appellant would be violated, without evidence present that such interference was acceptable in a democratic society and was in line with any of the purposes envisioned in Art.8. Para.2 of the European Convention on Human Rights (ECHR).

In the case of *Dorofeev*, SAC Decision of 12/12/2011, the Court explicitly noted that the national law did not entirely correspond to Article 1 of Directive 2008/115/EC, because it did not state that the standards and procedures with regard to third country nationals **had to conform to fundamental human rights**. In assessing whether fundamental human rights were respected, SAC found that the measure was in violation of Article 8 of ECHR, because the administrative body had not investigated the existence of family relationship and the fact that Mr.Dorofeev's mother permanently lived in Bulgaria. The administrative body that issued the removal order claimed that between the mother and the son there were no family relations, because of the fact that the mother was incapable to provide Dorofeev with a safe environment, which would separate him from the criminal acts he committed, and that the mother herself was concerned that Mr. Dorofeev might again start to commit crimes. The court found this conclusion to constitute an incorrect application of the substantive law, because:

> "*the connection with the mother does not have the sole goal of separation from the criminal environment and acts. Even when the mother is not capable to influence her child, if he is of age, to cease certain unlawful behaviors that he has, this doesn't mean that the connection between them is automatically depleted of substance or meaning. That is why family relations are considered a value protected by the law, because they have multisided and multilayer character, unexhausted in a single aspect or with a limited period of the life of a person. These relations may pass through different difficulties and characteristics, but inevitably have crucial meaning in the life of every person*."

In this relation SAC studied in detail and applied the criteria developed in **the case law of the European Court of Human Rights**. SAC invoked the judgments of the Strasbourg Court in the cases of *Abdulaziz, Cabales and Balkandali v the United Kingdom*, §67, *Boultif v Switzerland*, §39 and *Uner v The Netherlands*, §54, in admitting that indisputably the State had the powers to secure public order and to prevent crimes and to control the presence of foreign nationals on its territory. However, removal orders could interfere in the right to respect for private and family life enshrined in Article 8 ECHR.

SAC carried out the complex two-stage test provided in Article 8 ECHR. Firstly, in order to place the case in the scope of Article 8 ECHR, SAC invoked the case of *Maslov v Austria*, §62 and 63, in noting that, on the one hand, the relations between a single young person and his parents did constitute **family life** and, on the other hand, **private life** encompassed the physical and social identity of the person, including the relations that he has developed with other human beings during the period of his stay in the country. In this regard SAC took account of the fact that Mr. Dorofeev had lived in Bulgaria for more than twenty years and he had arrived in Bulgaria when he was 10-years old together with his mother, who remained in the country. Therefore, the court found it necessary to assess whether the interference in Mr. Dorofeev's private and family life was in conformity with the requirements under Paragraph 2 of Article 8 ECHR. SAC invoked the judgments of the Strasbourg court in the cases of *Maslov*, §71 – 76, *Uner*, §54-55 and 57-58, *Boultif*, §47-48, *Moustaquim v Belgium*, §41-46, and pointed out that the following criteria should have been discussed by the administrative body which issued the removal order: the nature and the severity of the crimes, of which the person had been convicted, the duration of his stay in the country, the time that had elapsed from the date of committing the crime(s) to the present moment and the behaviour of the third country national during that period, the stability of his social, cultural and family links with the country of residence and with the country of origin, the age at which the foreign national arrived in the host country: as a child or as an adult, the age at which the crimes were committed – whether the person was minor at the time, as well as whether there was a balance between the individual rights of the foreign national protected by the Convention and the interests of the society.

In the case of *Susanna Azatovna Minasyan*, Decision of 13/06/2012, besides the family connection (the appellant's two children), SAC highlighted another important fact that underlined the unlawfulness of the removal order. In the case in question, Mrs. Minasyan's removal order was **served to her more than five years after its issuance**. The order for 'coercive taking to the border' was issued on 28/01/2005, while it was served to its addressee on 03/06/2010. In the course of the court proceedings of appealing the removal order, Mrs. Minasyan presented evidence that there were two thousand leva in a bank account in her name, that she was a partner in a Bulgarian legal entity, and that her two daughters graduated elementary and secondary education in Bulgaria. Thus the Court found that the serving of the administrative act five years after its issuance, without taking into consideration whether a change in the indicated factual and legal grounds for its issuance had occurred, was by itself a fact indicating a violation of the basic principles of the administrative procedure – the principle of lawfulness, the principle of proportionality, the principle of rapidity and the principle of procedural economy.

