REDIAL PROJECT

National Synthesis Report – Bulgaria

(Draft)

National report on the second package of the return directive: Gulgaria

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?

YES

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;

C-146/14 PPU, Mahdi, 5 June 2014, §§ 44-45. The case relates to immigration detention, but also could be relevant with regard to procedural safeguards in issuing a return/removal decision with regard to the obligation to communicate reasons. The reference for a preliminary ruling has been made in the context of court proceedings concerning a request by the immigration detention authority before the court to have the length of pre-removal detention extended with six more months in the case of a detained Sudanese national. Under Article 46a (3) and (4) of the Law on Foreign Nationals in the Republic of Bulgaria, a list of the third-country nationals who have remained in a detention facility for more than six months owing to obstacles to their removal from Bulgaria is presented every six months by the head of the detention facility to the administrative court in whose jurisdiction the detention facility is located. At the end of each six-month period in a detention facility, the administrative court rules of its own motion, in camera, on whether the person concerned should remain in detention, whether alternative measures should be adopted or whether that person should be released. In that regard, the referring court raises the question, inter alia, of the compatibility with EU law, and in particular with the requirements laid down by Directive 2008/115, of the procedure provided for under Bulgarian law for reviewing extension of detention periods. According to the referring court, the nature of the review which it may carry out varies

depending on whether it is acting as a judicial authority or as an administrative authority. If it takes a first-instance decision whether detention shall be prolonged, its actions resemble the one of an administrative authority. If it hears and determines a case as a judicial authority, it is unable to rule on the merits of the case since, under Bulgarian procedural law, its role is limited to reviewing the grounds for extending the detention of the person concerned as set out in the direktor's letter initiating proceedings such as those before it. The Court of Justice of the European Union highlighted that the decision shall be issued in writing with reasons being given in fact and in law. In paragraph 45 of its Judgment, the CJEU noted:

> "According to the case-law of the Court, the obligation to communicate those reasons is necessary both to enable the third-country national concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question (see, to that effect, Heylens and Others, 222/86, EU:C:1987:442, paragraph 15, and Kadi and Al Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 337)."

- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the constant jurisprudence developed in your country etc.)

The impact of the CJEU judgment in the Mahdi case is mainly with regard to pre-removal detention, both first detention order and extension of the length of detention. With regard to the obligation to communicate reasons in the decision of the first-instance authority to extend the period of detention, administrative practice in Bulgaria was changed to substitute the "list of the third-country nationals who have remained in a detention facility for more than six months owing to obstacles to their removal from Bulgaria" as stipulated in national law, with individual orders giving reasons in fact and law as to why the detention of the third country national in question shall be prolonged.

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

YES

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

In the case of *Ibrahim*, heard by the Supreme Administrative Court of the Republic of Bulgaria, case No.7103/2011, the Court cited paragraphs 31 and 32 of the Judgment of the CJEU in the ***El Dridi*** **case C-61/11 PPU**, in order to highlight that Member States may depart from the standards and procedures of the Return Directive only as provided for therein, inter alia in Article 4. Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it. However the directive does not allow those States to apply stricter standards in the area that it governs.

In the same case, in relation to the obligation to interpret national law in accordance with the relevant law of the European Union in order to establish the meaning of the national norms, the national court also cited:

- Judgement in Von Colson, C-14/83, ECLI:EU:C:1984:153, paragraph 26
- Judgement in Inter-Environment Wallonie, C-129/96, ECLI:EU:C:1997:628

In the case of *Ibrahim* (Judgment of 11.05.2012) the national Court explicitly cited **Article 12, Paragraph 1 of the Return Directive** and highlighted that the administrative decision-making authority that issued the removal and entry ban orders had only formally fulfilled the requirements of the provision. The administrative authority had mentioned the facts of the case, but had not discussed them and had not made any legal or factual conclusions out of them:

> "For the authority the fact of marriage with a Bulgarian citizen, the fact of two children in common, the fact of a voluntary appearance of the foreigner to the competent authorities and on the day of the marriage which date was 28.12, i.e. the eve of New Year celebrations, the fact of the full cooperation and not creating any obstacles to resolving the issue of stay in the country are irrelevant to the imposition to the measures facts. The authority did not discuss them. For them, they are part of a factual situation, not facts justifying their decision to impose the measure. No reasoning was provided by the authority for the duration of the imposed measure. It is unclear in this case what has justified the imposition of the maximum amount of the entry ban."

Therefore, in the *Ibrahim* case the Court repealed the judgment of the first-level court and repealed the administrative act in question as unlawful.

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

YES, the ECHR

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

In the case of *Nalbandian*, case No.13704/2010, the Supreme Administrative Court referred to **Article 8 of the ECHR (right to respect for family life)** and stated:

> "In this case neither the administrative authority nor the first level court discussed the impact the measure would have on the family life of the appellant. They have not noted that as a result of the measure the right to family life of the appellant will be breached – his wife is Bulgarian citizen, they have two children who are also in the country and neither his wife nor his children should be forced to leave Bulgaria to exercise their right to family life, without any evidence that this intervention is permissible in a democratic society and is one of those referred to in Art. 8, §2 of the Convention aims."

In the case of *Gladkih*, case No.11574/2011, in relation to **the right to respect for private life** as interpreted by the ECtHR, although not directly referring to it, the Supreme Administrative Court noted the following:

> "The authority never discussed the fact that the entire conscious life of Gladkih passed in Bulgaria, that he does not have any kind of relations with the country of origin, did not track or discussed his behaviour during the stay in the country, the established connections and relationships".

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, because the national legislation is in compliance with Art.12 RD.

