EMN Ad-Hoc Query on BE AHQ on Motivation of return decisions and entry bans

Requested by Elisa VAN DER VALK on 31st March 2016

Return

Responses from Austria, Belgium, Blocked / Unknown, Croatia, Czech Republic, Estonia, Finland, Germany, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Slovak Republic, Spain, Sweden, United Kingdom, Norway (19 in total)

Background information:

The Belgian Immigration Office is increasingly confronted with suspensions and annulments of return decisions and entry bans by the Appeals Instances due to a lack of motivation based on the right of the migrant to be heard about possible impediments linked to the return of the concerned person. Article 41, 2, a of the EU Fundamental Rights Charter foresees "[…] the right of every person to be heard, before any individual measure which would affect him or her adversely is taken."

If a person is intercepted in irregular stay in Belgium, an administrative decision has to be taken within 24 hours, counting from the moment s/he has been controlled by the police services. The concerned foreigner is brought to the police station, where he will be questioned about the circumstances which have led to his arrest. The problem is that, in many cases, the person does not speak a language which is understandable for the police unit, does not want to cooperate, or even refuses to speak. The information sent to the Immigration Office, which has to take a return and/or entry ban decision on the basis of the police report, is therefore in many cases very limited. Furthermore is it very difficult to get an interpreter on short notice in order to get more information from the migrant. It is imperative that the Immigration Office takes a decision within the 24 hours, and even in many cases much quicker, since the police units do not always have the capacity (staff nor place) to keep the person in custody for several hours pending a decision.

In other cases, the Immigration Office already has a lot of information about the foreigner because s/he has applied for asylum, regularization… In these applications, a lot of information has already been included and the information has already been assessed. Nevertheless, the courts ask for a new assessment of the impediments through a new interview, in order to guarantee the right to be heard. In many cases the person does not cooperate with the Immigration Office, but submits arguments to the court, which were not always known to our services and which could be taken into consideration by the courts.

The right to be heard is very important in order to make an evaluation of (non) violation of article 3 or 8 of the ECHR (see also chapter 12.1 "Right to good administration and Right to be heard", of the Return Handbook, as published by the EU Commission, p. 64 – 66 - http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf). But the impression exists that this right is somewhat abused by certain foreigners, which leads to an increase of overruled return / entry ban decisions.

Belgium is therefore interested to learn about best practices, jurisprudence, legislative criteria … from the other Member States, how they deal with the right to be heard in the framework of return decisions and entry bans.

Summary

SUMMARY

BE AHQ on Motivation of return decisions and entry bans

Responses from Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Slovak Republic, Spain, Sweden, United Kingdom, Norway (19 in total)

1. Which legislative framework (laws, secondary legislation, procedures…) does your country foresee in order to comply with article 41 of the EU Fundamental Rights Charter?

18 out of 19 (Member) States foresee the right to be heard in their national legislation: mostly in administrative laws or codes (AT, HR, CZ, EE, DE, LV, NL, SK, SE, NO) and/or in immigration laws (CZ, FI, HU, IT, LU, PT, SK, ES, NO) and/or in internal guidelines or descriptions of a procedure (FI, LT and UK). One Member State (BE) reported that the right to be heard is not foreseen in legislation, but it is applied in practice.

2. Are specific criteria set (timing – until when migrants can add / submit information; type of information; limitations; specific forms;…) that the migrant has to comply with in order for his/her arguments to be taken into account?

The vast majority of (Member) States reported that there are specific criteria to be met in order for the arguments of the migrant to be taken into account.

The criteria mentioned by (Member) States are varied, and mostly relate to timing (e.g. migrant can only be heard within specific deadlines, etc.) or form (e.g. migrant always has to be heard orally; or the migrant always has to be heard in writing; or a set of compulsory questions has to be used during the hearing of the migrant, etc.).

3. Does your legislation foresee exceptions for which the right to be heard does not have to be respected <u>before</u> the decision is taken?

9 (Member) States reported that exceptions are foreseen to the right to be heard (HR, EE, DE, LV, LT, LU, PT, UK, NO). These exceptions apply in a variety of cases (e.g. when prompt action is required to avoid damage due to delays or to protect public interests; if the decision is urgent; if a decision of refusal of entry is taken by the Police at the border, etc.).

4. Please communicate interesting national jurisprudence about the (non) violation of the right to be heard (in favour of the migrant or in favour of the authorities).

