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REDIAL PROJECT

National Synthesis Report – Czech Republic

REDIAL Project: Art. 7 to 11 RD

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The Return Directive was transposed into the Czech law by Act No. 427/2010 Coll., which amended the Aliens' Act[1] (hereinafter also "ALA"). The amendment entered into force on 1 January 2011.

According to ALA, return decisions (mostly in the form of decision on administrative expulsion) are issued by the Office of the Aliens' Police. The administrative appeal against the decision of the Aliens' Police is possible. If the administrative appeal is dismissed, a foreigner can seek an annulment of the decision before the administrative courts. Administrative courts follow rules of procedure embodied in Act No. 150/2002 Coll., the Code of Administrative Justice (hereinafter also "CAJ"). Administrative decisions in immigration law cases, including detention of the TCNs, are subject to judicial review before regional courts that act as courts of the first instance. Subsequently, an extraordinary remedy (the Cassational complaint) against a decision of the regional court is available before the Supreme Administrative Court (hereinafter also "SAC").[2]

Article 7 of the Return Directive – Voluntary departure

[1] Act No. 326/1999 Coll., on the Residence of Aliens in the Territory of the Czech Republic.

[2] For further details regarding the judicial review of the lawfulness of detention under the Return Directive, see David Kosař, *Czech Republic – Questionnaire for National Reports Project*, CONTENTION: Control of Detention – project co-funded by the European Union, European Return Fund – "Community Actions" 2012. On the transposition of the Return Directive In the Czech Republic, see JILEK, D., PORIZEK, P.: *Návratová směrnice: vyhoštění, zajištění a soudní přezkum*, KVOP, 2011; and HOLA, E., KRYSKA, D. Analysis of Position of the Detained Foreigners, Praha: OPU, April 2010. See also more generally KOSAŘ, D., LUPAČOVÁ, H.: *Migration Law in the Czech Republic*, International Encyclopedia of Laws: Migration Law, Kluwer Law International, 2012.

Legislation

The period for voluntary departure within the meaning of Article 7(1) of the Return Directive (hereinafter also "RD") is governed by Art. 118 of the Aliens' Act. According to Art. 118(3) ALA the period for voluntary departure may vary between seven and sixty days.[3] If we compare this provision with the Return Directive, this provision at first sight seems to be more favourable for the third-country nationals than the Return Directive. However, the ALA does not allow extending this period above sixty days with regard to the specific circumstances of the case. Therefore, in this regard, this provision does not fully meet the requirements of the Return Directive.

In some respects, the Aliens' Act guarantees more favourable treatment for three-country nationals than the Directive. First of all, Art. 118(1) ALA considers providing period for voluntary departure an obligatory requirement for every return decision, even in the cases referred to in Art. 7(4) of the Return Directive. Regarding third-country nationals who pose a threat to public policy, public security or national security, Art. 118(3) ALA provides only the possibility of Aliens' Police to decide, in accordance with Art. 7(4) of the Return Directive, to shorten the period for voluntary departure below seven days.[4] Thus every third-country national who has been issued a return decision shall be provided a certain period for voluntary fulfilment of the obligation to leave the territory of the Czech Republic.

This provision does not exclude the possibility to detain the third-country national right after the return decision has been issued or during the period for voluntary departure, if the requirements of the Aliens' Act are met. For these cases, Art. 118(3) ALA provides that should the period, in accordance with the return decision, start to run during the detention of the third-country national, it will run after termination of the detention instead.[5] Similarly, if the third-country national is detained during the period, the period for voluntary shall be suspended.[6]

Article 118(3) ALA also implies that the period shorter than seven days cannot be granted for other reasons set out in the Art. 7(4) of the Return Directive, such as the risk of absconding or the dismissal of an application for a legal stay for being manifestly unfounded or fraudulent. Furthermore, the Czech legislature did not use the option provided by the Return Directive to establish that the period for voluntary departure shall be granted only following an application of the third-country national. As a result, the period for voluntary departure is an obligatory requirement of every return decision.

Article 123b ALA, which transposes Art. 7(3) of the Return Directive, regulates two types of special measures which can be imposed if there is a risk that a foreigner will not comply with the return decision and will not leave the territory of the Czech Republic within the period provided for voluntary departure. These special measures include: (a) obligation of the

[3] Art. 118(3) ALA, the first sentence.
[4] Art. 118(3) ALA, the second sentence.
[5] Art. 118(3) ALA, the third sentence.
[6] Art. 118(3) ALA, the fourth sentence.

foreigner to inform the Aliens' Police about his residence address, to reside there, to report every change of it and to regularly report in person within the period set by the Aliens' Police; (b) deposit of a financial guarantee.

