REDIAL PROJECT

National Synthesis Report – Lithuania

(Draft)

National reports on the Second Package of the Return Directive

Articles 12 to 14 RD

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/ NO

If yes:

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

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

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

The Supreme Administrative Court of Lithuania in administrative case *M.S. v. Migration Department under the Ministry of Interior* (No. A^{822}-69/2013, decision of 20 June 2013) did not refer to specific jurisprudence of the CJEU, but mentioned that it took account of it and concluded that: a) even if the person's stay on the territory of the country is illegal, the EU does not establish an unconditional imperative to expel him; b) while deciding on expulsion, all relevant factual circumstances shall be evaluated (including personal ones, related to protection of private and family life, as well as protection of the rights of the minors). It also mentioned its established practice that *evaluation of all factual*

circumstances shall take place not only while taking removal decision, but also return decision (*e.g.* decision of 17 October 2011 in administrative case *L. T. H. v. State Border Guard Service* (No. A[858]-2332/2011)) (emphasis added).

The Supreme Administrative Court of Lithuania has referred in several cases to general principle of applying and interpreting the national law in accordance with the provisions and aims of the Directive and made references in this respect to CJEU jurisprudence on this aspect (*Marleasing* (C-106/89), *Commune de Mesquer* (C-188/07), *Inter-Environnement Wallonie* (C-129/96), *Henkel KgaA* (C-218/01)).[1] *E.g.* in administrative case *Z. K. v. Kaunas County Police Headquarters* (No. A[756]-2681/2012, decision of 3 September 2013), the Court ruled that the respondent failed to properly evaluate all relevant circumstances related to protection of family life and therefore quashed the contested administrative decision.

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

YES/NO

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

1. Concerning safeguard of national security contained in Art. 12(1) of the Directive: Supreme Administrative Court in its decision in administrative case No. A[662]-1575/2013 of 21 January 2013 noted that a decision adopted may not be based only on the information which constitutes a state or official secret, i.e. classified information. In the view of the principle of fair hearing of the case established in Article 6 of the ECHR, the court stated that "such cases where data which constitutes a state secret and have not been declassified are the only evidence that is used to substantiate the case and are not known to one of the parties of the case in the judicial process, create preconditions for violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms, first of all, from the point of view of the right to fair hearing of the case (Article 6 of the Convention). Having regard to the ECHR jurisprudence, the panel of judges was of the opinion, that in the case considered the private interests of an individual and the public interest may not be opposed, they need to be combined, and this means that correct balance should be ensured between these interests in accordance with the criteria established by the Constitutional Court, the CJEU and the judicial institutions of the European Union. [...] the conclusion is not possible only on the grounds of the secret materials possessed by the respondent as the only evidence in the case considered. The court of the first instance has correctly stated that in the analysed administrative case, apart from the mentioned letter No 52-677KF of the Ministry of 05-09-2012 and letter No 52-730RN of 25-09-2012 there are no evidence that do not consist of information which constitutes a state secret which would justify the reasons of the applicant's inclusion into the list, therefore the court cannot substantiate its decision by this evidence (letter No 52-677KF of the Ministry of 05-09-2012 and letter No 52-730RN of 25-09-2012)."

2. Concerning justification of the decision: Supreme Administrative Court in administrative case No A[492]-2624/2014 (decision of 5 November 2014) referred to the principle of good administration embodied in Art. 41 (1) of the EU Charter and its content in Art. 41 (2) of the Charter, covering the right of every person to be heard before applying any individual unfavourable measure against him (point a); to familiarise with the case respecting the lawful confidentiality and professional, as well as business secrets (point b); and the duty of the administration to justify their decisions (point c). According to the Court, these provisions of the Charter should be taken into account as an additional source of legal interpretation. In interpreting Art. 8 of the Law on Public Administration, the Court has stated that the act shall contain main facts, arguments and evidence, as well as legal basis on

[1] Decision of Supreme Administrative Court of Lithuania of 3 September 2013 in administrative case No. A[756]-2681/2012, decision of 23 June 2010, No. A[858]-1810/2010; decision of 29 March 2010, No. A[525]-471/2010; decision of 8 December 2010, No. A[756]-686/2010 and others.

which the administrative authority has based its administrative act; presentation of the motives shall be adequate, clear and sufficient. It connected this norm to the principle of legal certainty. In this case, the Court considered that the respondent failed to establish and evaluate all circumstances relevant for the adoption of the decision and related to his right to reside in the EU, as the decision did not contain any supporting arguments and motives. In another case, *M.S. v. Migration Department under the Ministry of Interior* (No. A^{822}-69/2013, decision of 20 June 2013), the applicant appealed and challenged the findings of the first instance court, related to his expulsion and the entry ban. The Court pointed out that the respondent had not analyzed at all circumstances related to social and economic connections of the applicant and Lithuania. The first instance court erred in law by drawing conclusions on this question of family connections of the applicant in Lithuania, because there was no data in the contested administrative decision and by doing it on its own initiative the first instance court had not respected the procedural guaranties of the applicant, because he was not able to ask to summon witnesses, produce the evidence, etc. The Court noted that the respondent had the obligation, stemming from the principle of good administration, to substantiate its expulsion decision and to evaluate all relevant facts. Since the respondent failed to do that, the chamber annulled the part of the contested decision related to the expulsion of the applicant and the entry ban.