9 Member States provided examples of jurisprudence regarding the right to be heard (AT, BE, CZ, IT, LV, LT, LU, NL, SK).

Questions

1. Which legislative framework (laws, secondary legislation, procedures…) does your country foresee in order to comply with article 41 of the EU Fundamental Rights Charter? Please cite the texts and the references.
2. Are specific criteria set (timing – until when migrants can add / submit information; type of information; limitations; specific forms;…) that the migrant has to comply with in order for his/her arguments to be taken into account? If yes, please list them/give more information.
3. Does your legislation foresee exceptions for which the right to be heard does not have to be respected before the decision is taken (e.g. since some decisions have to be taken within a limited time frame, it is very difficult to guarantee this right to be heard beforehand; however the migrant has the right to submit arguments afterwards, which have to be evaluated within a specific timeframe after notification of the decision; e.g. decision of general interest, whereby this general interest primes above the right to be heard, such as public order or national security reasons; others …). If so, please list them/ provide more information.
4. Please communicate interesting national jurisprudence about the (non) violation of the right to be heard (in favor of the migrant or in favor of the authorities), which could be shared.

Responses

	Country	Wider Dissemination	Response
	Austria	Yes	**1.** According to Art. 37 General Administrative Procedures Act, it is the purpose of the investigation procedure to ascertain the state of facts relevant for processing an administrative matter and to enable the parties to claim their rights and legal interests. Further, according to Art. 45 para 3 General Administrative Procedures Act, the parties shall be given the opportunity to take notice of the result of the evidence taken and to comment on it (official translation by the Federal Chancellery, available at www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.pdf , accessed on 8 April 2016). **2.** The party has the right to be heard until the decision is taken (see Administrative High Court, 28 January 2004, 2000/12/0239). According to Art. 13 General Administrative Procedures Act, unless

			provided for differently in the administrative rules and regulations, any submissions, applications, information laid against somebody, complaints, and other reports may be filed with the respective authority in writing, orally, or by telephone. Appeals and submissions with a specific period or determining the duration of a period with a deadline shall be submitted in writing. To the extent the filing of a submission is not practical according to the nature of the case the authority may instruct the applicant to file the submission within an adequate period in writing or orally. Written submissions may be communicated to the authority in any technically feasible form, by e-mail however to the extent that no specific means of communication are provided for the electronic communication between the authority and the persons involved. Eventual technical requirements or organisational restrictions of the electronic communication between the authority and the persons involved are to be published on the internet (official translation by the Federal Chancellery, available at www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.pdf , accessed on 8 April 2016). Obviously, the Federal Office for Immigration and Asylum, which is responsible for return decisions and entry bans, has not published any specific requirements for electronic communication (see www.bfa.gv.at, accessed on 8 April 2016). According to Art. 20 para 1 Federal Office for Immigration and Asylum Procedures Act, a complaint filed against a decision of the Federal Office for Immigration and Asylum may only contain new facts or evidence (1) if the relevant circumstances have changed after the decision of the Federal Office for Immigration and Asylum, (2) if the proceedings before the Federal Office for Immigration and Asylum have been deficient, (3) if the new facts or evidence have not been accessible to the third-country national until the decision of the Federal Office for Immigration and Asylum or (4) if it was not possible for the third-country national to submit them. **3.** No, we are not aware of any relevant exceptions with respect to return decisions or entry bans. **4.** Submissions even have to be considered by the authority before it has taken a decision, if a deadline for the filing of a submission has not been met (Administrative High Court, 28 January 2004, 2000/12/0239).
	Belgium	Yes	**1.** It is not foreseen in a law or royal decree but the possibility is given to an irregular foreign national to provide information before an order to leave the territory is issued (mentioned in the administrative report drafted by the Police). When a foreign national applies for asylum/residence, he/she has the possibility to provide information in this framework.

			2. In case of applications for asylum/ residence, foreign nationals can provide information until the moment a decision is taken. In case of an irregular stay (with no applications for asylum/residence), the foreign national has the possibility to provide information before the Immigration Office issues an order to leave the territory. In case of criminal detainees, who are also irregular migrants, the Immigration Office asks them – for now - to fill out a questionnaire, in order to communicate which elements could impede a return decision or an entry ban. In some cases, the Immigration Office case workers will visit the detainee, will question him and fill out the questionnaire together with him. The elements invoked by the criminal migrant will be included in the return decision and entry ban, as well as the assessment made by the Immigration Office of these elements. In case of arrest by the police of an irregular migrant, the actual procedure to take and notify a decision within 24 hours after arrest does not foresee that this questionnaire is filled out before the decision is taken, since there are some logistical and time limitations (e.g. finding an interpreter, translation of declaration / questionnaire, … within the 24 hours, so that these elements can be taken into account for the decision). This means that the "right to be heard" will only be possible by questioning the migrant, detained in the closed immigration center, after his arrival in the detention center. This filled out questionnaire will be sent ASAP to the Immigration Office, if necessary translated consequently, and afterwards a written assessment will be made (which may be influencing the decision taken before, e.g. lift of suspension of the entry ban; release out of detention; but in many cases no change of the detention conditions). **3.** No. **4.** Both on the Dutch-speaking and on the French-speaking side, the Council for Alien Law Litigation (CALL) has already indicated that the fact to be heard in the framework of an administrative report is enough to comply with the right to be heard. In the past, decisions were regularly annulled by the CALL due to a violation of the right to be heard as the administrative report of the control of a foreign national did not show that the foreign national had been heard. The CALL now usually considers it to be sufficient for the foreign national to be heard by the Police (administrative report) and/or when the application does not mention what the foreign national stated (when he was heard) which led to a different decision taken by the Immigration Office regarding the issuance of an order to leave the territory. With judgement n. 233.257 dd. 15.12.2015, the French-speaking Council of State indicated that, even though an order to leave the territory and an entry ban are linked, the two measures are different in scope (obligation to leave the territory versus prohibition to enter it again). Furthermore, it is indicated that, even if the foreign