The imposition of a special measure is usually included in the return decision. However, the special measures are used as alternatives to detention of the foreigner, which means that the administrative authority is obliged to examine the possibility of imposing special measures before the decision on detention is adopted. Consequently, the decision on detention must adequately justify why in the particular case the imposition of some of the alternative would not be sufficient.

Case law

The administrative actions brought against the return decision usually do not challenge the length of the period for voluntary departure. Hence the case law regarding this issue is not very rich. If the length of the period for voluntary departure is actually challenged, the administrative courts primarily examine whether the administrative authority thoroughly justified the determination of the length of this period.

The SAC has dealt with the adequacy of the length of the period for voluntary departure only in very general terms so far. For example, in Judgment No. 10 Azs 238/2014 the SAC found the period of 30 days adequate on the basis of several factors. More specifically, it held that:

> "The Supreme Administrative Court [...] considers the thirty-day period for departure adequate. It is clear that the administrative authority decided within the statutory range established by law while determining the period for voluntary departure of the foreigner form the Czech Republic. The length of the period has been properly reasoned and [...] the administrative authority neither exceeded the statutory limits nor misused its discretion."[7]

The SAC also took into account the fact that the foreigner possessed a valid travel document and the counterarguments of the foreigner – that it is impossible to buy a ticket to Vietnam in such a short time and even if it would be possible, the ticket would be unreasonably expensive – speculative and irrelevant. Finally, the SAC observed that the case of removal of the given foreigner has been repeatedly subject to an administrative as well as judicial review. As a result, he had enough time to arrange his matters regarding his departure from the Czech Republic (since an action against a return decision always triggers a suspensive effect on the enforceability of the decision).

The vast majority of administrative courts′ judgements regarding Article 7 of the Return Directive deal with alternatives to detention (or in other words certain obligations aimed at avoiding the risk of absconding). Foreigners who have been detained often argue that the administrative authority failed to adequately assess the possibility of imposing any of the available alternatives to detention prior to ordering detention. Administrative courts then

[7] Judgement of the SAC of 27 November 2014, No. 10 Azs 238/2014, § 14 (author's translation).

focus on assessing whether the imposition of certain obligations might have resulted in obstructing of the return decision (by absconding of the foreigner).

For instance, in the case No. 9 Azs 192/2014 of 30 September 2014 the SAC dealt with the possibility of imposing these obligations in a situation when a foreigner has already been issued a return decision but did not leave the territory of the Czech Republic within the prescribed period. The SAC eventually concluded that:

> "In a situation when the special measure was imposed in the past and the foreigner has seriously violated his obligations relating to this special measure, it is clear that for the future it is not sufficient to impose it again and thus it is necessary to use a more effective measure, which is detention. The conduct itself referred to in Art. 124 para. 1 letter d) of the Aliens' Act [violation of the obligation arising from the imposition of special measure] basically implies the reason to believe that the enforcement of the return decision could be obstructed if the administrative authority used coercive means other than detention." [8]

According to the SAC, imposing of certain obligations within the meaning of Art. 7(3) of the Return Directive comes into consideration only within the phase of issuing the return decision. This means that, if the decision had been already issued and the foreigner failed to comply, the administrative authority is authorized to use more coercive measures, detention included. This conclusion corresponds with the Return Decision, according to which certain obligations may be imposed for the duration of the period for voluntary departure [Art. 7(3) RD] or in case of postponement of the removal [Art. 7(3) RD]. As a result, there is no place for these obligations after non-compliance with the return decision.

In Judgement of 15 July 2011, No. 7 As 76/2011, the SAC also held that the Aliens' Police is not required to impose special measures and to proceed to detention of a foreigner only in situation after she violated these special measures. Instead, the SAC held that:

> "The imposition of special measures must therefore be given priority over detaining a foreigner, but only if it can be assumed that the foreigner will be able to fulfil the obligations arising from the special measures and while there is no reasonable concern that the imposition of special measures may jeopardize enforcement of the return decision"[9]

The SAC also dealt with the relation between the period for voluntary departure and the period for entry ban. We will get back to this judgment in the section of this report devoted to Article 11 of the Return Directive.

[8] Judgement of the SAC of 30 September 2014, No. 9 Azs 192/2014, § 22 (author's translation).
[9] Judgement of the SAC of 15 July 2011, No. 7 As 76/2011 (author's translation).

