



REDIAL PROJECT

National Synthesis Report – Czech Republic

(Draft)

Template: National reports on the second package of the Return Directive

Articles 12 to 14 RD

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Rem: please consider that the questions below do not represent an exhaustive list of issues raised by these provisions but mainly offer a starting point for research and greatly facilitate our subsequent comparative analysis. Any other jurisprudence which does not touch precisely on these issues might be included in your report, as long as it is relevant for the interpretation/implementation of Article 12-14 of Chapter III of the Return Directive (see in this regard the REDIAL [Annotated Return Directive](#) covering both the ECtHR and CJEU relevant case law).

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

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

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

NO

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

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

NO

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)?

NO

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?

Article 12 (3) of the directive has not been implemented into Czech law. When issuing a return decision, an administrative authority does not distinguish between TCNs who have illegally entered the territory of the State and TCNs who found themselves in an irregular situation for other reason. Return decision is never issued by means of standard form.

As regards providing translation of the return decision, the Czech Republic has not explicitly transposed the requirements of the Article 12 (2) of the Return Directive. To make things even more complicated, although Czech law does enshrine right to an interpreter [even on the constitutional level in Article 37 (4) of the Charter of Fundamental Rights and Freedoms and further in Art. 16 (3) of the Code of Administrative Procedure], administrative courts¹ came to a conclusion that such right does not cover the entire proceeding, but only those parts where the administrative authorities orally communicate with the foreigner, which means that the foreigner does not have the subjective right to translation of the official documents (including the decisions on the merits). However, the Opinion No. 46 of the Advisory Group of the Ministry of the Interior for the Administrative Code stipulated that when the proceedings is initiated *ex officio* (*e.g.* in case of expulsion) the applicant must be, according to Article 37(4) of the Czech Charter of Fundamental Rights, assigned an interpreter for free who will translate the decision on the merits for the applicant. This Opinion is complied with in practice and was upheld by the Supreme Administrative Courts in Judgment No. 6 A 17/2000 of 27.01.2004; and, more recently, in Judgment No. 2 As 99/2012.

Finally, while the last amendment of the Czech Aliens' Act⁵ did not expressly mention that procedural safeguards guaranteed during the return procedure apply also to the administrative decision extending the period for voluntary departure, the procedural safeguards are guaranteed to all return related decisions through the general provisions of the Administrative Code.

¹ For further details see judgment of the Regional Court in Brno no. 32 A 61/2015. The court referred to the earlier case law of the Constitutional Court according to which aliens who are subject to administrative or judicial proceedings do not have the right to get translated decision, no matter that they do not understand it, since the constitutional right to interpreter does not go so far that aliens would be able to receive translated decisions of administrative authorities. The Court did not refer to Art. 12 of the Return Directive. The Court conceded, however, that authorities, bound by the principles of good administration, are obliged to enable aliens at least to hire an interpreter who would explain them the decision; the aliens would have to pay such interpreters from their own pocket.

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

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

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

YES

Reference was made to the ECHR and case law of the European Court of Human Rights by the Constitutional Court in Judgment No. Pl. ÚS 26/07,² by which the Constitutional Court annulled the provision of the Aliens Act that prohibited judicial review of decisions on removal of TCNs, if those TCNs stayed in the Czech Republic illegally. The decision predates the Return Directive, though. Constitutional Court briefly referred to the case law of the ECtHR regarding Articles 2, 3 and 8 of the Convention in the context of return of foreigners pointing to the fact that autonomy of the Contracting States as regards adoption of return decision is limited by the fundamental rights of the foreigners. The conclusion of the Constitutional Court about the unconstitutionality of the contested provision was, however, based on the national constitution. The Court relied on the fact that Charter of Fundamental Rights and Freedoms [in Art. 36(2) of the Charter] prohibits excluding decisions concerning fundamental rights and freedoms from the judicial review and given that return decision is capable of interfering with human right of foreigners, judicial review of such decision cannot be excluded. The Constitutional Court also emphasized that national constitution does not distinguish between foreigners who stay on the Czech territory legally and those who stay illegally. That is why all foreigners shall be protected against return decisions.

