REDIAL PROJECT

National Synthesis Report – Spain

(Draft)

National report on the second package of the Return Directive

Articles 12 to 14 RD

Cristina Gortázar R.

Introduction

Spanish courts do not refer to CJEU ruling (or to the provisions 12, 13 and 14 of the Return Directive as interpreted by the Court) in their judgments.

Other provisions of the Return Directive were not really mentioned until the Zaizoune judgment was adopted (April 23, 2015). After Zaizoune, once it is not possible to apply a fine punishment instead of the removal order, Spanish courts have emphasised the importance to apply: 1) article 7 of the Return Directive on voluntary departure and 2) the possibility to regularise third country nationals on family grounds or other roots (settlement) in Spanish society (see Spanish Report, Redial first block)

Although Spanish courts do not mention the Return Directive on grounds related with Articles 12-14, the Courts do quote the Spanish legislation by which the Directive has been transposed into Spanish Law (different Articles of Organic Act 4/2000 of January 11 on the rights and freedoms of aliens in Spain and on their social integration (Immigration Act 4/2000).

So far, first of all, in cases related with Articles 12-14 of the Return Directive, Spanish judges always start by quoting Article 24 (1) of Spanish Constitution stating *"all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.*") [1]. Sometimes Article 13 of the ECHR is jointly quoted with Article 24 (1) of the Spanish Constitution. Nevertheless, neither Articles 12, 13 and 14 of the Return Directive nor Article 47 of the EU Charter has been quoted by Spanish courts.

It is relevant to point out that the Spanish Ombudsman has recommended on the necessity to change Spanish administrative practice with reference to certain cases of non-compliance with the right to a due process of irregularly staying third country nationals.[2]

[1] In Case 51/2010, the High Court of the Autonomous Region of Castilla y León stated that the third country national's right to a due process of law had been infringed according to Article 24 (1) of the Spanish Constitution. The High Court of the Autonomous Region of Castilla y León found that the obligation to inform the applicant of the main reasons (motivation) that guided the judge in his or her finding had not been observed in this particular case. Neither administrative authorities nor a judge can base a decision solely on a generic statement relating to an unfavourable police report, as had occurred in this case. Therefore, the High Court revoked the appealed judgment and overturned the administrative decision. (See Redial database.)

[2] Spanish Ombudsman Recommendation 154/2012 of 4 December, to the Secretary of State on Security (Ministry of Interior) in order to dictate instructions with the purpose of the acts of the execution of the expulsion resolution referred to in article 57.2 of the Immigration Act fulfilled after the entitled person is notified, and so that the person has sufficient time to appeal and has recourse to request a precautionary suspension of the contentious order, when

Article 12 of the Return Directive

Having said that, it is to be noted that Article 20 of the Immigration Act 4/2000 transposes Article 12 of the Return Directive (although it is not a verbatim transposition, quite an otherwise transposition) by affirming:

"1. Foreigners have the right of the effective judicial protection. 2. The administrative procedures established in immigration matters will respect, in all cases, the guarantees provided under general law on administrative procedure, especially in relation to advertising of the regulations, challenging adversaries evidence, hearing of the entitled party and reasoning of decisions, except as provided in Article 27 of this Law (Established under the Immigration Organic Law 8 / 2000)".

Nonetheless, the so-called *hot devolutions* in Ceuta and Melilla (Spanish cities in the North of Morocco) is a very relevant issue. The practices most likely contradict International and EU Law and definitely defy the Spanish Immigration Act.

That is the reason why Spanish Law 4/2015 on the Citizen Security (*Ley Orgánica 4/2015 de protección de la seguridad ciudadana*) introduced an Additional provision (*disposición Adicional Décima*) to the Spanish Immigration Act adding a new concept of "refusal at the border" (*rechazo en frontera*) only to be applied at Ceuta and Melilla borders. It contains the following wording:

"1. Foreigners that are detected on the border of the territories of Ceuta or Melilla while trying to overcome the defensive features of the border to irregularly cross the border can be rejected to prevent the foreigners from entering Spain illegally. 2 In any case, the rejection will be realised by respecting the international and human rights regulations of which Spain is a party".