Article 8 of the Return Directive – Removal

Legislation

Two general observations must be made before this Report zeroes in on the legislation and case law regarding Article 8 of the Return Directive. First, the Aliens' Act does not contain a comprehensive regulation of the enforcement of return decisions. Second, this area is also regulated by criminal law.

Article 8(1) of the Return Directive presupposes enforcing the return decision in two cases: (1) if no period for voluntary departure has been granted [in accordance with Art. 7(4) RD]; or if the foreigner failed to comply with the return decision within the period for voluntary departure. In accordance with Article 8(2) of the Return Directive, the State shall not enforce the return decision before the period has expired, except for situations referred to in Art. 7(4) of the Return Directive.

Article 8 has been transposed into the Aliens' Act only partially. As mentioned before, under the Czech law a period for voluntary departure is granted in every case, including to those TCNs referred to in Art. 7(4) of the Return Directive. The Aliens' Act does not expressly allow enforcement of the return decision only after expiration of the period for voluntary departure. Nor does it determine in which cases the decision may be enforced during this period. However, this can be deduced from the grounds stipulated by the Aliens' Act for detention prior to removal. According to Art. 124(1) ALA, the Aliens' Police are entitled to detain a foreigner under these circumstances:

(a) [if] there is a risk that the foreigner might endanger national security or seriously disrupt public order;
(b) [if] there is a risk that the foreigner might obstruct the enforcement of the return decision;
(c) [if] the foreigner did not leave the territory of the Czech Republic within the period set in return decision;
(d) [if] the foreigner has seriously violated the obligation arising from the imposition of special measure or
(e) [if] the foreigner is registered in the information system of the Contracting States.

Consequently, in the situations (a), (b) and (e) it is possible to enforce the return decision (by detaining of the foreigner) right after the return decision has been issued, and in the situations referred to in the situation (d) it is possible to enforce the return decision before the expiry of the period for voluntary departure.

After a foreigner has been issued a return decision, failed to comply with this decision, and did not leave the territory of the Czech Republic within the prescribed period for voluntary departure, three different scenarios may follow. First, according to Art. 124(1)(d) of the Aliens' Act, the administrative authority is entitled to detain the foreigner. Second, in accordance with Article 337(1)(b) of the Criminal Code,[10] she who resides in the territory of the Czech Republic despite being issued a return decision commits a crime of obstructing the

[10] Act No. 40/2009 Coll. on Criminal Proceedings, as amended.

enforcement of the administrative decision and shall be punished by imprisonment for up to two years. Third, the administrative authority may decide that the foreigner will not be detained and will not be subjected to criminal sanctions, and, instead, a new return decision – accompanied by a re-entry ban which is longer than the one in the original decision – will be issued. The choice between these three options depends on specific circumstances of each case.

Case law

The leading regarding the application of Art. 8 of the Return Directive is Judgement of the Supreme Court[11] No 7 Tdo 500/2014 of 7 May 2014, where the Supreme Court analysed Art. 8 paras. (1) and (4) of the Return Directive. This case concerns facts that are very similar to the factual scenario that led to the *El Dridi* judgment.[12] The Czech case involved a foreigner who was issued a return decision due to his illegal stay in the Czech Republic. Since he did not comply and stayed in the Czech Republic, he was sentenced in criminal proceedings for the crime of non-compliance with administrative decision and expulsion. The sentence was three months of imprisonment, but unlike in El Dridi, in this case the prison sentence was suspended (for two years).

The Supreme Court concluded that prison sentence in situation, when the foreigner did not respect return decision issued in administrative proceedings is consistent with the Return Directive as well as with the case law of the CJEU. Referring to the *El Dridi* judgement, the Supreme Court concluded that that EU law does allow the use of criminal law in return proceedings if prior use of administrative law proceedings, which imposed less coercive measures, failed in forcing a foreigner to leave the territory of the European Union. More specifically, the Supreme Court held that:

> "The conduct of the defendant has given a clear signal that he is not willing to respect the return decision of the administrative authority with the entry ban for a period of two years, and, therefore, it is evident that the same sanction [… imposed] in the administrative proceedings would not lead to a correction of the defendant nor to the enforcement of the return in accordance with the return decision issued by the Aliens' Police."[13]

> "[...] in a situation where such measures [in this criminal case those measures being a return decision issued by the Aliens' Police] have not led to the expected result being achieved, namely, the removal of the third-country national against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States' territory."[14]

In addition, the Supreme Court emphasized that, in the present case, the criminal punishment was just a suspended prison sentence. Therefore, this criminal sanction did not undermine the possibility of the foreigner to leave the European Union as soon as possible in order to comply with an earlier return decision.