The stated principles in the *Minasyan* case correspond to the requirements of **Article 8 (1) of Directive 2008/115** 'to take all necessary measures to enforce the return decision' and could be seen as meaning that **'late measures' without a fresh consideration of the personal situation of the third country national concerned are in themselves unlawful.** The national court provided the reasoning that in accordance with Art. 4, para.2 of the Administrative Procedural Code, an administrative act is issued for the purposes provided in the law. The purpose of the coercive measures under the Law on Foreign Nationals in the Republic of Bulgaria was 'to guarantee the observance of the legal order established in the country with regard to the residence of foreign citizens while respecting their rights'. The Court reached the conclusion that the serving of an order imposing a coercive measure five years after its issuance, without a verification conducted for the existence of the legal grounds as of the date of serving, '**entirely compromised the purpose of the law**'.

While in the *Minasyan* case the national court addressed the issue of 'late' removal measures, in the case of *Fetullah Guney*, Decision of 18/05/2013, the Sofia City Administrative Court sanctioned as untimely **'premature' removal**. Mr. Fetullah Gunei resided legally in the country on the basis of a residence permit valid until 03/09/2012. Before the term of the permitted residence expired, on 16/08/2012 Mr. Gunei asked for extension of the residence term, because he was a student in a Bulgarian university. The competent authorities conducted a check at the residence address provided by Mr. Gunei, but did not find him, and also conducted a verification with the university and found out that he was enrolled in the second year, but as of the date of the verification had not paid the education fee. Therefore on 26/11/2012 the competent authority issued an order to terminate the proceedings on Mr. Gunei's application and on 26/02/2013 issued an order imposing on Mr. Gunei "coercive taking to the border" on the ground that he did not leave the country before his permitted residence term expired. The order to terminate the proceedings on his application for extension of the residence permit and the order imposing the removal measure were presented simultaneously to Mr. Gunei, who logded an appeal in front of the Court. In the case reviewing the lawfulness of the removal order the Court stated that it will not study the lawfulness of the order for terminating the procedure on the application for extension of the residence permit as it was an object of another case pending before the Court. The judge however noted that the appeal against the order terminating the residence permit procedure had suspended the entry into force of the order and therefore the order was not yet in force. The court states that although on the date of imposition of the coercive measure of removal Mr. Gunei did not have permission for residence in the country, the administrative authority should have waited for the proceedings on the appeal of the order terminating the proceedings on the application for extension of the residence term to conclude, and then decide. According to the court by not doing so the administrative body infringed Article 6 of the Code on Administrative Procedure, which required the authorities 'to exercise their powers in a reasonable manner, in good faith and in a fair way'.

Although the court did not invoke it directly, the decision corresponds to **Article Art.44 (2) of the Law on Foreign Nationals in the Republic of Bulgaria**, which stipulates:

> "*In imposing compulsory administrative measures the competent authorities shall take into account the length of stay of the foreigner in the Republic of Bulgaria, the categories of vulnerable persons, the existence of proceedings under the Law on Asylum and Refugees or proceedings for renewal of the residence permit or other authorization offering a right to stay,*

*the family situation, and the existence of family, cultural and social ties with the country of origin.*"

The last Bulgarian case under Article 8 in the REDIAL database concerns the **(in-) applicability of the Return Directive to third country nationals who are family members of EU citizens**. In the case of *Eduard Grigorian*, Decision of 05/08/2014, the Supreme Administrative Court found as relevant the fact that Mr. Grigorian, an Armenian citizen, was a husband and a father respectively of French citizens. Mr. Grigorian was detained while exiting Bulgaria on the ground that he presented an Armenian passport with a fake first page. He also possessed a valid French residence card, which authenticity was confirmed by the French embassy in Bulgaria. The Bulgarian authorities placed Mr. Grigorian in immigration detention and imposed on him an 'order for coercive taking to the border'. The first level court that examined the appeal against the cited removal order had confirmed its lawfulness on the ground that Mr. Grigorian did not have a valid identity document and therefore he fell within the scope of Article 41 (3) of the Law on Foreign Nationals in the Republic of Bulgaria, which stated that an order for coercive taking to the border is issued when 'it is established that the foreigner has entered and resides in the country with a false or forged document for travel abroad'. The Supreme Administrative Court (SAC) repealed the decision of the first level court as wrong. The main argument of SAC was related with the inapplicability of the Law on Foreign Nationals in the Republic of Bulgaria, and accordingly of Directive 2008/115, with regard to the legal status of Mr. Grigorian, because he had status of a family member of a European Union citizen, and not that of an illegally residing citizen of a third country. SAC noted that with regard to Mr. Grigorian measures under the Law on the Entry, Residence and Departure from Republic of Bulgaria of Citizens of the European Union and the Members of their Families, which transposes Directive 2004/38, could be applied, but not measures under the Law on Foreigners.