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 (to a certain extent)

One of the few decisions expressly referring to Return Directive is Judgment of the Supreme Administrative Court (SAC) no. 4 Azs 122/2015, which regards the right to legal assistance in return proceedings, especially when a foreigner is subject to detention. SAC addressed article 13 (3) of the Directive and held that *“When transposing the provision of the Return Directive into Aliens’ Act, the legislator absolutely inadequately fulfilled its objective of ensuring the effective exercise of right of foreigners to receive legal advice or legal representation. [...] None of the provisions of the Aliens’ Act or any other law do guarantee obtaining free legal advice or legal representation to all foreigners, who so not have sufficient financial resources. Above all, the Aliens’ Act does not give any assurance that legal aid will be granted to foreigners or that they will get it on time, as the Act does not enshrine any general obligation of the competent administrative authority to ensure legal*

² The earlier Judgment of the Constitutional Court (Pl.ÚS 27/97, 26 May 1998) found the same practice in violation with the Czech Charter of Fundamental Rights and Freedoms (i.e. not only with the Czech Charter of Fundamental Rights).

advice or legal assistance for the foreigners, so they do not suffer any harm. This legislative deficiency is evident especially in cases of detained foreigners or in cases of foreigners in reception or residential centres, who have been delivered a decision issued in proceedings under the Aliens' Act and who have a very short time limit for filing an appeal or an action to the administrative court."

The SAC urged the authorities to do as much as possible to achieve the goal of the Return Directive Art. 13 (3) – especially to make sure that detention facilities are visited weekly by lawyers so all aliens have effective chance to make their appeals on time. Moreover, the SAC admitted that a lack of access to legal aid might present serious reason for missing the deadline for filing an appeal and consequently might be a reason for granting an excuse from not bringing appeal on time (Art. 41 of Administrative Procedure Act allows applying for a waiver of a missed deadline for an act if the deadline could not have been met due to serious reason that occurred without a fault of the applicant). Before this judgment, administrative authorities have been constantly refusing to accept that lack of legal assistance can be viewed as “a serious reason that occurred without a fault of the applicant”.

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

NO

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)?

This exact issue has not been subject to judicial decision-making so far. It may be caused by the fact, that under the Czech Aliens' Act, return decision (so called decision on administrative expulsion), except obliging the TCN to leave the area of EU member states, includes also determination of the period for voluntary departure (which is being provided always except situations when a TCN is detained) and an obligatory re-entry ban. The Czech Republic thus used the possibility provided for by the Directive in Art. 6 (6) and a return decision together with re-entry ban are issued in a single administrative decision that also sets the period for voluntary departure.

As regards extending the period for voluntary departure, until 18 December 2015, Czech law did not provide for such option. This changed by the amendment to the Aliens' Act by law no. 314/2015. A TCN now has a possibility to apply for extension of the period for voluntary departure for certain reasons. In that case, according to Art. 118 (3) Aliens' Act, new return decision (again setting a duty to return and the re-entry ban) will be issued which will provide for new, extended period. Therefore, the TCN can use all of the remedies that are available against the return decision.

Postponement of removal is not granted in a form of separate decision. If the removal of the TCN is being postponed for the reason under Art. 9(1)(a) of the Directive (*non-refoulement* obligations), the return decision does not come into force until the *non-refoulement* is no longer applicable to the TCN. The removal therefore cannot be enforced. If the cause of postponement of the removal lies in the reason under Art. 9(1)(b) of the Directive (suspensive effect), no separate decision is adopted as well, since the suspensive effect of the appeal or of the administrative action against the return decision is granted automatically.

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

One of remedies available against a return decision is a cassation complaint – an extraordinary remedy which can be (on limited grounds) filed to the SAC if the administrative court rejects the action against the return decision. Generally, cassation complaint does not have suspensive effect,³ but the SAC can grant suspensive effect upon request of the applicant if (a) the execution of the decision would cause far greater harm to the applicant than granting of the suspensive effect might cause to other persons and (b) granting of the suspensive effect will not violate any of important public interests. The situation, however, differs when foreigners facing expulsion are concerned. Although there is no legal provision guaranteeing these foreigners different status in this regard, case law of the Supreme Administrative Court provides otherwise. In its judgment no 1 Azs 160/2014 the SAC concluded that: *“When reviewing the return decision of the competent administrative authorities, the harm that the applicant might face, is evident from the very nature of such decision. This applies at least in terms of ensuring the right to a fair trial and the right to respect for private life. The Court must take this into account even in situation when the applicant in his/her application for suspensive effect does not highlight any specific facts of his case nor does he propose any evidence to prove those facts.”* This decision of the SAC implies that the cassation complaint of the foreigner facing expulsion shall have almost automatic suspensive effect, unless there are certain specific circumstances of the case that would justify prioritizing of the public interest over the rights of the foreigner.