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[11] The Supreme Court is the highest judicial authority in civil and criminal cases.
[12] Judgment C-61/11 *PPU, Hassen El Dridi alias Soufi Karim*, ECLI:EU:C:2011:268.
[13] Ibid (author's translation).
[14] Judgement of the Supreme Court of 7 May 2014, No. 7 Tdo 500/2014 (author's translation).

> "[...] suspended prison sentence imposed on a defendant does not jeopardize the achievement of the objectives pursued by the Return Directive, which consists in the departure of the defendant from the territory of the Czech Republic."[15]

The abovementioned reasoning of the Supreme Court suffers from certain shortcomings and might not eventually satisfy the CJEU's criteria. The possibility of imposing criminal sanctions for non-compliance with third-country nationals with the return decisions has been repeatedly brought before the CJEU. In *El Dridi*, the CJEU found the legislation allowing imposing a sentence of imprisonment on a third country national for not respecting the return decision to be inconsistent with the Return Directive on the grounds that imprisonment would delay removal and, therefore, it would threaten the achievement of the objective of the Return Directive. On the other hand, in *Achoughbabian*,[16] the CJEU concluded that, in general, the Return Directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence. Nevertheless, the legislation cannot impose imprisonment on illegally staying third country nationals during the return procedure. The Member States may only adopt or maintain criminal provisions governing situation in which coercive measures were insufficient to enforce the return of the foreigner. Finally, in *Sagor*,[17] the CJEU held that the legislation penalising illegal stay by means of fine which can be replaced by an expulsion order is compatible with the Return Directive, whereas legislation penalising illegal stay by means of home detention order is not.

Recall that in the Czech case, No 7 Tdo 500/2014, the suspended prison sentence was imposed. It is true, as the Supreme Court opined, that a suspended prison sentence itself does not prevent the actual realization of the return decision to the extent that the foreigner still has the opportunity to leave the territory of a state. However, the problem may arise if the foreigner failed to comply with the suspended sentence (i.e. he remains on the territory of the State), in which case the court shall decide that the prison sentence will be served. This decision, unlike the previous one, would definitely undermine the possibility of the foreigner to leave the European Union as soon as possible.

The abovementioned case law of the CJEU indicates that criminal sanctions (especially in the form of imprisonment or in another form, if they may lead to the delay of the return) for illegal stay may only be adopted once the return procedure is exhausted, after the use of coercive measures failed to facilitate the removal of the third-country national, and only in so far as there is no justified ground for non-return. In the case before the Supreme Court, the return procedure has not been exhausted, since the administrative authorities did not use all available measures to enforce the return decision – the foreigner has not been detained and the authorities have not taken any other steps to carry out his removal. Therefore, the prison sentence (even if it was a suspended one) should have come into play only in the situation

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[15] Ibid (author's translation).
[16] Judgement C-329/11 *Alexandre Achughbabian against Préfet du Val-de-Marne*, ECLI:EU:C:2011:807.
[17] Judgement C-430/11 *Md Sagor*, ECLI:EU:C:2012:777.

after the State had made an unsuccessful effort to expel the foreigner, which did not happen in this case.

The (im)possibility of enforcing the return decision was also assessed by the Supreme Court in the two cases involving the same foreigner – Case No. 8 Tdo 230/2014 of 26 March 2014 and Case No. 4 Tdo 354/2014 of 29 April 2014. In both cases the Supreme Court annulled judgements of lower courts. In Case No. 4 Tdo 354/2014 the foreigner was found guilty of committing the crime of non-compliance with administrative decision and expulsion, but the lower court did not impose any punishment because in the lower court`s view the very fact of guilty judgment was an efficient deterrent for the plaintiff. In the follow-up case, decided under the Case No. 8 Tdo 230/2014, the foreigner was again found guilty for the crime of non-compliance with administrative decision and expulsion, but this he was sentenced to ten months imprisonment.