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

If yes: please elaborate further on this issue

This question cannot be answered with certainty, because there are no cases where the Supreme Administrative Court of Lithuania has clearly departed from national law/administrative practice on the basis of the Return Directive or/and the CJEU jurisprudence. However, there are a few cases, where the Court has set the rule that was not in line with existing administrative practice. *E.g.* in administrative case *L.T.H. v. State Border Guard Service* (No. A^{858}-2332/2011, decision of 17 October 2011) the Court said that it is necessary to evaluate individual circumstances and provide justification also for return decision, not only for removal decision, because it is not necessary to artificially break down the procedure into two stages when it is already known in the first stage that negative consequences will occur for the applicant. Previous practice was that there is no dispute if there are no negative consequences arising from the decision, thus the Court would refuse to look into the case.

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

YES/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)?

YES/<u>NO</u>

If yes: please elaborate further on this issue

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?

This issue is not reflected in the jurisprudence of national courts of higher instance as far as known to the author of this Report. However, it can be stated that the legislative provisions concerning the requirements for translation of decisions are more favourable than in the Directive, as decisions need to be translated in full and not only the main elements as required by the Directive. But in practice this is not always observed.[2]

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/ <u>NO</u>

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;
- Please elaborate further on the **<u>follow-up</u>** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the traditional jurisprudence developed in your country etc.)

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?

<u>YES</u>/NO

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

The Court referred to Advocate General Kokott conclusion in the case of *Zurita Garcia* (C-261/08 and C-348/08) in administrative case *L.T.H. v. State Border Guard Service* (No. A[858]-2332/2011, decision of 17 October 2011) by stating that return decision refers to the aim of returning third country nationals, without specifically separating the decisions that can be implemented in voluntary or compulsory manner.

[2] Study on Return and Removal of Third- Country Nationals, National report, Vilnius, 2015, available on: http://www.redcross.lt/files/Return_study_final_2015(2).pdf [Accessed 8 March 2016], p. 91.

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

YES/NO

If yes: in which cases and for what purpose? (*e.g.* did the national court give priority to the right to an effective judicial remedy (Article 47 EU Charter) instead of the right to a legal remedy enshrined in Article 13 for instance when interpreting what is an impartial and independent national administrative authority – Article 13(1) RD)

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/NO

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?

YES/NO

If yes: please elaborate further on this issue

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)?

It is clear from the practice of the Supreme Administrative Court of Lithuania, that the "decision related to return" covers both the decision on voluntary departure and the removal decision. For instance, the Court decided several times on suspension of enforcement of the decision when it concerned the decision on voluntary return. In the case of *A. M. C. v. Migration Board of Vilnius County Police Headquarters* (No. AS[662]-839/2014, decision of 23 July 2014) the Court noted that under Art. 71 of the Law on Administrative Proceedings administrative courts have the power to impose interim measures at any stage of judicial proceedings if failure to take interim measures could impede the enforcement of the court decision or render the decision unenforceable. The Court pointed out that *although from the point of view of Art. 126 of the Law on the Legal Status of the Aliens the administrative decision ordering the applicant to leave Lithuania is not coercive in nature, the application of Art. 71 of the Law on Administrative Proceedings is not restricted solely to administrative decisions of coercive nature* (emphasis added). Besides, a failure to comply with such a decision would result in real negative consequences for the applicant - the expulsion decision, which is of coercive nature, would be adopted. The Court took into account the fact that the applicant lived in Lithuania for quite a long time, had tight social and economic relations with Lithuania and because of that decided to impose the interim measures - the suspension of the challenged decision. In an earlier decision (case of *T. M. v. Vilnius County Police Headquarters*, No. AS[822]-768/2013, 9 October 2013) the Court was of the same opinion. In this case, the Court noted that the applicant lived in Lithuania since 1995 (from the age of 5) with both of his parents, spoke only Lithuanian, had a business in Lithuania, the order to leave Lithuania was adopted because the applicant failed to renew his permission of stay in Lithuania after the expiry of the earlier one.