It means that any third country national irregularly entering Spanish territory through the *fences* of Ceuta and Melilla will be immediately taken to the Moroccan authorities.

For Spanish academics and practitioners[3] this amendment will only respect International and EU Law if a *fast track procedure* will guarantee *basic human rights and the audience to the person, legal assistance and if necessary an interpreter due to the vulnerable situation of some of this third country nationals*. In these cases not even a written decision is issued. The Spanish Minister of Interior promised a protocol to be applied in such cases but so far nothing has been done.[4]

Article 13 of the return Directive

Spanish courts do not refer to Article 47 EU Charter; sometimes they make reference to Article 13 ECHR.

Nonetheless, in Spain a very hot issue is the so-called *express expulsions*, which are expulsions from the Police Office (*Comisaría*) after detention for no more than 72 hours. In such a short period of time individuals have no possibility to obtain legal advice, representation or, where necessary, linguistic assistance.[5] Furthermore, personal circumstances of the third country national are not taken into account.

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urgent circumstances coincide. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf, p. 445.

[3] See "Rechazos en frontera: ¿Fronteras sin derechos?". Available on: http://eprints.ucm.es/29379/.

[4] M. Martínez Escamilla (Coord.), *Detención, internamiento y expulsión de personas extranjeras*; M. Martinez Escamilla, "Detención, internamiento y expulsión de ciudadanos extranjeros en situación irregular". *Detención, internamiento y expulsión administrativa de personas extranjeras en situación irregular I+D+i Iusmigrante (Iuspuniendi e inmigración irregular*) (DER 2011-26449), granted by the Spanish Minister of Science, Madrid, 2015, p. 34. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf.

[5] M. Martínez Escamilla (Coord.), *Detención, internamiento y expulsión de personas extranjeras*; M. Martinez Escamilla, "Detención, internamiento y expulsión de ciudadanos extranjeros en situación irregular". *Detención,*

Professor Araceli Manjón Cabeza gives us a real – but not unique – case:

"Edgar, a fictitious name, entered into Spain as a minor looking to be reunited with family. When he turned 18 he received an order of expulsion. Edgar studies at a public institute. He has a known address in Spain in which he lives with his family. His family has legal jobs and residences and are close to obtaining citizenship. Edgar does not have a criminal record, and he dreams of being legal resident, and has an appointment in a few days with authorities to make it a reality. The arrest happened outside of the his institute – the authorities were looking for him, it was neither a causal nor a random arrest. A public defender is notified a day later, Friday evening, thus has no time to turn to a judge, the only option is the police. The police reject the suspension request before the family is able to provide documentation that proves Edgar has put down roots in Spain. Although the family requests for the decision to be reversed, it is not. On Saturday morning the expulsion happened. Edgar was wearing the clothes he had on at the time of the arrest, and he was not permitted him to tell his family goodbye. On Thursday, Edgar left his house for the institute and he was not to be seen again. The only thing that Edgar had against the expulsion order was an appeal. What does the fundamental right to effective judicial protection serve?".[6]

Of course those are cases in which the person has *already a removal order approved* according to Spanish Immigration Act. *However, the order could have been issued (perhaps) many months ago, therefore, personal circumstances could have changed*. Additionally there is not ability to temporarily suspend the enforcement *due to the promptness of the enforcement of the expulsion order.*

Express expulsions are generally enforced in relation to *macro-flights* (special flights only with the purpose of returning irregular migrants).

So far, no jurisprudence on the possible gaps of due process rights of individuals subjected to *express expulsions* has been generated.

However, the Spanish Ombudsman recommended to the Secretary of State on Security (*Secretaria de Estado de Seguridad*) the necessity to fully respect the right to legal advise or representation, and further that it is doubtful that *express expulsions* guarantee such necessities.[7] The Spanish Ombudsman understands that the execution of the administrative act of an express expulsion in 72 hours is not compatible with Article 24 (1) of Spanish Constitution. Therefore, such actions are in contradiction with the right to due process. However, the recommendation was not accepted by the Secretary of State on Security (Ministry of Interior).