## Art. 9 (2) RD: Postponement of Removal

There aren't any national judgments which establish new precedents or significant new legal principles or concepts. No Bulgarian case law on Art. 9 (2) RD has been distinguished as landmark by the national judge and the academic expert in the REDIAL project.

Although there is Bulgarian bibliography[1] dedicated on the judgment in the case of *Abdida* C-562/13, there are no references yet to the judgment in the national case law.

## Art. 10 (2) RD: Return and Removal of Unaccompanied Minors

There aren't any national judgments which establish new precedents or significant new legal principles or concepts. No Bulgarian case law on Art. 10 (2) RD has been distinguished as landmark by the national judge and the academic expert in the REDIAL project.

## Article 11 RD: Entry ban accompanying return decision

The case-law in Bulgaria regarding entry bans accompanying return decisions concerns the application of Paragraphs 1 and 2 of Article 11 of the Return Directive. According to Article 42з of the Law on Foreign Nationals in the Republic of Bulgaria (LFRB) a return ban *shall be* imposed if there are any of the 24 (twenty-four) grounds for refusal of an entry visa to a third-country national under Article 10 (1) LFRB or if no period of voluntary departure has been granted or if the obligation for return has not been complied with. Furthermore, Article 42 (2) LFRB provides that every expulsion order on national

[1] Ilareva, Valeria, From 'Asylum Seekers' to 'Human Beings': the Legal Status of Third Country Nationals who Cannot be Returned Due to Humanitarian Considerations. The Judgments of the CJEU in the M'Bodj and Abdida cases, *European Law Review*, Issue XII (2015), http://evropeiskipravenpregled.eu/том-xii-2015-г/ (In Bulgarian: 'От „търсещи убежище" към „хора": правното положение на чужденците, които не могат да бъдат отведени по хуманитарни причини', *Европейски правен преглед*). Published also at http://blog.farbg.eu/?p=2254

security or public order grounds is accompanies by an entry ban. According to Paragraph 3 of Article 42з LFRB, the length of the entry ban is for a period of up to 5 years. It may exceed five years if 'the person poses a serious threat to the public order or to the national security'. According to Paragraph 4 of Article 42з LFRB, the entry ban may be imposed together with an order for withdrawing the residence permit or an order for coercive taking to the border if there are any of the grounds under Article 10 (1) LFRB. The scope of Article 10 (1) is very broad[2] and the binding competence of the

[2]According to Art.10 (1) LFRB, a visa or entry is refused to a third country national if the third-country national:

"1. poses or may endanger the safety or interests of the Bulgarian State or where there is evidence that he/she acts against the security of the country;

2. with his/her actions he/she has discredited the Bulgarian state or has derogated the prestige and dignity of the Bulgarian nation and his/her entry into the country may harm relations of the Republic of Bulgaria with another State;

3. there is evidence that he/she is a member of a criminal group or organization that carried out a terrorist activity, smuggling and illegal transactions with arms, explosives, ammunition, pyrotechnic products, strategic raw materials, goods and dual-use technologies, as well as illicit trafficking in narcotic drugs and psychotropic substances and precursors and raw materials for their production;

4. there is evidence that he/she trades in human beings and illegal entry in the country and is bringing persons in other countries;

5. has been expelled from the Republic of Bulgaria not later than 10 years ago and has not restored in 6 months from expulsion the resources spent for this expulsion by the country;

6. has been convicted for intentionally committed crime on the territory of the Republic of Bulgaria, which under Bulgarian law is punished by not less than one year of imprisonment;

7. has attempted to enter the country or to pass through it using false or forged documents, visa or residence permit;

8. it can be suggested that he/she will disseminate grave infectious disease, suffers from a disease that according to the criteria of the Ministry of Health and the World Health Organization is a threat to public health, or does not have a certificate of vaccination or comes from a region with complicated epidemic epizootic situation;

9. has no ensured maintenance and necessary obligatory insurances during his/her stay in the country and funds ensuring possibility for returning back;