Taking into account the above-mentioned facts the Court found that grounds for temporary suspension of the challenged decision exist and decided to suspend the challenged decision. In accordance with the Court's assessment, such circumstances as presence of family relations in Lithuania, long period of the applicant's residing in Lithuania, availability of economic and social relations are sufficient grounds for applying a claim protection measure by suspending the effect of the return decision.[3]

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/<u>NO</u>

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)

In cases when the Supreme Administrative Court found a lack of substantiation for the decision, the decisions of the lower instance courts have been repealed. This particularly concerned the cases where the migration authorities have failed to consider applicant's connections in Lithuania that could prevent return (family connections most often). The authorities frequently used the argument that it is not necessary to consider applicant's connections with Lithuania at the stage of the voluntary return decision. The Court was of the opinion that for the purpose of economy of the procedure it is necessary to consider the existence of these connections at any time, not necessarily only when removal decision is issued.[4]

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/<u>NO</u>

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.)

[3] Decision of the Supreme Administrative Court of Lithuania in administrative case No. AS602-273/2012 of 13 January 2012; decision in administrative case No. AS575-580/2012 of 24 August 2012; decision in administrative case No. AS822-768/2013 of 9 October 2013; decision in administrative case No. AS662-839/2014 of 23 July 2014.

[4] Supreme Administrative Court of Lithuania decision in a case *M. S. v. Migration Department under the Ministry of Interior* (No. A^{822}-69/2013, decision of 20 June 2013).

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

YES/NO

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?

According to the legislation, the third-country national who had submitted an application for asylum and in respect to whom a decision not to grant asylum was adopted, may use legal assistance guaranteed by the state in appealing against a decision related with return, removal, or an entry ban. When a decision related with return, removal, or an entry ban is adopted in respect to other third-country nationals, i.e. the ones who have not submitted an application for asylum, the legislation of Lithuania does not provide for a possibility to seek for legal assistance guaranteed by the state. The lawyers claim that in practice there are very few cases in which third-country nationals in which third-country nationals file appeals against their removal because of this reason.[5] No court practice was found on this issue.

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

If yes: please elaborate further on this issue

There have been no judgments known to the author of this Report where lack of interpreter would be an issue, thus this question cannot be responded yes or no. However, the courts consider that the right to take advantage of an interpreter's services does not include the requirement to translate all court's procedural documents into the language that the interested person can understand.[6]

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?)

This issue has not been dealt with by the appellate courts.

[5] Study on Return and Removal of Third- Country Nationals, National report, Vilnius, 2015, available on: http://www.redcross.lt/files/Return_study_final_2015(2).pdf [Accessed 8 March 2016], p. 96.

[6] Decision of the Supreme Administrative Court of Lithuania in administrative case No A556-888/2010 of 9 July 2010.

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

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;
- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the traditional jurisprudence developed in your country etc.)

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

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

Concerning family unity: the Supreme Administrative Court in its decision of 20 June 2013 in administrative case *M.S. v. Migration Department under the Ministry of Interior* (No. A[822]-69/2013) referred to Art. 5(1) of the Directive to take account of family life and obligations under *non-refoulement* principle, as well as Art. 14(1)(a) to take into account family unity. The Court did not refer to specific jurisprudence of the CJEU, but mentioned that it took account of this practice and concluded that: a) even if the person's stay on the territory of the country is illegal, the EU does not establish an unconditional imperative to expel him; b) *while deciding on expulsion, all relevant factual circumstances shall be evaluated (including personal ones, related to protection of private and family life, as well as protection of the rights of the minors)* (emphasis added).

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

YES/NO

If yes: in which cases and for what purpose?

1. Concerning family reunification, definition of family relations: the Supreme Administrative Court in its decision of 20 June 2013 in administrative case *M. S. v. Migration Department under the Ministry of Interior* (No. A[822]-69/2013) referred to ECHR jurisprudence concerning protection of the family (*Abdulaziz, Cabales and Balkandali v. United Kingdom, Ahmut v. Netherlands, Boultif v. Switzerland, Üner v. Netherlands*).

2. Concerning importance of family unity in case of return, fair balance of interests and best interests of the child: the Supreme Administrative Court in its decision of 17 October 2011 in administrative case *L. T. H. v. State Border Guard Service* (No. A[858]-2332/2011) (*Amrollahi v. Denmark, Hokkanen v. Finland, Kosmopoulou v. Greece*).

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/<u>NO</u>

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 safeguards pending return?

YES/<u>NO</u>

If yes: please elaborate further on this issue

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?

Please elaborate further on this issue

There is no practice in this respect in the national courts as concerns third country nationals. Usually such cases concern prisoners, but not persons in return procedures.

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/<u>NO</u>

If yes: please elaborate further on this issue