In 2014, once again, the Spanish Ombudsman recommended to end the short period of time between the notification of an enforcement of expulsion and the expulsion itself. Nonetheless the recommendation has been rejected.[8]

Regarding the possibility to judicial appeal: In Spain all (final) administrative acts related with return decisions have the possibility to be challenged against the courts. However, the difficulties arise with

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internamiento y expulsión administrativa de personas extranjeras en situación irregular I+D+i Iusmigrante (Iuspuniendi e inmigración irregular) (DER 2011-26449), granted by the Spanish Minister of Science, Madrid, 2015, pp. 48-52. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf.

[6] Araceli Manjón-Cabeza, Nos moiorum: La UE ha puesto en marcha un gran operativo policial contra los 'sin papeles', *El País*, 23 October 2014, available on: http://elpais.com/elpais/2014/10/22/opinion/1413975485_711118.html.

[7] Spanish Ombudsman Recommendation 154/2012 of 4 December, to the Secretary of State on Security (Ministry of Interior) Recommendation 154/2012, 4 December, in order to dictate instructions with the purpose of the acts of the execution of the expulsion resolution referred to in article 57.2 of the Immigration Act fulfilled after the entitled person is notified, and so that the person has sufficient time to appeal and has recourse to request a precautionary suspension of the contentious order, when urgent circumstances coincide. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf, p. 445.

[8] Spanish Ombudsman Recommendation 255/2014 of 15 October, to the General Police Office for Aliens and Borders, Ministry of Interior (*Comisaria General de Extranjería y Fronteras*) on legal assistance to aliens under detention for execution procedures, available on: https://www.defensordelpueblo.es/wp-content/uploads/2015/06/E_1_recomendaciones_2014.pdf, p. 427.

the non-automatic suspensive effect of the appeal against the enforcement of an expulsion order. This is just a possibility up to the judge (*medidas cautelares, habeas corpus*)

It is interesting to note that Spanish Immigration Act 4/2000 after being modified by Act 2/2009 grants free legal assistance for irregular migrants in all judicial procedures in same conditions as Spanish citizens; also in administrative procedures related with their entry denial, devolution or expulsion and in all procedures related with their international protection claims (Article 22 of Immigration Act 4/2000 as modified by Act 2/ 2009).

Specific recognition of availability of interpreters is at Article 22 (2) Immigration Act 4/2000 regarding all administrative procedures related with their entry denial, devolution or expulsion and in all procedures related with their international protection claims. No specific recognition of availability of interpreters for judicial procedures related with appeals against their entry denial, devolution or expulsion (Article 22 (3) Immigration Act 4/2000)

Article 14 of the Return Directive: *Safeguards pending return*

In the case quoted at Redial Database (Article 14 Return Directive, Spain), the Court, although not making reference to article 14 (1) applies Article 64 (2) of the Immigration Act 4/2000 which is a FORMAL transposition (verbatim) of Article 14 (1) RD.

As an example, we can refer to the case quoted at Redial database: The first instance criminal court writ of 24 February 2012 issued the applicant's detention as preventive measure in order to avoid a risk of absconding if he was finally subject to return procedures. Subsequently, the applicant lodged an appeal alleging that he lived with two brothers in the same domicile (appeal number 241/2012). The *Audiencia Provincial* took into account Article 64(2) of the Immigration Act 4/2000, which is a formal transposition of Article 14(1) of the Return Directive, *and stressed that Member States shall ensure the principle of maintenance of family unity with family members present in their territory*. Thus, the writ of the first instance criminal court was overturned and the *Audiencia Provincial* laid down the obligation to report regularly to the authorities.

Due to scarce cases of voluntary departure in the sense of the Return Directive (see comments on application of article 7 at Spanish Report first block of Redial project) there are very few cases at Spanish case law. It is to be expected an increase of appeals on grounds of social needs of irregular migrants pending return once the Zaizoune judgment has put an end to the Spanish doctrine by which the expulsion from the Spanish territory was substituted by a fine punishment.

Finally, the case of Case G.V.A v. Spain (ECtHR), although it is not directly related with Article 14 of the Return Directive, it is probably of certain interest for the Redial Project.