Another decision relevant to this matter is already mentioned judgment of the SAC, in which the question whether lack of access to legal assistance might be a reason for granting an excuse from not bringing appeal on time, was addressed. SAC concluded that in a situation when a TCN is detained and there is no legal aid available during the period for filing an appeal against a return decision (which is just 5 days) an excuse from not bringing appeal on time shall be granted.

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).

No decision of administrative court is available which would address this issue. However, given that Art. 36 of the Code of Administrative Procedure clearly recognizes the right of the parties of the proceeding to express their views and to comment on the findings of the administrative authority before the decision is adopted, violation of this right would be a reason for the court to annul the return decision and the administrative authority would have to adopt a new one.

³ Note that the suspensive effect before the regional courts is explicitly stipulated by law. The case law mentioned below concerns the suspensive effect before the Supreme Administrative Court (the highest administrative court and a second-instance court in these matters), which is not required by the RD.

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

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?

Under Czech law⁴, the presiding judge (the chamber president) may appoint a legal representative to every person who submits a motion, as long as such person fulfils two conditions: (a) he/she meets the requirements for exemption from court fees (as set in Court Fees Act⁵) and (b) it is necessary for the protection of his/her rights.

In accordance with the Court Fees Act, a foreigner challenging decision on administrative expulsion, decision on detention or decision on prolongation of detention falls within a category of subjects that are exempt from court fees. This, however, does not automatically mean, the every foreigner challenging one of the mentioned decisions will fulfil the first conditions for appointing a representative. A situation may occur when albeit the foreigner will not have to pay a court fees, but at the same time the court will not appoint him/her a representative, because it turns out that the foreigner has adequate means to choose and pay for the representative. Also the second condition (necessity of representative) depends on specific circumstances of each case. One of the aspects the court takes into account in cases of foreigners is whether the foreigner can speak Czech and whether he/she is oriented in the Czech legal system⁶.

It is thus very probable that a foreigner, who lacks sufficient financial resources, does not speak Czech and/or is not familiar with the legal system, will meet the conditions for appointing a representative. A foreigner is entitled to choose a representative whom he/she would like the court to appoint and the court will most likely appoint this particular person as a representative (the court may appoint another representative, if for example the one chosen by the foreigner is work loaded).

In any case – if the court appoints a representative for a foreigner or if the motion of the foreigner is dismissed – the court issues a resolution. If the representative was not appointed, a foreigner may challenge the resolution by a cassation complaint.

The proceeding regarding appointment of representative is independent of proceeding regarding return or detention decision. The motions for the appointment of a representative shall be decided preferentially (prior to any other submissions received by the court) and in any case before the judgment on the merits is adopted.

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

If yes: please elaborate further on this issue

⁴ See Art. 35(8) of the Act No. 150/2002 Coll., the Code of Administrative Justice.

⁵ Act No. 549/1991 Coll., on Court Fees, as amended.

⁶ Judgment of the Supreme Administrative Court of 30. September 2003, no. 1 Azs 5/2003-47.

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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?)

An appeal against a return decision is decided by the Alien Police Service Directorate – an authority superior to Regional Police Directorates which are competent for issuing return decisions. The courts do not consider this to be an issue. Although itself a review of the return decision before the Alien Police Service Directorate might not fulfil the condition of independency and impartiality as required by the Art. 13(1) of the Return Directive, given that the appellate decision of Alien Police Service Directorate can further be subjected to judicial review, the independency and impartiality of the review is guaranteed via aggregate of available remedies (similarly see *Kudła v. Poland* [GC], no. 30210/96, § 157).

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

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

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

NO

D. Have national courts ever disregarded/deperted 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

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

NO

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?

No decision of national courts dealing with issue of safeguards pending return is available. However, a provision of the Aliens Act concerning emergency health care and essential treatment of illness can be mentioned at this point. This provision (Art. 176a of the Aliens Act) contains an exhaustive list of medical conditions under which a foreigner is entitled to receive a free health care during a period for voluntary departure. In accordance with Art. 176a, a foreigner will be provided urgent and basic medical treatment in connection with the mandatory quarantine and in conditions that

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

No special standard, that would take into account special needs of vulnerable persons, as required by para. 1(d) of article 14, is presumed by Aliens' Act.

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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