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REDIAL PROJECT

National Synthesis Report – Germany

(Draft)

Second Package of the Return Directive – Articles 12-14

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Preliminary Remark

There is very little in the German jurisprudence on issues relating to Articles 12 to 14 RD. German courts have been primarily concerned with questions on the interpretation of Article 7, in particular the need to combine the return decision with an appropriate period for voluntary departure, and Article 11 the requirement ex officio of a determination of the length of an entry ban with regard to decisions adopted before the implementation of the provision in German law and the Principle of separate accommodation in specialised detention facilities. The cases in the data bank of the project thus do not indicate any German court decisions in relation to Article 12, while there are two decisions dealing with corollary aspects of 13 and 14 RD, which will be discussed below.

In addition to the database, we have embarked upon autonomous research into the German administrative jurisprudence, which includes courts on all levels from administrative regional courts to administrative appeal courts for the respective *Länder* and the Federal Administrative Court. In general, administrative courts increasingly refer to the Return Directive in combination with German law implementing the provisions of the directive, frequently in the context of an interpretation in accordance with Union law. Occasionally they had also – in the time period before the implementation of the RD – invoked the Directive to fill gaps or to correct incompatibilities of existing German laws and practices with the RD. No decision however could be identified where a German Court has applied Articles 12 to 14 RD in disregarding their regular meaning under EU law.

The limited relevance of Articles 12-14 RD in Germany contrasts with the enhanced visibility of other provisions of the Directive in German case law. The main factor explaining this outcome is the pertinence of domestic constitutional guarantees on an effective judicial remedy (Article 19(4) of the German Constitution) as well as a highly developed culture of enhanced rights of defence in administrative procedures, which apply to return decisions as well. Since these domestic guarantees are far more detailed than the rather abstract guarantees in Articles 12-14 RD, the latter quite simply at little added value within the German domestic context, since national laws and practices are already in compliance with ECJ and ECtHR requirements.

More specifically, the statutory guarantees for administrative procedures implementing Article 12 RD are laid down in the Codes of Administrative Procedure of the Federation (*Bund*) and the *Länder*,

which both contain extensive guarantees which are much more detailed than the Return Directive.¹ Judicial remedies implementing Article 13 Return Directive are regulated in the Act of Administrative Court Procedure, which applies throughout Germany and similarly contains a set of extensive guarantees,² which often build upon ambitious case law of the Federal Constitutional Court.

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?

YES/ NO

References to CJEU rulings are common practice of German administrative courts. Yet, there are no CJEU rulings specifically on issues related to Articles 12-14 RD questions which have been referred to in German decisions. The reasons for this situation have been spelt out in the introductory comments.

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?

YES/NO

References to the CJEU rulings have occasionally been made although mostly in a rather general way relating to the scope of applicability of the Directive or the legal nature of an expulsion decision or decision to announce a deportation unless the person concerned does not leave voluntarily within the time provided for in the decision. The background of such decisions was generally the applicability of Articles 7 or 11 of the Directive rather than the specific requirements of Articles 12-14.

There are only some lower administrative court decisions mentioning Art. 12 RD (but not necessarily ECJ rulings related to the provision):

Firstly, the Administrative Court of Munich in a decision of 29 May 2011 states that no duty to deliver a written translation of the decision and the available judicial remedy ex officio can be derived from Art. 12, unless a formal request has been filed by the applicant.³

Secondly, the Civil Appeal Court of Saarbrücken states that according to Article 12 RD the competent alien authorities must enact a written decision which as a rule provides for an adequate timeframe to voluntarily depart between 7 and 30 days.⁴

Thirdly, transfers in the framework of the Dublin III Regulation No. 604/2013 however do not fall in the scope of application of Art. 12 /13 RD according to the Administrative Court of Regensburg.⁵ This view is supported by a more recent view of the Federal Administrative Court, although in a different context of voluntary departure.⁶ The Federal Court held that the rules of the RD are not

¹ For the federation see *Verwaltungsverfahrensgesetz* as of 23 January 2003 (Official Gazette 2003 I, p. 102), available on: <http://www.gesetze-im-internet.de/vwvfg/>.

² See *Verwaltungsgerichtsordnung* as of 19 March 1991 (Official Gazette 1991, p. 686), available on: <http://www.gesetze-im-internet.de/vwgo/>.

³ Administrative Court of Munich of 29 May 2011, M 24 K 11. 1579.

⁴ Administrative Civil Appeal Court Saarbrücken of 21 March 2011, 5 T 41/11.

⁵ Administrative Court of Regensburg of 20 July 2012, 5 S 12. 30230.