The conviction of the foreigner in both cases was based on the fact that the foreigner repeatedly failed to respect the period for voluntary departure and remained on the territory of the Czech Republic, even though he has been issued a return decision with an entry ban for the period of ten years. This pair of cases differs from the abovementioned Case No. 7 Tdo 500/2014 in one important aspect – in Cases No. 4 Tdo 354/2014 and No. 8 Tdo 230/2014 the foreigner was repeatedly issued the return decision in administrative proceedings and was imposed the the penalty of expulsion and deportation in criminal proceedings; he was held in the detention centres and prisons, including the expulsion custody, but his removal always failed to be enforced. What makes the case specific is the fact that the foreigner claimed to be stateless since his native land Georgia refused to recognize his as its citizen, as a result of which the foreigner could not obtain Georgian travel documents.

In accordance with its previous case law, the Supreme Court stated that

> "The law as well as the constant jurisprudence clearly indicates that the failure to respect a decision on administrative expulsion may be sanctioned by criminal law."[18]

The Supreme Court rejected argumenta's based on Article 8 of the Return Directive as well as arguments based on the *El Dridi* judgement. Instead, it held that, unlike in *El Dridi*, where the foreigner failed to comply with the first order requiring his removal from the national territory, in the current case the foreigner repeatedly failed to respect administrative expulsions and penalties of expulsion. The Supreme Court thus indicated indirectly that procedure whereby the sentence of imprisonment is imposed if the foreigner repeatedly does not comply with the return (expulsion) decision (administrative or criminal), is compatible with the Return Directive. However, in this case, this principle was not applied, since the foreigner lacked the objective possibility to comply with the return decisions.

In addition, the Supreme Court noted that the Return Directive is not applicable to the foreigner′s case at all, because it does not apply to stateless persons. More specifically, it observed that:

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[18] Judgement of the Supreme Court of 26 March 2014, No. 8 Tdo 230/2015 (author's translation).

> "According to article 2 para. 1 of the [Returns] Directive it applies to third-country nationals staying illegally on the territory of a Member State. Stateless persons are not mentioned, except for Article 11 para. 5 [of the Return Directive] where a reference is made to Council Directive 2004/83/EC of 29 April 2004 [...]."[19]

This position of the Supreme Court is problematic and presumably not consistent with the Return Directive. As the Supreme Court rightly observed, the Return Directive does not explicitly mention stateless persons. Nevertheless, the Return Directive must be interpreted in the conjunction with the Treaty on the Functioning of the European Union and its chapter regulating area of freedom, security and justice, (pursuant to which the Return Directive has been adopted), namely with Article 67(2) TFEU which states that:

> "[the Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals."

Stateless persons therefore should fall within the scope of Return Directive, despite the fact that the Return Directive itself does not explicitly say so. Moreover, Art. 3(1) of the Return Directive considers a third country national to be *any person* who is not citizen of the EU or a person enjoying the right of free movement, which includes also stateless persons.

Following purely domestic argumentation after excluding application of the Return Directive, in both cases the Supreme Court came to the conclusion that there was no room for criminal prosecution if the enforcement of removal was not objectively possible. The reasoning of the two judgements slightly differed. In Judgment No. 8 Tdo 230/2014, the Supreme Court emphasised actions of the foreigner, who was objectively unable to obtain travel documents and thus to comply with the return decision. These factors made clear that his non-compliance was not deliberate. On the other hand, in Judgment No. 4 Tdo 354/2014 the Supreme Court pointed to the actions of State, which was not capable of enforcing the removal of the foreigner, despite the fact that this situation was not caused by the foreigner, which means that he cannot face criminal prosecution.

The Supreme Court also identified the gap in the law, which is an objective impossibility to enforce removal of some foreigners. More specifically, in noted that:

> "In this context, a particularly urgent question arises as to whether and to what extent the Czech legal system is capable of reacting to situation when in the territory of the Czech Republic there is a foreigner without proper identity documents and without nationality."[20]

This problem is associated with the fact that administrative authorities, while issuing the return decision are not obliged to examine, whether the return is in fact possible or not, which may lead to situations like the one of the foreigner in the present case. The Return Directive does not deal with this issue either. Only Article 15(4) of the Return Directive prevents

[19] Ibid (author's translation).
[20] Ibid (author's translation).

detention to continue in case that a reasonable prospect of removal no longer exists. The Return Directive, however, does not regulate the procedure when the prospect of removal does not exist even at the time of issuing return decision.

Article 9 of the Return Directive - Postponement of removal

Legislation

The Aliens' Act does not contain a separate provision stipulating the conditions under which the postponement of removal is obligatory or at least optional.