			national was heard in the framework of the order to leave the territory, he/she should also be heard in the framework of the entry-ban. On the Dutch-speaking side, no judgements have been taken to this effect so far.
	Blocked / Unknown	Yes	**1.** Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals **2.** - **3.** - **4.** -
	Croatia	Yes	**1.** 1. According to the Article 30 General Administrative Procedure Act, the parties shall be given opportunity to give statements on all facts, circumstances and legal matters relevant for solving the administrative issues. Process can be implemented without prior party hearing, but only in cases if the party request will be adopted or of decision in the process has no negative influence on the legal interest. **2.** 2. Statement must be comprehensible and contain all facts and proof that he/she would consider relevant and must be submitted according to the deadline. **3.** 3. Exception is foreseen in Article 38 Foreigners Act. 1) The Police Station competent for controlling the crossing the state border shall adopt a decision on refusal of entry of a foreigner. The decision refusing the entry of the foreigner shall be adopted without interviewing the foreigner. (2) An appeal against the decision from Paragraph 1 of this Article may be lodged through the competent Diplomatic Mission or Consular Office of the Republic of Croatia. The Commission shall decide about the appeal. The appeal shall not postpone enforcement of the decision. **4.** 4. N/a.
	Czech Republic	Yes	**1.** The Article 41 of the EU Fundamental Rights Charter is generally reflected in the Administrative Proceeding Code (Act No. 500/2004 Coll., as amended). Administrative Proceeding Code is applied in all

			administrative proceedings (some exceptions and derogations depend on the type of administrative proceeding are regulated usually in particular Acts.) in the Czech Republic including the “return procedure” according to “Return Directive” (2008/115/EC). The Foreigners Act No. 326/1999 Coll., as amended, implements Return Directive and regulates the return decisions and removal decisions with entry bans at national level. E.g. Administrative Proceeding Code in Article 4 par. 4 says that: “The administrative authority will enable the persons concerned to exercise their rights and legitimate interests. This general rule allows, among others, persons in question submit his/her arguments during all administrative proceeding prior the decision is taken. Other provisions related to “right to be heard” are laid down by Foreigners Act. Section 169 par. 2 for example says that: “(2) A participant to the proceedings shall be obliged to appear in person and participate in the proceedings. An administrative authority shall be entitled to hear a participant to the proceedings if such hearing is necessary for ascertaining the actual situation, in particular for assessing whether a foreign national did not violate this Act with the aim to obtain a residence permit, in particular whether he/she entered into a fake marriage or declared paternity. A participant to the proceedings shall be obliged to give evidence which shall be the truth and he/she must not conceal anything. An administrative authority shall warn the participant to the proceedings on the consequences of refusing to testify or of giving untrue or incomplete testimony.” **2.** Person in question is obliged to submit all available evidence prior the decision is taken. All steps in the proceeding such as personal hearing or handing over the decision shall be done with the assistance of interpreter. **3.** Our legislation does not foresee any exception mentioned in your question. The rules concerning submitting the arguments, interpreter’s services etc. are valid for all types of administrative proceedings regardless the time limit for decision. **4.** The national jurisprudence generally accepts the right to submit arguments before the decision is taken and the right to comment other findings of the determining authority and submit arguments against these findings before the decision is taken.
	Estonia	Yes	**1.** According to the Estonian Administrative procedure act § 3 in administrative procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law. § 6 of the same act states that during proceedings in a matter, an administrative authority is required

