REDIAL PROJECT

National Synthesis Report – Poland

(Draft)

Polish report on the implementation of the Articles 12 to 14 of the Return Directive 2008/115/EC

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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?

YES

In the judgement of the Regional Administrative Court (RAC) in Warsaw of 7.10.2014 (No File IV SA/Wa 1074/14) Articles 12 and 13 of the Return Directive were invoked. The judgement of the RAC is not final because a cassation against it to the Supreme Administrative Court (SAC) is still pending (No File II OSK 61/15). In this case the administrative authority took a decision on return (accompanied by an entry ban) and did not inform the person concerned of the essence of the grounds on which a return decision was taken. The classified documents which constituted the basis of the decision were also not disclosed to the person concerned. However, all evidence was admitted by the tribunal, including classified documents which were not made available to the person concerned with a view to adversarial argument. In Polish law there has not been introduced a mechanism that would allow, an independent security-cleared counsel to examine the case file, such as currently is, for example, in the United Kingdom. It is obvious that the Polish approach is very restrictive in this area. Neither the alien nor the lawyer may see relevant documents that are covered by state secret protection or excluded on account of the best interest of the state. The RAC relied in its judgement on the Judgement of the SAC of 14.12.2011, File No II OSK 2293/10, in which the relevant documents were not presented either to the party or to his lawyer because of their confidentially. The RAC took the restrictive view that the confidentially of the documents, although diminishing the principles of fair trial and equality of arms between the parties to the proceedings, nevertheless has its grounds in the law and is of exceptional character. The right to a fair trial is not an absolute right. Additionally, all the documents were presented by the agency to the judge. The Court also put the emphasis on the fact that a decision on removal does not entail a risk to the alien of violation of basic human rights as a result of

return to a country of his origin In this regard the RAC in its judgement invoked concerning case law on combating terrorism – a judgement in joined cases of the CJEU (C-402/05P and C-415/05P Judgment of the Court (Grand Chamber) of 3 September 2008 Yassin Abdullah Kadi and Al Barakaat International Foundation, ECLI:EU:C:2008:461). The RAC took the view that such an interpretation is in line with art. 13 (1) Return Directive. Nevertheless the RAC admitted that such an interpretation limits to a certain degree procedural right provided in Article 12 (1) Return Directive that requires providing "reasons in fact" in the return decision, what is allowed in the national law under Article 12 (2) Return Directive.

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

YES

In the judgement of the Regional Administrative Court (RAC) in Warsaw of 7.10.2014 (No File IV SA/Wa 1074/14) – see above point B, description of the case. It was invoked a judgment of ECtHR (*Chahal v. United Kingdom*, 22414/93).

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)?

YES

At the outset it should be said that this right has not been *expressis verbis* affirmed in the Act on Foreigners of 12.12. 2013. The right to be heard before a return decision has been taken can only be derived from the general administrative procedural provisions contained in the Code of Administrative Procedure (CAP) with conjunction with provisions of the Act on Foreigners. It also may not always mean right to present arguments orally by giving testimony. Under Article 7§1 CAP in the course of proceedings the administrative authority is obliged to undertake all steps necessary to explain the facts of the case *ex officio*. Under Article 10 § 1 CAP the administrative authority while conducting any individual administrative case is obliged to guarantee the party active participation at each stage of proceedings, and, before the decision is rendered, it shall enable the party to express opinion concerning gathered evidence and materials and lodged demands. This principle is well established in cases related to aliens, for example a foreigner must be informed about the possibility to express his/her opinion about the files that have been collected and about the possibility to submit additional evidence (judgement of the Regional Administrative Court in Warsaw of 19 November 2007, File No. V SA/Wa 41/07). The Act on Foreigners requires from the administrative authority to instruct the foreigner in writing in a language understandable to him/her about the procedure and its principles, as well as about the rights granted to him/her (Article 7(1) of