The Spanish Constitutional Court (STC 186/2013, of 4 November[9]) decided in this case that the right to family and private life (although recognised at Article 8,1 ECHR) "has no constitutional guarantee under Article 18 (1) of Spanish Constitution" in this case where a third country national was going to be expelled on grounds of Article 57 (2) of the Immigration Act 4/2000 (to have been condemned of a crime punished with a penalty of more than one year of prison). This third country national exhausted all Spanish remedies and presented a claim to the ECtHR on grounds of violation by Spain of her right to private life. The Spanish Advocate of the State offered to recognise the violation of the woman's right to private life; to remove the expulsion order and to give her an amount of 19.104,73 Euros. Moreover, the Spanish Advocate of State compromised to take account of the ECtHR case law before applying in the future Article 57,5 of Immigration Act 4/2000. The ECtHR accepted the Spanish declaration[10]. It is necessary to follow up if the Spanish Courts will follow the declaration of the Spanish Advocate of State in G.V.A v Spain.

[9] Available on: http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23678.

[10] ECtHR, 17 March 2015, Case G.V.A v. Spain. Available on: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-153975.

TEMPLATE

NATIONAL REPORTS ON THE SECOND PACKAGE OF THE RETURN DIRECTIVE

Articles 12 to 14 RD

Cristina Gortázar R

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

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?

Spanish courts do not refer to CJEU ruling (or to the provisions 12, 13 and 14 of the Return Directive as interpreted by the Court) in their judgments.

Other provisions of the Return Directive were not really mentioned until the *Zaizoune* judgment was adopted (April 23, 2015). After *Zaizoune*, once it is not possible to apply a fine punishment instead of the removal order, Spanish courts have emphasised the importance to apply: 1) article 7 of the Return Directive on voluntary departure and also 2) the possibility to regularise third country nationals on family grounds or other roots (settlement) in Spanish society (see Spanish Report, Redial, first block)

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

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

NO, sometimes Spanish courts mention the ECHR case law on grounds to not return a third country national (mostly article 3ECHR), however the Charter is very scarcely mentioned by Spanish courts.

Certainly, *on grounds related to articles 12-14 of the Return Directive, Spanish courts do not mention the Return Directive,* but quote only the Spanish legislation by which the Directive has been transposed into Spanish Law.

So far, first of all, in cases related with Articles 12-14 of the Return Directive, Spanish judges always start by quoting Article 24 (1) of Spanish Constitution stating *"all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.*") Sometimes Article 13 of the ECHR is jointly quoted with Article 24 (1) of the Spanish Constitution. Nevertheless, neither Articles 12, 13 and 14 of the Return Directive nor Article 47 of the EU Charter has

been quoted by Spanish courts.

Having said that, it is to be noted that Article 20 of the Organic Act 4/2000 of January 11 on the rights and freedoms of aliens in Spain and on their social integration transposes Article 12 of the Return Directive (although it is not a verbatim transposition, quite an otherwise transposition) by affirming:

"1. Foreigners have the right of the effective judicial protection. 2. The administrative procedures established in immigration matters will respect, in all cases, the guarantees provided under general law on administrative procedure, especially in relation to advertising of the regulations, challenging adversaries evidence, hearing of the entitled party and reasoning of decisions, except as provided in Article 27 of this Law (Established under the Immigration Organic Law 8 / 2000)."

After Zaizoune, of course, articles 6, 7 and 8 of the return Directive are mentioned. However, articles 12, 13 and 14 of the Directive are not.

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

Spanish courts make reference very often to the Spanish Constitution article 24 on the right to due process including the right to be heard.

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, but very seldom: see, for instance, the case quoted at our database although it is quite old.

(Case 51/2010, High Court of the Autonomous Region of Castilla y León. On October 2, 2006 the Governmental Sub-delegate in Burgos adopted a decision against Ms. Evangelina XXX, a third-country national, refusing her request for permanent residence. The decision was based on an unfavourable police report, the details of which were not specified. Consequently, because of the decision to refuse to grant a permanent residence permit the administrative authorities directly adopted an expulsion order (without voluntary departure, the Return Directive did not exist at that time) instead of issuing a fine. A fine was the proportional sanction according to Spanish legislation and case law at the time (see Spanish Redial report first block).