10. at previous entry and residence systematically breached the border, passport and visa, currency or customs regime of the Republic of Bulgaria;

11. at previous stay he has breached the labour or tax laws of the country;

12. has no visas or tickets for the following countries along the route;

13. has been imposed a compulsory administrative measure not to enter the country and this measure is in force;

14. is included in the informational massif of the unwelcome foreigners in the country of art. 21a para. 1;

15. applies for an entry visa with a document for leaving the territory of another country in which to date he/she has resided;

16. applies for a visa with irregular travel document or other substitute document;

17. fails to prove the purpose and conditions of the intended stay;

18. has already stayed for three months during the current six-month period on the territory of the Republic of Bulgaria as visa holder pursuant to Art. 14, para. 3;

19. (*) is a person for whom there is an alert in the Schengen Information System for refusal of entry;

20. during a previous stay in the country systematically committed acts of disturbance of the public order;

21. there is evidence that the purpose of entry is to stay in the country as immigrant without having special permission for this;

22. there is evidence that the purpose of entry is to use the country as a transit point for migration to a third country;

23. has submitted a document with false content or has made false declarations;

24. there are reasonable doubts about the authenticity of the documents submitted for visa issuance, the veracity of their contents, the reliability of the statements by the alien or of his intention to leave the country before the visa expires."

administrative authorities to issue entry bans in such cases has been one of the main issues discussed before national courts in the light of Article 11 of the Return Directive.

In the case of *Yunus Khalil Ibrahim*, Court Decision of 11/05/2012, the entry ban on Mr. Ibrahim had been imposed on ground of Art. 10, p. 9 of the LFRB, namely, on the ground that the third country national had no 'ensured maintenance and the necessary obligatory insurances during his stay in Bulgaria and funds ensuring the possibility for returning back'. The Supreme Administrative Court (SAC) however, found the entry ban unlawful, because the administrative body should have discussed the significance of other relevant facts, such as the fact that Mr. Ibrahim concluded civil marriage with a Bulgarian citizen, the fact of the two mutual children with the Bulgarian citizen, the fact of Mr. Ibrahim's voluntary reporting to the migration authorities, moreover done on the day when he got civilly married, which day was December 28th, that is, in the eve of the New Year's celebrations, the fact of the thorough cooperation and lack of creation of obstacles of any kind for the resolution of the questions concerning his stay in the country.

Before the case reached SAC, the first level national court had found the entry ban lawful, because it considered that the administrative body had acted in conditions of the so-called 'binding authority' when it was obliged by law to issue the entry ban if it had established the existence of the circumstances stipulated in Art. 10, p.9 of the LFRB. SAC found this conclusion of the first level court to be wrong. SAC pointed out Article 44 (2) LFRB (cited above at page 6 of the Synthesis Report), which required the administrative authority to take into account a number of other factors concerning **the individual circumstances in the case**, regardless of the formal legal ground for imposing the measure. Thus SAC raised the issue of the interaction of the binding provision of Article 43ᵌ LFRB concerning the imposition of entry bans and the requirements of Article 44 (2) LFRB concerning the imposition of coercive measures in general. **SAC stated that in order to reply to this question, it shall consider which interpretation of the national law would correspond to the obligations of Bulgaria as a Member State of the European Union**. SAC noted that it was obliged to establish the meaning of the national legal norms that was in accordance with EU law, in this case, Directive 2008/115/EC (in this relation SAC cited the cases of *Von Colson*, C-14/83 and *Inter-Environnement Wallonie*, C-129/96). SAC went on to point out that Article 4 (3) of the Return Directive as interpreted in the judgment of the CJEU in the case of ***Hassan El Dridi (Souft Karim)* C-61/11 PPU, paras. 31 and 32**, allowed for Member States to adopt provisions for more favourable treatment of third country nationals as far as it was compatible with the Directive, but it did not allow for stricter standards than the ones established in the Directive. SAC reminded Recital 6 of the Preamble of the Return Directive, which provided for an individual approach in each case based on objective criteria. The court also pointed to Recital 13 of the Preamble, Article 8 (4) and Article 11 (2) of the Return Directive enshrining the principles of proportionality and effectiveness. SAC further reminded Art. 1 of the Directive with regard to respect to fundamental human rights as a basic standard in applying the measures provided in the Return Directive. Therefore, in view of the above, SAC concluded that when the facts under Article 43ᵌ LFRB concerning the imposition of entry bans were present, the administrative authorities was obliged to make an assessment of the circumstances stipulated in Art. 44 (2) LFRB and only then decide whether to impose the entry ban or nor and of what length. Furthermore, SAC noted that **the circumstances enumerated in Article 44, para. 2 LFRB should not be seen as exhaustively enumerated**. The authority is obliged to also discuss any other fact, which would have relevance on the imposition of the measure, following the principles of proportionality and efficiency of the measure with regard to the individual decision made.