⁶ Federal Administrative Court of 17 September 2015, I C 26/14.

applicable with regard to the obligation to enable a voluntary departure in the context of Dublin transfers to the competent EU Member State. Therefore no obligation can be derived from the RD to enable a person subject to a transfer/return decision under the Dublin Regulation to leave voluntarily rather than by way of an accompanied transfer. The Dublin Regulation rules are to be considered as *lex specialis* excluding the recourse to the RD. This may be considered as applying equally to Art. 12-14 RD. An exception applies only and the RD rules become applicable if a foreign national entering illegally from a competent EU Member State is returned to a safe third state other than to the competent EU Member State.⁷

Fourthly, a discussion as to the scope of applicability of the Return Directive has also arisen with regard to the legal nature of expulsion decisions under Sec. 53 ff. of the Residence Act and with respect to announcements of deportation according to Sec. 34a of the Asylum Procedure Act (now Asylum Act). An expulsion decision under German law is a decision terminating a residence. It is to be distinguished from an announcement of deportation under Sec. 59 Residence Act which determines the timeframe to leave Germany and constitutes the basis for a deportation. The Administrative Appeal Court of Baden-Württemberg does not consider an expulsion decision as a return decision in the RD.⁸ Therefore the rules, including the procedural rules of Art. 12-14 do not apply. The Court refers to the CJEU ruling of 19 September 2013, C-297/12 stating that this ruling does not support a different interpretation. A different conclusion applies with regard to the announcement of deportation under Sec. 59 Residence Act⁹ – unless a deportation order is made under Sec. 34a Sec. 1 in Connection with Sec. 27a with regard to a transfer to a competent EU Member State.¹⁰

Finally, the issue of a right to be heard during the return procedure is not reported to have been discussed by a court, probably since the right to be heard is an undisputed constitutional requirement in every administrative procedure on the legality of administrative measures interfering into individual rights.

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

YES/NO

The Federal Administrative Court invoked the ECJ judgment in C-249/13, Boudjlida to justify its conclusion that the human right to good administration enshrined in Article 41 Charter of Fundamental Rights is addressed to the institutions and bodies of the EU only and cannot be invoked, therefore, against the activities of domestic authorities.¹¹ Since the case concerned a Dublin surrender to Spain, to which the Return Directive does not apply, there was no need for the court to refer to Article 12 Return Directive in addition to the ECJ judgment mentioned above.

⁷ Civil Appeal Court of Hannover of 30 April 2015, 8 T 16/15: similar Civil Appeal Court of Stuttgart of 16 February 2015, 19 T 43/15.

⁸ Administrative Appeal Court of Baden-Württemberg of 15 October 2013, 11 S 2114/13.

⁹ Administrative Court of Freiburg of 1 February 2016, 7 K 2404/15.

¹⁰ Administrative Appeal Court of Baden-Württemberg of 16 April 2014, 11 S 1721/13.

¹¹ See Federal Administrative Court, Decision of 27 October 2015, 1 C 33.14.

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?

YES/NO

In line with the introductory comments, the domestic (constitutional) guarantees on an effective judicial remedy and administrative rights of defence are far more detailed than the rather abstract guarantees in Articles 12-14 RD. For that reason, the latter quite simply at little added value within the German domestic context, since national laws and practices are already in compliance with ECJ and ECtHR requirements.

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

YES/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)?

YES/NO

The obligation to consider potential violations *ex officio* stems from the rather far-fetched constitutional guarantees described at the outset. In this field of administrative law, German judges are obliged to exercise a full control over all elements, which might affect the legality of the measure *ex officio* (*Untersuchungsgrundsatz*). This extends to both questions of law and of fact. Therefore, judicial control is not limited to the arguments raised by the parties in Germany.

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?

The question was not raised in domestic court proceedings.

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?

YES/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?

YES/NO

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

YES/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 Articles 13 RD?

YES/NO

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

YES/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?

Art. 13 RD has occasionally been controversially discussed in the jurisprudence of administrative and civil courts in the context of effective judicial protection to file a legal remedy against return decisions and connected decisions on entry bans.

Firstly, the Federal Civil Court has stated in a ruling of 8 January 2014 that in the interim period before the new provisions of the RD on entry bans were implemented in German law an alien subject to a return decision must be given sufficient amount of time to file a judicial remedy provided for in Art. 13 RD against a subsequent order of an entry ban.¹² Therefore no deportation order must be made before a sufficient time frame has been given to the person concerned to file a judicial remedy.

Secondly, the Administrative Appeal Court of Berlin-Brandenburg decided that interim judicial protection under Art. 13 para 2 RD provides for a right to seek effective protection not only with regard to return decisions but also with connected decisions on an entry ban. This implies that the person concerned must have the possibility to file an appeal before a decision of deportation is executed by the authorities although the Court admits that the Return Directive cannot be interpreted as guaranteeing a right to remain until a final decision has been taken by the Court.¹³ The failure of the administrative authorities to provide for adequate time to file an effective remedy does not mean in the Court's view that the administrative court is entitled to fix a time limit before a deportation order may not be executed. It is still up to the administrative authorities to determine a proper time limit. The requirement of effective judicial protection does not imply a transfer of original administrative power to the Court in spite of the Court exercising full judicial control over the administrative authorities.¹⁴

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?