According to Art. 169(5) ALA, an appeal against the return decision always has a suspensive effect. The action against the return decision also has a suspensive effect on the enforceability of the decision pursuant to Art. 172(3) ALA. Furthermore, on the request of the foreigner, the Supreme Administrative Court may grant (and usually does so) suspensive effect to a cassation complaint in accordance with the Art. 107(1) of the Code of Administrative Justice.[21] Therefore if the foreigner decides to challenge the return decision, her removal may not be enforced until the final decision is adopted.

The principle of non-refoulement is guaranteed by Art. 179(1) ALA, which stipulates "reasons prohibiting expulsion".[22] This provision forbids expulsion of the foreigner if there is a reasonable concern that in the State to which she ought to be returned she might face the risk of serious harm and due to such danger she is unable or unwilling to enjoy the protection of that State. Then on the basis of Art. 120a(1) of the Aliens' Act, before the return decision is issued, the Aliens' Police are obliged to request a binding opinion of the Ministry of the Interior as to whether the foreigner's departure is possible. If any reason prohibiting expulsion arises after the return decision entered legal force, the Aliens' Police will issue a new return decision, again after requesting a binding opinion of the Ministry of the Interior [Art. 120a(2) ALA]. If, pursuant to this binding opinion, there are reasons prohibiting foreigner's expulsion, the Aliens' Police shall grant the foreigner the so-called "toleration" visa [Art. 120a(4) ALA], which is a visa for the period over 90 days for the purpose of tolerated stay governed by Art. 33(1)(a) ALA.[23]

The Aliens' Act does not contain a provision that would allow postponement of the removal on the basis of specific circumstances of the case. Article 10 ALA provides that the obligation to leave the territory does not apply to a foreigner if there is an immediate threat to her life because of an accident or sudden illness, or if withholding of emergency medical care would cause her permanent pathological changes, or if it is necessary to provide the foreigner emergency medical care in connection with the childbirth. However, this provision applies only to a foreigner who was refused an entry to the territory. Therefore, Art. 9(2) of the Return Directive has not been properly transposed into the Czech law.

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[21] Act No. 150/2002 Coll., the Code of Administrative Justice.
[22] Note that 'reasons prohibiting expulsion' are supposed to cover predominantly the Art. 3 ECHR cases, but their scope is much broader. For further details, see KOSAŘ, D., LUPAČOVÁ, H.: *Migration Law in the Czech Republic*, International Encyclopedia of Laws: Migration Law, Kluwer Law International, 2012, pp. 140-141.
[23] See ibid.

Case law

In case No. 9 As 23/2009 of 19 November 2009 the SAC analysed Art. 9(2)(b) in the context of Art. 15(6) of the Return Directive (despite the fact that at the time of issuing this judgment, the Return Directive had not yet been transposed into Czech law) in relation to the lack of identification of the foreigner. The SAC eventually held that:

> "[...] in cases falling under Article 9 paragraph 2 letter b) of the Return Directive, the administrative authorities will be able to postpone removal. This will apply to situations where the administrative authority, despite all efforts, failed to verify the identity of the foreigner due to objective reasons. If the decision on postponement is adopted, the reasons for detention may cease to exist. The construction of Article 15 para. 6 [of the Return Directive] on the other hand, is built on the opposite assumption, being that the obstacle to the enforcement of the removal of the foreigner will be primarily a lack of cooperation on the part of the foreigner. This may typically include using a false identity. For these situations, the Return Directive does not enable the possibility of releasing the foreigner from the detention, but rather states explicitly that the detention may even be prolonged beyond the maximum duration specified in Article 15 para. 5 [of the Return Directive]."[24]

The SAC also stressed the need to take into account all relevant circumstances of the case, which may lead to future postponement of removal into account already within the administrative expulsion proceedings and consider whether it will be possible to enforce the return decision.

> "The purpose of such procedure is, to the extent possible, to eliminate doubts about the prospect of enforcing the return decision. Observance of this procedure by the administrative authorities should reduce the existence of cases like the present case, where the foreigner, after being imposed a return decision, wants to depart within the subscribed period, but for objective reasons, independent on her will, she cannot do so. Such a situation can, under certain conditions stipulated by law, result in her detention, which represents on the one hand unwanted interference with personal liberty of the foreigner, and on the other hand, ineffective and uneconomical process."[25]

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[24] Judgement of the SAC of 19 November 2009, No. 9 As 23/2009 (author's translation).
[25] Ibid (author's translation)

Article 10 of the Return Directive - Return and removal of unaccompanied minors

Legislation

The first paragraph of Article 10 of the Return Directive was transposed by Article 119(9) ALA, which reads as follows:

> "In case of an unaccompanied minor (Art 180c ALA), the [Aliens' P]olice shall immediately appoint him a guardian for administrative expulsion proceedings. The [Aliens'] Police shall inform the unaccompanied minor about appointing the guardian and instruct him on guardian′s assignments."