			to establish the facts relevant to the matter and, if necessary, collect evidence on its own initiative for such purpose. According § 40 of the same act an administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form. Before taking any measures which may damage the rights of a participant in a proceeding, he or she shall be granted a possibility to provide his or her opinion and objections. **2.** Besides the regulation mentioned in question 1 there are no further criteria set. **3.** An administrative proceeding may be conducted without hearing the opinions and objections of a participant in the proceeding in the following cases: 1) if prompt action is required for prevention of damage arising from delay or for the protection of public interests; 2) if there is no deviation from the information provided in the application or explanation of the participant in the proceeding and there is no need for additional information; 3) if the resolution is not made against the participant in the proceeding; 4) if notification of the administrative act or measure, which is necessary to allow submission of opinions or objections, does not enable achievement of the purpose of the administrative act or measure; 5) if the participant in the proceeding in not known or if the measure taken affects an infinite number of persons and identification of the persons is impossible within a reasonable period of time; 6) if an administrative act is issued as a general order or the number of participants in the proceeding exceeds fifty; 7) in other cases provided by law. **4.** No interesting national jurisprudence to share.
+	Finland	Yes	**1.** Section 145 of the Finnish Alien's Act: Opportunity to be heard An alien and his or her spouse or comparable partner residing in Finland shall be given an opportunity to be heard in a matter relating to refusal of entry, deportation or prohibition of entry concerning him or her. Internal guidelines of the Finnish Immigration Service (MIGDno-2015-542) (only in Finnish, unofficial translation by the FI EMN NCP) The opportunity to be heard has to be carried out in an appropriate manner, which can be verified at a later stage. If the opportunity to be heard is neglected, it is considered an administrative error, which results in the dismissal of the decision in the appeals procedure. The alien may use a representative in the hearing. When a deportee is given an opportunity to be heard, the procedure may not be conducted over the telephone. In general the opportunity to be heard, will be conducted by the person giving a written

			statement. In exceptional situations, the Police or the Border guard can conduct the opportunity to be heard orally, but in these cases a written transcript is produced. The written statement of the opportunity to be heard has to be delivered to the Finnish Immigration Service within a specified time frame. Within this time frame, the alien can also ask for an extension to the time to provide the statement. **2.** The opportunity to be heard has to be in writing (please see the previous answer). A time frame for providing the statement is given. As in all administrative proceedings, the person can present clarifications or additional information on his/her case as long as the case is pending. **3.** The opportunity to be heard is mandated by legislation, thus it must always be given. **4.** No information available.
	Germany	Yes	**1.** According to Section 28 of the General Administrative Procedure Act (§ 28 Verwaltungsverfahrensgesetz), every person has to be heard before any individual measure which would affect him or her adversely is taken. This law is based on Art. 103 of the Basis Law of Germany, which guarantees the right to a hearing during every trial. Section 28 applies to all administrative procedures including issuance of return decisions. The right to be heard might be regulated more detailed in some procedures (e.g. Section 25 asylum procedure act), however exceptions are also possible (e.g. emergency measures). The responsible authority has to inform the individual about the possibility to give a statement and also provide an appropriate time frame. **2.** As mentioned above, the responsible authority – in case where migrants are concerned the immigration or asylum authorities – have to inform the migrant about the possibility to give a statement and provide an appropriate time frame. In case of no response, the authority usually offers another possibility to a hearing and also explains the consequences of a further non-response: any arguments provided by the migrant after the set time can be precluded from being taken into consideration. During an appeal process, information and arguments of the migrants can also be precluded from consideration if they are not presented within a set time frame. **3.** According to Section 28 of the General Administrative Procedure Act, subsection 2, there are following exceptions: • Urgency of measures (usually when it comes to police or safety measures); • If another

			important time limit could not be met; • If the hearing could produce adversely information in contrast to a previous hearing (very rarely used) • If the authority will take non-individual measures (not applicable with the alien and asylum law) • If measures of enforcement are taken. In these cases, it is at the authorities discretion (under due diligence) to forgo the hearing, however they provided a sufficient explanation. According to Section 28, subsection 3, a hearing is prohibited, if it would provide danger for the safety and security of the Federal Republic or individuals. This subsection is rarely applicable. **4.** n/a
	Italy	Yes	**1.** Legislative Decree 25 July 1998, No 286, Single text consolidating the provisions regulating immigration and the status of foreign nationals (Consolidated Act on Immigration), Article 13, established that the expulsion of a foreign national should be decided by the Minister of the Interior on grounds of public policy or national security, and by the Prefect, on a case-by case basis, when given circumstances arise. In all circumstances, the decision to expel a foreign national is made by reasoned decree that is immediately enforceable, even if that measure is contested by the person concerned. An expulsion decree, like any other act concerning entry, stay and expulsion is notified to the person concerned with instructions on how to contest the decision and a translation in a language that the applicant knows, or, if that is not possible, in French, English or Spanish. An expulsion decree may be contested before a regular court. In particular, disputes in this area are regulated by Article 18 of Legislative Decree 1 September 2011, No 150, Complementary provisions to the Code of Civil Procedure on the reduction and simplification of civil cognisance proceedings. Article 18 provides for the following: Any appeal must be lodged within thirty days from the notification of the decision, or within sixty days, if the claimant lives abroad; Any appeal, with the decree setting the date of the hearing, must be notified at least five days before the hearing; The authority that has issued a contested decision may appear before the court since the first hearing either personally or through properly delegated officials; In all circumstance, a decision must be taken within twenty days from the date on which the appeal was lodged. See also question no 3. **2.** See question no 1 **3.** See question no 1