YES/NO

If yes: please elaborate further on this issue

¹² Federal Civil Court of 8 January 2014 VZB 137/12 reported in the database.

¹³ Administrative Appeal Court of Berlin-Brandenburg of 21 March 2014, 12 S 113/13.

¹⁴ See fn. 12 and Administrative Appeal Court of Berlin-Brandenburg of 15 August 2013, 7 B 24/13, mn. 78.

C. What legal remedy is considered or applied by national courts in case of violation of the right to be heard by the administration?

There is no uniform position yet, within Germany, what the right to effective judicial protection in the sense of Art. 13 RD (irrespective of Art. 7 RD requirements) exactly means in terms of a time frame between the announcement of a return decision (announcement of a deportation order) and actual deportation however. A majority of administrative courts seems to assume that there has always to be granted an adequate period of time if only one day between the announcement of a deportation order and deportation in order to file a remedy.¹⁵ Therefore the person to be returned must have the actual possibility to submit the appeal while he/she is still on German territory.¹⁶ The right to effective judicial is violated if the return decision is only communicated one day before a person is transferred to Poland.¹⁷ A different view is taken by the Administrative Court of Gelsenkirchen stating that the Return Directive does not require that there has to be a time frame between an announcement of a deportation order and deportation.¹⁸ A judgement of the Administrative Appeal Court deals with legal advice and representation.¹⁹ The Court interprets Art. 13 para 2 RD as leaving it to the national legislator whether legal assistance and legal aid are granted free to any person subject to a return decision. German rules do not provide free legal aid unless there is an examination of a persons need and a decision as to chances of success. The Court states that there was no need under the provisions to apply special rules rather than applying the general rules on legal assistance in the German Administrative Court Procedure Act.

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?

YES/NO

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

YES/NO

It remains the obligation of individuals to ask for legal assistance which is provided in accordance with provisions which are not specific to expulsion proceedings, i.e. the general rules apply.

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)?

YES/NO

¹⁵ Administrative Appeal Court of Berlin-Brandenburg of 21 March 2014, 12 S 113.13; Administrative Appeal Court of Hesse of 13 October 2014, 7 B 1413/14; Administrative Appeal Court of Baden-Württemberg of 19 December 2012, 11 S 2302/12 reported in the database; Administrative Court of 25 June 2015, 19 K 116.15.

¹⁶ Administrative Appeal Court of Baden-Württemberg of 19 December 2012, 11 S 2302/12 reported in the database; Administrative Court of Münster of 17 January 2013, 8 L 37/13.

¹⁷ Administrative Court of Weimar of 26 November 2011, 7 E 20005/11; note however that in the framework of Dublin transfers Art. 13 RD is not applicable according to German administrative jurisprudence.

¹⁸ Administrative Court of Gelsenkirchen of 29 October 2015, 8 K 2231/15.

¹⁹ Administrative Appeal Court of Hesse of 5 June 2012, 3 B 823/12.

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?)

Although German administrative law knows the concept of an appeal (*Widerspruch*) before a hierarchical the superior administrative authority as a precondition for judicial review, this option does not apply in return proceedings in accordance with section 83 of the Residence Act which states that in matters of return decisions, including entry bans and time limits of the letter, that appeared procedure before an administrative authority does not apply. The underlying rationale is simple: since many foreigners subject to a return decision will appeal before the court anyway, the idea of the prior appeals procedure within the administration (i.e. to prevent unnecessary court cases by allowing the administration to correct itself) does not apply.

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?

YES/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?

YES/NO

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

YES/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 14?

YES/NO

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

YES/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?

There is no domestic case law on the matter for the simple reason that most third-country nationals subject to return decisions are covered by rather extensive provisions of the German Act on Reception Conditions for Asylum Seekers²⁰ which – notwithstanding its name – applies to those without leave to remain in the same way as it applies to asylum seekers. Since its guarantees mostly exceed the minimum provisions enshrined in Article 14 Return Directive, there is no need for domestic courts to refer to the latter provision.

With regard to family unity no decisions are reported either (Administrative Appeal Court of Baden-Württemberg of 19 December 2012, 11 S 2302/12 reported in the database mentions the provision only in passing). This may be explained by the fact that the large majority of deportation orders is made with respect to asylum seekers entering irregularly from a competent EU Member state into Germany. The provisions on modalities of return, resp. transfer to the competent EU Member State of the Dublin Regulation No. 604/2013 are applicable in this case according to the jurisprudence of the Federal Administrative Court. It should be mentioned however that with respect to family unity and safeguard of minors very similar provisions apply with respect to the return procedure pending return under the constitutional duty of protection of family and children.

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?

YES/NO

²⁰ Asylbewerberleistungsgesetz, available on: <http://www.gesetze-im-internet.de/asylblg/>.