In the case of *Mustafa Mohamad Ismail*, Court Decision of 13/05/2011, the length of **the entry ban imposed was 10 years**. Mr. Ismail had been sentenced to imprisonment for **committing the crime of drug smuggling**. Thus the entry ban was imposed on him on ground of Art. 10 (6) LFRB, namely because he had been 'convicted for intentionally committed crime on the territory of the Republic of Bulgaria, which under Bulgarian law is punished by not less than one year of imprisonment'. The first level court that reviewed the entry ban found it to be lawful as, according to the court, firstly, the administrative body was under an obligation to impose the entry ban when the circumstances under Art. 10 (6) LFRB were present and, secondly, it had discretion with regard to the length of the entry ban. However SAC found that conclusion to be wrong. On the one hand, SAC invoked Art. 44 (2) LFRB and the principle of proportionality. The Court found that the entry ban imposed was unlawful,

because the facts that Mr. Ismail suffered from a serious illness, he was a single parent of a minor Bulgarian citizen and that his return to the Republic of Lebanon would put his life in danger, were relevant to the authority's assessment as to the imposition of the measure, but were not discussed by the authority. On the other hand, SAC noted that the administrative authority had not stated explicitly whether the third country national was a threat to the public order or the national security and what the content of that threat was. Indeed, according to Paragraph 3 of Article 42з LFRB, the length of the entry ban may exceed five years if 'the person poses a serious threat to the public order or to the national security'. However the administrative authority had not provided any reasoning in this regard and therefore the court was unable to exercise judicial review. SAC highlighted that in any case when the administrative body imposes an entry ban which length is over 5 years, **it should present concrete considerations relating to the personal behaviour of the third country national and it was not enough to just make a reference to the provision of Art. 10, para 1, pt. 6 of the LFRB**.

These breakthrough judgments of SAC in the Bulgarian case law are thoroughly in harmony with Art. 11 (1) and (2) of the Return Directive.

Along the same lines we find the judgment of SAC in the case of *Mahmut Yildirim*, Decision of 28/01/2013. For 11 years Mr.Yildirim had resided lawfully in the country. He was imprisoned for one year and six months after a sentence for robbery entered into force; his serving of the sentence was postponed. Then he was sentenced to imprisonment for a term of eight years on the basis of a sentence from 2008 for drug trafficking. On July 28th, 2011, he was provisionally released early from serving the remainder of his imprisonment term. A probation measure was imposed on him. The competent authority on the execution of the probation measure assessed its implementation as a diligent one. In 2012 he married a Bulgarian citizen. In 2013 **expulsion and entry ban for five years** were imposed on Mr.Yildirim on the ground that he had committed an intentional crime punishable by imprisonment of more than one year and his presence in the country posed **a serious threat to public order**. SAC repealed the order for expulsion and entry ban as unlawful. The court noted that although the stated ground constituted Art. 10, Para.1, point 6 of the LFRB, '**the act of committing a crime and serving a sentence for it does not automatically imply by itself that the person is a serious threat to public order**'. According to the Court, the legislator had provided the administrative authority with the opportunity to assess, through an analysis of all relevant facts, whether the personal conduct of the foreign national constituted a threat to public order and the nature of that threat. This assessment should be motivated on the basis of concrete facts which allow the court to conduct an assessment of the lawfulness of the imposed measure. Such facts and assessment were absent in this case.

Furthermore, the court noted that Art. 46, para. 3 of the LFRB explicitly stated that the factual grounds for imposing the expulsion order on public order grounds are not mentioned in the order. This legislative decision was determined by **the need to protect information that was specific to national security or public order**. However, it did not mean that the court should not be provided with the factual grounds that justify the imposition of the measure. The opposite would mean that the act of the competent authority is not actually subject to judicial review. SAC pointed out that there were ways, by abiding to the Law on Protection of Classified Information and by respecting the interests of national security or public order, to provide the court with information which would enable it to assess the lawfulness of the imposed measure. This requirement also guaranteed **the right of the addressee of the measures to effective judicial remedies**. The Republic of Bulgaria has been the addressee of many appeals[3] before the European Court of Human Rights for failing to respect the right to effective remedies under Article 13 in relation to Article 3 and 8 of the Convention in cases of expulsion of third country nationals.