Ms. Evangelina XXX *challenged the decision before the Contentious-Administrative Court Nº 1 of Burgos, and the judgement on December 3, 2008 was a dismissal of the appeal.* Ms. Evangelina XXX appealed the decision before the High Court of the Autonomous Region of Castilla y León, alleging that her right to effective judicial protection had been violated (appeal number 205/2009). *The High Court of the Autonomous Region of Castilla y León stated that the applicant's right to a due process of law had been infringed according to Article 24 (1) of the Spanish Constitution* that states that "[a]ll persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence." The High Court of the Autonomous Region of Castilla y León found that *the obligation to inform the applicant of the main reasons (motivation) that guided the judge in his or her finding had not been observed in this particular case. Neither the administrative authorities nor a judge can base a decision solely on a generic statement relating to an unfavourable police report, as had occurred in this case*. Therefore, the High Court revoked the appealed judgment and overturned the administrative decision.)

If yes: please elaborate further on this issue

After the entry into force of the Return Directive, and though I have not found Spanish Courts on article 12 of the Return Directive, is *relevant to point out* that the *Spanish*

Ombudsman has recommended the need to change Spanish administrative practices with reference to certain cases of noncompliance with the right to a due process of irregularly staying third country nationals.[11]

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)?

NOT to my knowledge.

Nonetheless, the so-called *hot devolutions* in Ceuta and Melilla (Spanish cities in the North of Morocco) is a very relevant issue. The practices most likely contradict International and EU Law and definitely defy the Spanish Immigration Act.

That is the reason why Spanish Law 4/2015 on the Citizen Security (*Ley Orgánica 4/2015 de protección de la seguridad ciudadana*) introduced an Additional provision (disposición Adicional Décima) to the Spanish Immigration Act adding a new concept of "refusal at the border" (rechazo en frontera) only to be applied at Ceuta and Melilla borders. It contains the following wording:

"1. Foreigners that are detected on the border of the territories of Ceuta or Melilla while trying to overcome the defensive features of the border to irregularly cross the border can be rejected to prevent the foreigners from entering Spain illegally. 2 In any case, the rejection will be realised by respecting the international and human rights regulations of which Spain is a party".

It means that any third country national irregularly entering Spanish territory through the *fences* of Ceuta and Melilla will be immediately taken to the Moroccan authorities.

For Spanish academics and practitioners[12] this amendment will only respect International and EU Law if a *fast track procedure* will guarantee *basic human rights and the audience to the person, legal assistance and if necessary an interpreter due to the vulnerable situation of some of this third country nationals*. In these cases not even a written decision is issued. The Spanish Minister of Interior promised a protocol to be applied in such cases but so far nothing has been done.[13]

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[11] Spanish Ombudsman Recommendation 154/2012 of 4 December, to the Secretary of State on Security (Ministry of Interior) Recommendation 154/2012, 4 December, in order to dictate instructions with the purpose of the acts of the execution of the expulsion resolution referred to in article 57.2 of the Immigration Act fulfilled after the entitled person is notified, and so that the person has sufficient time to appeal and has recourse to request a precautionary suspension of the contentious order, when urgent circumstances coincide. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf, p. 445.

[12] See "Rechazos en frontera: ¿Fronteras sin derechos?". Available on: http://eprints.ucm.es/29379/.

[13] M. Martínez Escamilla (Coord.*) Detención, internamiento y expulsión de personas extranjeras*; M. Martinez Escamilla "Detención, internamiento y expulsión de ciudadanos extranjeros en situación irregular". *Detención, internamiento y expulsión administrativa de personas extranjeras* en situación irregular *I+D+i Iusmigrante (Iuspuniendi e inmigración irregular*) (DER 2011-26449), granted by the Spanish Minister of Science, Madrid, 2015, p. 34. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf.

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?

Spanish Court decisions on that issue have not been established.

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

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?

NO

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

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

NO. Spanish courts refer to the Spanish Constitution Article 24 (1), already mentioned, and sometimes to Article 13 ECHR. So far, the courts do not make reference to Article 47 of the EU Charter.

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)

No, not at all.