			4. Constitutional Court - By Judgement No 222/2004, the Constitutional Court held that enforcing a decision to escort a person to the border before validation by the judicial authority was in contrast with Article13 (3) of the Italian Constitution, and that the validation procedure did not respect the right of a foreign national to be heard by the court with the assistance of a defending counsel. Court of Cassation - By Judgement No 5728/04, the Court of Cassation confirmed that it is an obligation, not just an entitlement, of the Court to hear a foreign national when validating an expulsion decree issued by a Questore (provincial chief of police) in order to guarantee the right of defence of expelled immigrants. Court of Cassation – By Judgement No. 3154/03, the Court of Cassation held that a foreign national who has been subject to an expulsion measure must be heard in person. In particular, the Court established that a person for whom expulsion is requested must be heard in the forms set out in the Code of Civil Procedure, as provided for in the Single Act on Immigration and in accordance with the principle of the right to a hearing, which requires notification by the office of the court's clerk of the appeal and of the decree setting the date of the hearing in chambers.
	Latvia	Yes	**1.** Herewith information for questions 1.-3. is provided Conditions related to the right to be heard are prescribed in the Administrative Procedure Law. According to Article 4, (1), 11 of the Administrative Procedure Law in administrative proceedings the principle of procedural equity shall be applied. According to Article 14.1 of the Administrative Procedure Law institutions and courts shall, in taking decisions, observe impartiality and shall give the participants in the proceedings an appropriate opportunity to express the viewpoint thereof and to submit evidence. An official in respect of whose impartiality there may exist justified doubts shall not participate in the taking of the decision. According to Article 61 of the Administrative Procedure Law participant in an administrative proceeding has the right to become acquainted with the matter and express his or her opinion at any stage of the proceedings. This right does not extend to information which in accordance with Article 54, (2) (Information that reveals the identity of the person who has reported about the violation of a law, may be provided only with the consent of such person, except in cases provided in the norms of law) of this law or other laws may not be disclosed. Opinions submitted to the institution in writing shall be attached to the matter. In the Article 62 of the Administrative Procedure Law is determined that: (1) In deciding in regard to the issuing of such administrative act as might be unfavourable to the addressee or a third party, an institution shall clarify and assess the opinions and arguments of the addressee or the third party in such matter. (2) Clarification of the opinion and arguments of a person is not required if: 1) the issue of the administrative

			act is urgent and any delay may directly endanger the security of the State, public order, environment, or the life, health or property of persons; 2) the case is objectively insignificant; 3) it flows from the substance of the case that the clarification of the opinion of the person is impossible or inadequate. (3) If an administrative act is issued in writing and the opinion and arguments of a person have not been clarified the reason shall be stated in the basis for the administrative act. According to Article 67, (2) 4, 5 and 6 of the Administrative Procedure Law administrative acts issued in writing shall include opinions and arguments of the participants in the administrative proceedings, if such opinions have been expressed, determination of facts and basis for the administrative act, including, in particular, considerations of usefulness. In the Article 66 of the Administrative Procedure Law is determined that: (1) In considering the usefulness of the issue of, or of the content of an administrative act, an institution shall take a decision regarding: 1) the necessity of the administrative act for the attaining of a legal (legitimate) goal; 2) the suitability of the administrative act for the attaining of the relevant goal; 3) the need for the administrative act, that is, whether it is possible to attain such goal by means which are less restrictive of the rights and legal interests of participants in the administrative proceeding; and 4) the conformity of the administrative act, comparing the infringement of the rights of a private person and the benefits for the public interest, as well as taking into account that substantial restriction of the rights of a private person may only be justified by a significant benefit to the public. (2) The restriction of human rights, if this in substance deprives the addressee of the relevant rights, is not proportionate in any case. According to Article 67, (3) of the Administrative Procedure Law in the determination of the facts part of an administrative act, shall be set out the evidence upon which conclusions are based and the grounds on the basis of which evidence has been rejected. In issuing return decision authority takes into account the arguments and opinion of the person given (in writing) at the moment when the fact of violating the law was fixed. In every unfavourable decision proportionality (the benefits which society derives from the restrictions imposed on a person must be greater than the restrictions on the rights or legal interests of the person (Article 66 of the Administrative Procedure Law). Significant restrictions on the rights or legal interests of a private person are only justified by a significant benefit to society) is evaluated. The decision is made comprehensively and objectively assessing the legal provisions in the context of the actual circumstances. Irregular migrant always has the right to contest the return decision and submit arguments to the head of the authority, which will be evaluated. Irregular migrant is entitled to appeal the decision of the head of the authority to the court. So if the case comes to the court the arguments of the irregular migrant have already been evaluated. In Immigration Law there is not prescribed term in which return decision should