In the case of *Said Ali Mohamed (Adnan Qasim Mohamed)*, SAC Decision of 09/01/2015, the third country national coming from Iraq had been convicted and imprisoned for illegal border crossing. An order for expulsion and 5-years entry ban was imposed on him. The Court found the order that imposed the coercive measure 'entry ban' to be unlawful because a) the authority imposed the

[3] See, e.g., the cases of Auad v. Bulgaria, No. 46390/10, 11 October 2011, para.120; Al-Nashif and Others v. Bulgaria, No. 5093/99, 20 June 2002; C.G. and Others v. Bulgaria, No.1365/07, 24 April 2008; Raza v. Bulgaria, No. 31465/08, 11 February 2010; M. and Others v. Bulgaria, No. 41416/08, 26 July 2011, etc.

maximum term of the measure without stating factual grounds for this decision and b) it invoked simultaneously two separate legal grounds.

The court held that **the length of an entry ban** is an essential element of the measure and that it is crucial for the assessment whether the measure affects the individual's rights and legitimate interests and to what extent. The national court relied on the express requirement of **Art. 11, Para. 2 of the Return Directive** according to which the length of the entry ban is determined with due regard to all circumstances that are relevant to the particular case. The court held that "the lack of reasoning for an essential element of the coercive measure – its duration – renders that order unlawful in this part."

Furthermore, in the entry ban order of Mr. Mohamed the administrative authority cumulatively indicated two grounds for its imposition (Art. 10 (1) (6) and Art. 42 (2) LFRB) without taking into account that they were to be invoked in terms of different factual elements. Thus Art. 10, para.1, point 6 LFRB concerned the conviction of the third country national, while Art. 42 (2) LFRB separately provided that an expulsion order on public order grounds was always accompanied by an entry ban. The court held that the administrative authority should have either imposed the entry ban due to the issued expulsion order on the basis of Art. 42 LFRB, and then the conviction would have been an irrelevant fact, or the authority should have imposed the entry ban regardless of the expulsion order, and then the legal basis for its imposition would have consisted solely of Art. 10, para. 1, pt. 6 of the LFRB. **By indicating both grounds for imposing the coercive measure of entry ban the authority had actually deprived its act of grounds.** Neither the addressee of the act nor the court could decide the grounds on which the coercive measure was imposed and, taking that into consideration, could organize the legal defence and the review of the lawfulness of the act – that was the duty of the administrative authority.

The last case from the REDIAL database concerns the substantial overhaul that has taken place in the Bulgarian legislation concerning entry bans following the adoption of the Return Directive. Prior to that, the usual length of entry bans imposed on third country nationals by Bulgaria was 10 years. Following the transposition of the Return Directive, the 'usual' maximum length of entry bans is 5 years. In the case of *Susanna Azatovna Minasyan*, SAC Decision of 13/06/2012, the entry ban was issued in 2005, but it was served to Mrs. Minasyan as late as in 2010. SAC found that to be a substantial flaw leading to the unlawfulness of the entry ban order. The court noted that the purpose of the coercive measures in the Law on Foreigners was to guarantee the observance of the legal order established in the country with regard to the residence of foreign citizens, while respecting their rights. In light of that, the serving of an order imposing a coercive administrative measure as late as five years after its issuance, without a verification conducted for the existence of the legal grounds as of the date of serving, compromised entirely the purpose of the law. In the case of *Minasyan* a long period of time had passed between the issuance of the order and the review of its lawfulness by the Court, during which time new facts had occurred not only in the personal life of the addressee, which if discussed by the administrative body could have led to a different conclusion, but also in the manner of regulation by the State of that kind of social relations, that is, new legislative amendments had taken place, which the Court was obliged to consider. SAC noted that the goal of every administrative act was for the given social relationships to be settled according to what is provided in the legal norm. In the situation where the legislator, before the conclusion of the oral hearings before the Court, had rearranged the relevant factual relationships, the Court should respect the legislator's will and conform its act to the change which had occurred. 'The contrary would mean formality, which would not correspond to justice or rationality.'

**The conclusion** that we can draw in this Synthesis Report on national case law is that the application of Directive 2008/115/EC has brought **more favourable treatment to third country nationals in Bulgaria**. It has decreased the legalistic formality and has enhanced justice and reason of the rule of law.