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

If yes: please elaborate further on this issue

Nonetheless, in Spain a very hot issue is the so-called *express expulsions* which are expulsions from the Police Office (Comisaría) after detention for no more than 72 hours. In such a short period of time individuals have no possibility to obtain legal advice, representation or, where necessary, linguistic assistance.[14] Furthermore, personal circumstances of the third country national are not taken into account.

Professor Araceli Manjón Cabeza gives us a real – but not unique – case:

"Edgar, a fictitious name, entered into Spain as a minor looking to be reunited with family. When he turned 18 he received an order of expulsion. Edgar studies at a public institute. He has a known address in Spain in which he lives with his family. His family has legal jobs and residences and are close to obtaining citizenship. Edgar does not have a criminal record, and he dreams of being legal resident, and has an appointment in a few days with authorities to make it a reality

The arrest happened outside of the his institute – the authorities were looking for him, it was neither a causal nor a random arrest. A public defender is notified a day later, Friday evening, thus has no time to turn to a judge, the only option is the police. The police reject the suspension request before the family is able to provide documentation that proves Edgar has put down roots in Spain. Although the family requests for the decision to be reversed, it is not.

On Saturday morning the expulsion happened. Edgar was wearing the clothes he had on at the time of the arrest, and he was not permitted him to tell his family goodbye.

On Thursday, Edgar left his house for the institute and he was not to be seen again. The only thing that Edgar had against the expulsion order, was an appeal. What does the fundamental right to effective judicial protection serve?".[15]

Of course those are cases in which the person has *already a removal order approved* according to Spanish Immigration Act. *However, the order could have been issued (perhaps) many months ago, therefore, personal circumstances could have changed*. Additionally there is not ability to temporarily suspend the enforcement *due to the promptness of the enforcement of the expulsion order.*

***Express expulsions* are generally enforced in relation to *macro-flights* (special flights only with the purpose of returning irregular migrants).**

So far, no jurisprudence on the possible gaps of due process rights of individuals subjected to *express expulsions* has been generated.

However, the Spanish Ombudsman recommended to the Secretary of State on Security (Secretaria de Estado de Seguridad) the necessity to fully respect the right to legal advise or representation, and further that it is doubtful that *express expulsions* guarantee such necessities.[16] The Spanish Ombudsman understands that the execution of the administrative

[14] M. Martínez Escamilla (Coord.), *Detención, internamiento y expulsión de personas extranjeras*; M. Martinez Escamilla, "Detención, internamiento y expulsión de ciudadanos extranjeros en situación irregular". *Detención, internamiento y expulsión administrativa de personas extranjeras en situación irregular I+D+i Iusmigrante (Iuspuniendi e inmigración irregular*) (DER 2011-26449), granted by the Spanish Minister of Science, Madrid, 2015, p. 48-52. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf.

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[16] Spanish Ombudsman Recommendation 154/2012 of 4 December, to the Secretary of State on Security (Ministry of Interior) Recommendation 154/2012, 4 December, in order to dictate instructions with the purpose of the acts of the execution of the expulsion resolution referred to in article 57.2 of the Immigration Act fulfilled after the entitled person is notified, and so that the person has sufficient time to appeal and has recourse to request a precautionary suspension of the contentious order, when urgent circumstances coincide. Available on: http://www.intermigra.info//archivos/News116/DetenInternyExp.pdf, p. 445.

act of an *express expulsion* in 72 hours *is not compatible with Article 24 (1) of Spanish Constitution. Therefore, such actions are in contradiction with the right to due process.* However, the recommendation was not accepted by the Secretary of State on Security (Ministry of Interior).

In 2014, once again, the Spanish Ombudsman recommended to end the short period of time between the notification of an enforcement of expulsion and the expulsion itself. Nonetheless the recommendation has been rejected.[17]

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

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)?

In Spain, all (final) administrative acts related to return decisions have the possibility of being challenged in court. However, difficulties arise with the non-automatic suspensive effect of the appeal against a removal order. The decision on the suspensive effect is a possibility up to the judge (*medidas cautelares, habeas corpus)*

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.)

NO

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 Courts can decide the annulment of the act.