			be taken. According to Immigration Law the State Police official has the right to detain a foreigner (if there are grounds) for three hours until handing him or her over to the State Border Guard. An official of the State Border Guard has the right to detain a foreigner (if there are grounds) for a period not exceeding 10 days. An official of the State Border Guard has the right to detain a foreigner for more than 10 days only according to a decision of a judge of a district (city) court. Based on the application of an official of the State Border Guard, the judge shall take a decision to detain a foreigner for a time period of up to two months or regarding the refusal of detention. Taking into account the above-mentioned competent authorities in Latvia before taking a return decision has enough time to hear the arguments of the irregular migrant and assess them. **2.** See above **3.** See above **4.** In the case law and legal literature it is widely acknowledged that: 1) A person has the opportunity to express his/her views on all issues, facts and legal norms before a decision is made; 2) Authority is obliged to hear the arguments of the person before making an unfavourable decision in case if there is no in the legal norms defined exceptions. Hearing obligation is not merely a formal requirement, this obligation of the institution is an integral component to a fair administrative process; 3) The opinion and arguments of the person should be stated in the unfavourable decision in order to be sure that the arguments of the person are evaluated. In such decision should be stated only arguments which are relevant, that is, which are essential and are able to influence the legal situation; 4) The competent authority shall value the opinion and arguments of the person with the existing documentary evidence. Arguments of the person are heard and considered, but that does not mean that the institution has to agree with the opinion of the person; 5) The lack of hearing before making unfavourable decision is considered as a substantial procedural violation. If this principle (right to be heard) is violated, it is a basis to revoke an unfavourable decision. Such administrative act should be revoked only if in case of hearing would have been issued in terms of content different administrative act; 6) If the arguments of the person haven`t been heard before issuing an unfavourable decision, reasons why this is not done should be pointed out in the administrative act. The lack of justification in administrative act is considered as serious violation that causes an unlawfulness of the administrative act.

	Lithuania	Yes	**1.** The right to be heard before taking any return decision is stipulated in a description of the procedure for adopting and enforcing such decisions approved by an order of the Minister of the Interior. This description provides that a decision on the return of an alien must be based on certain documents, including the alien's interview sheet in the specified format. When interviewing the alien, in order to complete the interview sheet the alien must answer the questions related not only to his identity (citizenship, first name/names, family name/names, date and place of birth, ethnicity, mother tongue, foreign languages spoken, the last residence in the country of origin, education, specialty, profession, criminal record, data on the existing documents confirming the person's identity and citizenship, the visas and residence permits issued by foreign states), but also to his family members and relatives (first names and family names of the spouse, children, parents and other relatives, the date and place of their birth, ethnicity, place of residence) and to circumstances of his entry into Lithuania (the date and place of and reason for departure from the country of origin, the states visited after the departure from the country of origin; the country of destination, the purpose of the travel; the date, circumstances and purpose of entry into Lithuania), the place of residence in Lithuania and the persons who he came to join or with whom he resided in Lithuania, the source of livelihood in Lithuania, and social, economic and other ties with Lithuania. The alien is also asked to indicate whether he wishes to return to the country of origin or to a foreign state which he is entitled to enter or which agrees to receive him (to indicate the name of the state, if he does not wish to return – to indicate the reason). In the course of interviewing the alien and completing the interview sheet, the alien may also provide and indicate additional information, which is also recorded in the interview sheet. In its case-law, the Supreme Administrative Court of Lithuania stresses that the principle of good administration covers accessibility of public services and the right to be heard. Moreover, the court has ruled that the provisions of the right to good administration as referred to in Article 41(2) of the Charter of Fundamental Rights express general legal values, which may, in deciding on the content of the principle of good administration in Lithuania, be taken into account as an additional source of interpretation of law. **2.** Requirements or restrictions as to when an alien may provide additional information before or upon taking a return decision and/or issuing an entry ban have not been specified, however the Law on the Legal Status of Aliens stipulates that an alien may lodge an appeal against a decision taken under this Law (i.e., both a return decision and an entry ban) to the appropriate district administrative court within 14 days from the date of service of the decision.