The role of the guardian is being performed by an authority for social and legal protection of children in accordance with the Act No. 359/1999 Coll., on Social and Legal Protection of Children.

The second paragraph of Article 10 of the Return Directive was transposed by Art. 128(3) ALA, which stipulates that:

> "In case of an unaccompanied minor, the [Aliens' P]olice shall carry out the acts referred to in paragraphs 1 [transportation of the detained foreigner to a border crossing in order to leave the territory] and 2 [leaving a detained foreigner in the facility for detention until conditions for his departure from the territory are ensured] only after the State, where the unaccompanied minor is being deported to, stated that the unaccompanied minor will be ensured a reception corresponding to his age."

Case law

Given that removal of unaccompanied minors is very rare in the Czech Republic, no relevant case law was found on this matter.

Article 11 of the Return Directive – Entry bans

Legislation

The Aliens' Act does not give the administrative authorities discretion as to whether the return decision shall be accompanied by an entry ban or not. In accordance with Art. 118(1)ALA, the entry ban is an obligatory requirement of every return decision. There is no exception to this rule and, therefore, under no circumstances it is possible to refrain from issuing the entry ban.

Even if a foreigner has been a victim of human trafficking and has been granted a residence permit pursuant to Council Directive 2004/81/EC (or who applied for this residence permit), the entry ban is also imposed, but pursuant to Art. 119a(4) ALA the return decision cannot be executed.

As regards the length of entry bans, Art. 119(1) ALA divides the reasons for expulsion into three groups depending on their severity and, accordingly, allows issuing the entry ban for up to three, five or ten years.

According to Art. 119(1)(a)ALA an entry ban for up to ten years can be issued when:

1. if there is a substantiated risk that the foreigner might endanger the security of the state during her residence in the Czech Republic by using violence in asserting political aims or by performing an activity endangering the foundations of a democratic state or aimed at disrupting the integrity of the Czech Republic, and/or in any other similar manner; or
2. if there is a substantiated risk that the foreigner might materially violate public order during her residence in the Czech Republic

According to Art. 119(1)(b) ALA, an entry ban for up to five years can be issued:

1. if the foreigner attempts to prove her identity during a border or residence check by using a document that had been forged, or by using a document of some other person as her own document;
2. if the foreigner tries to prove her identity during a residence or border check when leaving the Czech Republic by using a document that is invalid for the reasons referred to in Article 116 letters (a), (b), (c) or (d) [if the validity period stated therein had expired; the travel document had been damaged to such an extent that the entries therein are illegible; it has been flawed; and if it contains incorrect data and information or changes made in an unauthorised manner];
3. if the foreigner had been employed in the Czech Republic without a work permit even though such work permit is a condition for employment, or if the foreigner performs a taxable gainful activity without holding a licence defined in the special legal regulation or had employed a foreigner without a work permit or had intermediated such employment to a foreigner;
4. if the foreigner had acted or was to act on behalf of a legal entity that employed the foreigner without a work permit or that intermediated such employment;
5. if the foreigner fails to submit to a border check if she is required by the [Aliens'] Police to do so;
6. if the foreigner crosses the national border in a hideout or attempts to do so;
7. if the foreigner crosses the national border otherwise than through a border crossing point;

8. if the foreigner does not prove, in a reliable manner, that she resides in any of the Contracting States for a period for which she has been authorised to reside on a temporary basis without any visa or on the basis of a short-term visa; or
9. if the foreigner had repeatedly intentionally breached legal regulations and if the decision on administrative expulsion is proportionate to the breach of the obligation imposed by this legal regulation or if she had obstructed the execution of judicial or administrative decisions;

According to Art. 119(1)(c)ALA, an entry ban for up to three years can be issued:

1. if the foreigner resides in the Czech Republic without a travel document even though she has not been authorised to do so;
2. if the foreigner resides in the Czech Republic without a visa even though she has not been authorised to do so, or without a valid residence permit;
3. if the foreigner had stated, in any proceedings defined herein, untrue information with the intention of influencing the decision-making of an administrative authority; or
4. if there is a substantiated risk that the foreigner could seriously endanger public health during her residence on the basis that she suffers from a serious illness.