[17] Spanish Ombudsman Recommendation 255/2014 of 15 October, to the General Police Office for Aliens and Borders, Ministry of Interior (*Comisaria General de Extranjería y Fronteras*) on legal assistance to aliens under detention for execution procedures, available on: https://www.defensordelpueblo.es/wp-content/uploads/2015/06/E_1_recomendaciones_2014.pdf, p. 427.

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?

To my knowledge, 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 defence, 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. The Spanish Immigration Act 4/2000 after being modified by Act 2/2009 grants free legal assistance to irregular migrants, in equal conditions as Spanish citizens, in all judicial procedures; additionally it is available in administrative procedures in relation to entry denial, devolution or expulsion and in all procedures related to international protection claims (Article 22 of Immigration Act 4/2000 as modified by Act 2/ 2009).

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?

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. No case law exists to my knowledge. The specific recognition of the availability of interpreters is in Article 22 (2) Immigration Act 4/2000 in all administrative procedures related with the entry denial, the devolution or expulsion and in all the procedures related to international protection claims. However, no specific recognition exists for judicial procedures related to the appeals against entry denial and devolution or expulsion (Article 22 (3) Immigration Act 4/2000).

If yes: please elaborate further on this issue

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?)

In Spain all administrative final decisions related to the return decisions and removal orders can be challenged to the judges. However, there is not an automatic *suspensive* effect of the administrative decision on removal when an appeal is presented to the judge but only the possibility to ask for its suspension (Article 21 of Immigration Act 4/2000, inter alia).

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

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?

NO. However in the case quoted at Redial Database (article 14 Return Directive, Spain) the Court, although not making reference to article 14 (1), applies Article 64 (2) of the Immigration Act 4/2000 which is a FORMAL transposition (verbatim) of Article 14 (1).

(On February 24, 2012, at the first appearance in criminal court, the court issued a writ stating that the applicant's detention was a preventative measure in order to avoid the risk of escape if the applicant was ultimately subject to the return procedures. Subsequently, the applicant lodged an appeal alleging that he lived with two brothers in the same domicile (appeal number 241/2012). The *Audiencia Provincial* took into account Article 64(2) of the Immigration Act 4/2000, which is a formal transposition of Article 14(1) of the Return Directive, *and stressed that Member States shall ensure the principle of maintenance of family unity with family members present in their territory*. Thus, the writ of the first instance criminal court was overturned and the *Audiencia Provincial* laid down the obligation to report regularly to the authorities)

Although it is not a case related to Article 14 of the Return Directive, the Spanish Constitutional Court (STC 186/2013, of 4 November[18]) ruling is of interest to the current issue. The Spanish Constitutional Court decided that the right to family and private life (although recognised at Article 8,1 ECHR) "has no constitutional guarantee under Article 18 (1) of Spanish Constitution" in the case of a third country national who was going to be expelled on grounds of Article 57 (2) of the Immigration Act 4/2000 (expulsion is applicable if an individual is sentenced to a crime punishable by a penalty of more than one year in prison). The third country national exhausted all Spanish remedies, and then presented a claim to the ECtHR on grounds of infringement by Spain on her right to a private life. In order to avoid a negative judgment against Spain, the Spanish Advocate of the State offered the ECtHR to recognise the violation of the woman's right to private life, to remove the expulsion order and to pay her 19.104,73 Euros. Moreover, the Spanish Advocate of State agreed to take into account the ECtHR case law before applying Article 57,5 of Immigration Act 4/2000 in future cases. The ECtHR accepted the Spanish declaration.[19] It is necessary to track Spanish Courts to determine if the declaration of the Spanish Advocate of State in G.V.A v Spain will continue to be followed.

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

[18] Available on: http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23678.

[19] ECtHR, 17 March 2015, Case G.V.A v. Spain. Available on: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-153975.

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

YES, to the ECHR but very seldom.

If yes: in which cases and for what purpose?

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

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?

NO

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?

Due to scarce cases of voluntary departure in the sense of the Return Directive (see comments on application of article 7 of the Spanish Report first block of Redial project) few cases are available in Spanish case law. It is to be expected an increase of appeals on grounds of social needs of irregular migrants pending return once the Zaizoune judgment has put an end to the Spanish doctrine by which the expulsion from the Spanish territory was substituted by a fine punishment.

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

If yes: please elaborate further on this issue