If yes: please elaborate further on this issue

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

NO

If yes: please elaborate further on this issue

2. National Jurisprudence: major trends

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

In Bulgaria the judge controls ex officio all the elements of the lawfulness of the administrative act, irrespective of the arguments of the parties. This follows from the general provision of Article 168, Paras. 1 and 2 of the Bulgarian Code on Administrative Procedure.

In all cases of *Nalbandian* (case No.13704/2010), *Gladkih* (case No.11574/2011), *Ibrahim* (case No.7103/2011) and *Daminov* (case No.5004/2012) the national court considered it unlawful that the administrative authority had sometimes mentioned, but even so had not discussed in its decision, a number of relevant facts with regard to the return and/or the proportionality of the length of the entry ban of the third country nationals. For example, such relevant facts have been considered to be family ties, social integration, maintenance support, health condition and behaviour during stay in the country of the TCN.

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?

In Bulgaria no translated standard templates have been introduced, but the orders for return/removal/entry ban/detention shall be notified to their addressee with the help of an interpreter. Thus, in the case of *Arevik Shmavonyan*, case No.13731/2011, the Supreme Administrative Court cited the general Code on Administrative Procedure, Article 14, Para 2, which states that "*Persons who do not speak Bulgarian language can benefit from their native or another designated by them language. In these cases an interpreter is appointed*". In the case of *Arevik Shmavonyan*, the third country national had signed the order in question under a blank statement in Bulgarian that the order was served to her "in a language that I speak". The order did not specify the language Mrs. Shmavonyan speaks. The court found that such statement is not the necessary and sufficient proof that the notification to the addressee was made in a language she knew.

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?

YES

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

In the case of *Medjdi* (case No.14207/2012), the Supreme Administrative Court stated that lack of an interpreter during a court hearing with an appellant who is a third country national and clearly does not speak Bulgarian, is "contrary to the purposes and to the due result of Directive 2008/115 /EC and casts doubt on the effectiveness of judicial protection". With regard to **the principle of effectiveness of the judicial control**, the court cited:

- Judgement in *Impact*, C-268/06, ECLI:EU:C:2008:223, paragraph 42, 43
- Order in *Asparuhov Estov and Others*, C-339/10, ECLI:EU:C:2010:680, paragraph 13
- Order in *Claude Chartry*, C-457/09, ECLI:EU:C:2011:101, paragraph 25
- Order in *Boncea*, C-483/11 and C-484/11, ECLI:EU:C:2011:832, paragraph 29

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

YES

In the case of *Medjdi* (case No.14207/2012), the Supreme Administrative Court stated that lack of an interpreter during a court hearing with an appellant who is a third country national and clearly does not speak Bulgarian, is contrary also to **Article 47 of the Charter of Fundamental Rights of the European Union**. The court further noted that the principle of effective judicial protection of the rights guaranteed by EU law is a general principle of EU law and is enshrined in the common constitutional traditions of Member States, as well as in **Articles 6 and 13 of the European Convention on Human Rights.**

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?

Not with regard to return and entry ban decisions, but with regard to judicial review of (the length) of detention in relation to Article 15 RD.

If yes: please elaborate further on this issue

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

I would infer that the answer for Bulgaria is "all of the above", because the judgment in the case of *Medjdi* (case No.14207/2012), uploaded in the READIAL database, concerns extension of detention under Article 15 RD.

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.)

Not in relation to Article 13 RD, but only regarding Article 15 RD in the field of detention.

If yes: please elaborate further on this issue

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

The court repeals the administrative order/decision in question.

In case the violation of the right to be heard has been committed by the first level court (as it is in the case of *Medjdi*), the Supreme Administrative Court (SAC) returns the case for reconsideration in accordance with the instructions that SAC has given by another panel of the first level court.

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

NO

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

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

YES, but only if the appeal has already reached the court within the preclusive term of 14 days.

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 Article 22, paragraph 1, point 9 of the Law on Legal Aid, irregular migrants who have been imposed 'a coercive administrative measure' are entitled to free legal aid to 'prepare documents for

a court case', provided that they do not have means to pay it. However the legal provision has not been applied in practice, because no third country national so far has managed to go through the procedure for granting legal aid and to submit his/her appeal within the preclusive term of 14 days.

Once somehow an appeal has reached the court on time, the court may appoint a pro bono lawyer from the National Bureau on Legal Aid, taking into account *inter alia* the financial, family and health situation of the appellant. Denial to do so without providing reasoning, in principle might be a legitimate reason to quash the judgment.

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

In the case of *Arevik Shmavonyan*, case No.13731/2011, the Supreme Administrative Court found that the appealed order was served to Mrs. Shmavonyan without the participation of an interpreter in a language she spoke. The court cited the general Code on Administrative Procedure, Article 14, Para 2, which states that "*Persons who do not speak Bulgarian language can benefit from their native or another designated by them language. In these cases an interpreter is appointed*". In this case the third country national had signed the order in question under a blank statement in Bulgarian that the order was served to her "in a language that I speak". The order did not specify the language Mrs. Shmavonyan speaks. The court found that such statement is not the necessary and sufficient proof that the notification to the addressee was made in a language she knew. SAC repealed the ruling of the first level court that had considered Mrs. Shmavonyan's appeal inadmissible on the ground that it had been submitted after the 14-days term (starting to run from the date of proper notification of the order) had elapsed.

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?)

According to the Bulgarian national law, the review is done by the court and judicial review has two levels.

III. Article 14: Safeguards pending return

There are no reported (uploaded) judgments from Bulgaria under Article 14 RD.