the Act on Foreigners). In the chapter of the Act on Foreigners that deals with return decisions there are also other specific provisions that safeguard the right to be heard. Articles 311 (2) and 327 (2) of the Act on Foreigners impose an obligation on the administrative authority that takes a return primary decision to provide an understandable interpretation or translation of the legal basis of the decision, the ruling and the instruction about whether and how an appeal against the return decision may be filed. In its appeal to the 2nd instance administrative authority (The Head of the Office for Foreigners) an appellant may present all arguments against a return decision, such as his point of view on the legality of his stay, on the possible application of Articles 5 and 6(2) to (5) of the Return Directive and on the detailed arrangements for his return (what is required by the CJEU judgement in *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*). Raising such arguments would result in necessity for hearing a testimony or getting more information from the appellant in other form (for example, written). All procedural deficiencies in an individual case are examined *ex officio* by the first instance administrative court (Regional Administrative Court in Warsaw) and at the subsequent stage of the procedure can be raised in the cassation to the Supreme Administrative Court.

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?

Using standard forms is provided in Article 311 of the Act on Foreigners in case a foreigner has crossed or attempted to cross the border in breach of legal regulations (illegal entry of the territory). In such a situation a return decision can be issued by using a template. However, contrary to regulation in the Article 12 (3) of the Return Directive – under Polish law using a template for a decision does not discharge a decision maker from the obligation to inform a foreigner in writing in a language he/she understands about the legal basis, about the contents of the decision and whether and how an appeal against the return decision may be filed (Article 311 (2) Act on Foreigners). It means that in the light of the Act on Foreigners the problem of understanding of the content of the return decision issued by means of a standard form should not occur, because the "general information" required under Article 12(3) last sentence of the Directive is replaced by obligation of an individual information required under Article 311(2) of the Act on Foreigners.

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

In the judgement of the Regional Administrative Court (RAC) in Warsaw of 7.10.2014 (No File IV SA/Wa 1074/14) Articles 12 and 13 of the Return Directive were invoked. The judgement was appealed against and the SAC has not delivered its judgement yet. The issue in the case was using a classified documents while taking a return decision – see above point 1B.

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

YES

In the judgement of the Regional Administrative Court (RAC) in Warsaw of 7.10.2014 (No File IV SA/Wa 1074/14) – see above point 1B. It was invoked a judgment of ECtHR (*Chahal v. United Kingdom*, 22414/93). The Regional Court did not find a breach of Article 47 of the EU Charter while using a classified documents in the procedure and upholding an administrative decision that had no factual reasons, but only provided legal reasons (justification of the decision was limited to the provisions of law).

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?

NO

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?

This term covers or related decisions to the return but detention decisions. The detention decisions fall within jurisdiction of the criminal court.

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?

NO

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

The court sets aside (reverse) a return decision and sends back the case to the administration with instruction (it has a binding force) to conduct a rehearing and re-examine the case accordingly.

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

The Act of 30.08.2002 Law on proceedings before administrative courts allows an appellant to apply to the first instance court for granting free legal assistance (1) in full – if the person has proved that he is unable to bear any costs of the proceedings or (2) in part – if he has proved that he is unable to bear complete costs of proceedings without detriment to the necessary maintenance of himself and his family. Denial of the free legal assistance alone can be appealed to the Supreme Administrative Court.

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

This principle is well established in the case law always if a foreigner is involved in the case as a complaining party (for example, judgement of the SAC of 30.10.2008, No File II OSK 1097/07). Also the applicant's complaints during the course of the administrative procedure about quality of interpretation justify additional interview (judgement of the Regional Administrative Court in Warsaw of 29 August 2006, File No. V SA/Wa 150/06).

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?)

The Polish model can be described as 2 plus 2 (two administrative and two judicial authorities). The 1st instance administrative decision is taken by the Polish Border Guard agency and the 2nd instance administrative decision is taken by the Head of the Office for Foreigners. These are administrative authorities. One has to appeal against the 1st instance decision to the Head of the Office for Foreigners before lodging an appeal with the administrative court. The judicial review is carried out by the Regional Administrative Court in Warsaw and the Supreme Administrative Court. The issue of interpretation of "competent […] administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence" has never been examined in the case law, since it is understood that Head of the Office for Foreigners is just an administrative authority and the Regional Administrative Court is a part of the judiciary in Poland.

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/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?

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?

It has not been case law related to Article 14 of the Return Directive.

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