			3. The interview sheet referred to in the response to Question 1 is not completed in the cases when a decision is taken to voluntarily return an alien who is present at a border crossing point and who is to leave Lithuania and will leave immediately upon the taking of the decision (in the cases when, while carrying out controls of persons on exit, it is found that the alien is staying in Lithuania illegally). If an entry ban is not issued along with a return decision (only a decision on expulsion is taken along with the entry ban), the legal acts regulating the procedure for issuing entry bans (the Law on the Legal Status of Aliens and the Rules for Compiling and Managing the National No-Entry List approved by a resolution of the Government) do not stipulate the duty to hear an alien before taking a decision to ban entry into Lithuania. According to the interpretation formed in the case-law of the Supreme Administrative Court of Lithuania, the individual administrative acts adopted by public administration entities address different types of legal relations which are regulated by special law norms intended exclusively for the regulation of these legal relations. In its ruling of 09-11-2015 in Administrative Case No A-3592-624/2015, the Supreme Administrative Court of Lithuania points out that the legal acts do not impose on the Migration Department the duty to request that an alien provides additional data before taking a decision to ban entry into Lithuania, hence the Migration Department, by not requiring to provide such data, did not violate any legal acts regulating the procedure for taking such a decision. **4.** See the answer above.
	Luxembourg	Yes	**1.** In Luxembourg, article 100 (1) of the amended law of 29 August 2008 on free movement of persons and immigration considers irregular stay of a third-country national that gives rise to a return decision, when the person: (a) does not fulfil, or no longer fulfils, the conditions of entering and stay laid down in article 34; (b) remains on the territory after his/her visa has expired, or, if he/she is not subject to the obligation to possess a visa, remains beyond three months from the date of his/her entry onto the territory; (c) is not in possession of an authorisation to stay valid for a period exceeding three months or a work permit, if the latter is required; (d) when another Member State has already issued a removal decision. In those cases the Minister in charge of Immigration will issue a refusal decision duly motivated in accordance with article 109 (1). This decision is notified to the third-country national and a copy of the decision is handed to the person concerned (article 110 (1)). The decision will indicate the administrative recourses available against the decision as well as the deadline to exercise them (article 110 (2)). At the request of the person concerned the principal elements of the decision shall be communicated to him/her

			in a language which he/she understands or may reasonably be expected to understand (article 110 (3)). The refusal decision declaring the irregular stay of the alien shall carry with it an obligation requiring to leave the territory, and shall state the time allowed for doing this voluntarily. Normally this period of time is of 30 days after notification of the decision (article 111 (1) and (2)). Also, an entry ban can be issued against the alien for a maximum duration of 5 years. This can be issued at the same time or after the return decision was issued (article 112 (1)). Against the return decision (article 109) and entry ban an annulment appeal can be filed before the First instance Administrative Court. The deadline for filing the appeal is of 3 months after the notification of the decision (article 113). The annulment appeal does not have a suspensive effect (article 113). However, a postponement of the removal request can be filed before the First instance Administrative Court (article 114). The appeal before the First instance Administrative Court must contain: the facts as well as the request of the annulment and must attach all the documents that he/she would consider relevant. Then the State has a deadline of three months to answer the appeal. After the answer of the State has been filed, the person concerned has a month to reply the arguments of the State. Then the State will have a month to reply to the arguments of the plaintiff. In a deadline of one month of the last reply the First instance Administrative Court will fix the date for a public hearing. Normally a month after the public hearing the Court will render its decision. The normal maximum duration of the administrative procedure is of 7 months from the filing of the appeal. During the duration of the procedure if the person concerned is not in detention s/he can attend the audience before the First instance Administrative Court (article 115). Against the decision of the First instance Administrative Court the person concerned can file an appeal before the Administrative Court (article 113). The deadline for filing the appeal is of 40 days after the notification of the decision. As part of the application for international protection, the right to be heard is very important, referred to as a “fundamental” right by our jurisprudence. The right to be heard and the modalities of interviews are governed by articles 13, 14 and 15 of the law of 18th December 2015. We have not seen an abuse of the “right to be heard”. Indeed the requests for complementary interviews are very rare. Please note that asylum seekers (except those from visa free Western Balkan countries) are in a hurry to receive an invitation for an interview in order to be heard on the reasons of their application. Vice-versa, it happens regularly that asylum seekers from visa free Western Balkan countries try to get their interview postponed, i.e. by bringing medical certificates, in order to prolong the asylum procedure. **2.** Yes. See answer to question 1.