Paragraph 3 of Article 11 of the Return Directive was transposed by Art. 122(5)(b) ALA, according to which the Aliens' Police may, at the request of the foreigner, issue a new decision revoking the decision on administrative expulsion, if the foreigner proves that she voluntarily left the territory within the period laid down in the decision on administrative expulsion. However, this provision adds one more condition for revocation of the decision, which is that the revocation shall be proportional to the reason which led to issuing the initial decision. Article 122(5)(a) ALA provides an additional reason that allows revoking the decision on administrative expulsion – if the grounds for issuing the decision no longer exist and half of the period of entry ban has passed.

Case law

In Case No. 1 As 106/2010 of 24 January 2012 the Supreme Administrative Court dealt with the issue of when the period within which the third country national cannot enter the EU (entry ban) starts. The case was decided by the Grand Chamber of the Supreme Administrative Court, the aim of which is to unify the conflicting case law of regular chambers of the SAC.

The Grand Chamber held that the EU law does not answer the question when the entry ban starts to run. Therefore, it is the issue of national procedural law. More specifically, the Grand Chamber held that:

> "It is therefore primarily for the administrative authority to determine in the operative part of the decision on administrative expulsion the beginning of the period in which the foreigner is obliged to leave the territory, as well as the beginning of the period for entry ban."[26]

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[26] Judgement of the Grand Chamber of the Administrative Supreme Court No. 1 As 106/2010 of 24 January 2012, § 29 (author's translation)

> "If, however, the administrative authority did not use this competence and determined, as in the current case, only the total period for the entry ban without in any way determining the beginning of this period, it can be only assumed that this period is counted, as well as other legal effects of the decision on administrative expulsion for which the law does not provide otherwise, from the date of the legal force of the decision."[27]

In order to avoid misunderstanding, it should be noted that the amendment to the Aliens' Act, which entered into force on 1 January 2012, stipulates that the entry ban does not run while the return decision is not enforceable (e.g. when the enforcement of the decision is suspended due to action brought against it or due to ongoing proceedings on granting international protection). This change was introduced in order to prevent the shortening of the entry ban by its running before the actual realization of the return decision. Before the amendment, no such a provision was included in the Aliens' Act, which basically meant that a suspension of the enforceability of the decision had no effect on counting the period for entry ban.

The decision of the SAC No. 1 As 7/2013 of 10 April 2013 addresses the relation between the period for voluntary return (Art. 7 RD) and the entry ban. The conclusion of the SAC was that the period for voluntary departure and the period for entry ban serve two different purposes and are independent of each other. It is therefore not necessary to bind the beginning of both periods to the same time point.

Concerning the period for voluntary departure, the SAC held that

> "The essence of the period for voluntary departure is to encourage the foreigner to leave the territory voluntarily within a specified time limit [...] without the need for using coercive measures."[28]

On the other hand, as regards the period for entry ban, the SAC concluded that:

> "The ban on entry into the territory of the Member States of the European Union [...] expresses the time period during which the foreigner is denied re-entry to the territory of the Member States of the EU, with regard to his conduct in the past and a danger he poses to the society. [...] In this context it should be added that under Article 11 of the Return Directive, the return decision may not be automatically accompanied by entry ban. Although the legislature has not expressly allowed such option in the Aliens' Act, this fact indicates the autonomy and severability of the verdicts about determining the period for voluntary departure and the period for entry ban."[29]

The abovementioned judgment of the Grand Chamber made clear that if the administrative body does not specify the exact date, the entry ban starts to run when the return decision entered the legal force. The start of the period for voluntary departure depends on the legal force of the decision, unless the administrative authority stipulates otherwise. In this situation, both periods would start to run at the one point. However, if the enforcement of the decision is suspended, unlike the entry ban period, which will not run, the period for voluntary departure

[27] Ibid, point. 30 (author's translation)
[28] Judgement of the Supreme Administrative Court No. 1 As 7/2013 of 10 April 2013, § 16 (author's translation)
[29] Ibid, § 17 (author's translation)

will. This may lead to a situation, when the period for departure expires before the court decides on the action against the return decision and, therefore, the foreigner will have to depart the day when the court′s decision is delivered to him.

The SAC concluded that this situation does not constitute a disproportionate interference with the rights of the foreigner, since she had the opportunity to leave the country before the court′s decision has been made and thus comply with the return decision. Moreover, if she had left the country within the period for voluntary return, she would have gained the benefit of the possibility of the withdrawal or suspension of the entry ban.