			3. Yes. See answer to question 1. As mentioned above, once the motivated decision is taken the person concerned can file an appeal against the decision before the First instance Administrative Court exposing the facts and providing the evidence he/she considers relevant for the case. **4.** Judgement of the Administrative Court, n° 32266 of 11 July 2013.
	Netherlands	Yes	**1.** According to article 4:8 of the Dutch General Administration Law (Algemene Wet Bestuursrecht) should anyone be heard before taking an adversely measure to him/her. If nonetheless this measure is taken, should this decision sufficiently be motivated (chapter 3.7). Return decisions are no exception to these rules, according to our highest court on Administrative Law (Afdeling Bestuursrechtspraak van de Raad van State) in its verdict dated June 15th 2012 (see consideration 2.5.3, in 2nd paragraph). **2.** A Return decision and/or Entry ban can be imposed by competent government officials from both the Ministry of Justice and Safety, and the police force as well as border control-officers. In the case of the issue by police or border control, there is indeed a matter of timing. The term of holding a person to investigate his/her identity and/or status of (il)legal stay is maximum 6 hours, and, if no interpreter can be found within that time, to be extended to max 48 hours. After that follows release or detention. Due to the Boudjlida-judgment of the EU-Court of Justice (C 249/13, dated December 11th, 2014) – consideration 48 the third national concerned must -in respect to article 5 of the Return Directive 2008/115/EU- at least be questioned about the best interests of the child, family life and the state of health and, the principle of non-refoulement. In the same judgment is the right of consulting a lawyer (at own costs) in advance of the hearing recognized.) The Dutch police uses a set of compulsory questions which should be posed in the hearing in advance of taking the return decision a/o entry ban. The questionnaire (in Dutch) is attached. **3.** No, in the Netherlands the third national should always be heard before the issue of a Return decision. This should take place within the 6 (plus eventually extension of 48) hours that the person can be legally hold. If there is no hearing possible and by this result neither a Return decision could be taken, the person should be released. Detention on basis of the Return directive is only possible when a Return decision is taken, and issued to the person. As said, this is not possible without a hearing in advance. (Because of the unsatisfactory of this situation, there is a study to make the hearing possible after the issue, but until now without any result.) If the third national has not been given the opportunity to express his views, it does

			not necessarily lead to the cancelation of a return decision. The court examines what the third national had wanted to state. If that would not have led to a different conclusion the return decision can be upheld. **4.** After a period of legal residence, there does not have to be taken a new return decision each time. In its judgment of February 15, 2016 the European Court ruled that there does not have to be a new return decision after a period of rightful residence. If prior to the period of legal residence there was already a return decision, this return decision upholds after the period of legal residence.
	Portugal	Yes	**1.** In order to comply with article 41 of the EU Fundamental Rights Charter, the Portuguese Law foresees: Art 148 of Act 23/07 (Immigration Law): 1 - During the proceedings, the audition of the concerned person is assured and he/she shall have all the defence guarantees (n.º 1). 2. The audition mentioned in the preceding number is valid for all purposes as an audition of the concerned person. 3- The responsible for the proceedings must promote all the essential procedures in order to obtain the truth and he/she may refuse, in a grounded order, the request of the person against whom the proceedings were made, when decides as proved the alleged facts **2.** No. **3.** Yes. According to the terms of article 124, nº1, of the Code of Administrative Procedures, the citizens audition in a procedure may be dismissed when: a)the decision is urgent; b)the interested part has requested the postponement which nº 2 of the previous article refers to and, due to undisputable facts, it's not possible to schedule a new date in the terms of nº3 of the same article; c) it's predictable the proceeding may compromise the decision's execution or its usefulness; d) the number of interested persons to hear in the audition is extremely high and, in that case, the audition is impracticable; so, a public consultation must be done the most appropriate way when possible; e)the interested parts have already made their statement on the relevant issues that matter to take a decision and on the evidences gathered; f) The procedure's elements lead to a fully favorable decision to the interested parts. According to the terms of nº2 of the same article, the final decision must be properly sustained by reasons why the audition didn't occur. **4.** -

	Slovak Republic	Yes	**1.** There are several references in the Slovak legislation: • Act on Residence of Aliens n. 404/2011 Coll.: In accordance with the art. 120 (7) of the Act on Residence of Aliens, before issuing the decision on the administrative expulsion or the decision on detention, a police department will enable the foreigner and his/her selected legal representative to comment on the grounds/basis and forms of the findings on this decision, or also to suggest any addition; for this purpose, police department shall notify selected legal representative about such possibility. According to the art. 77 (7) of the Act on Residence of Aliens, an alien against whom the proceedings on administrative expulsion are brought can be represented by an attorney or other representative that s/he chooses; the representative can be only a natural person with full legal competence, unless provided otherwise. The person mentioned in the first sentence can only have one chosen representative for the same case. According to the art. 77 (8) of the Act on Residence of Aliens, a third country national shall be entitled to obtain legal representation within the extent and under the conditions as per a special regulation. • Administrative Code, n. 71/1967 According to the art. 22 (Records) of the Administrative Code: 1) A record is written about important actions in the proceedings, especially about the evidence executed, comments of the parties to the proceedings, oral proceedings and voting of the administrative authority. 2) It must be evident from the records who, where and when conducted the proceeding, the subjects of the proceeding, who took part on the proceeding, how it was performed, what suggestions were made and which measures were taken; in the records of voting also the statement of the decision and result of the decision must be noted. 3) After being read out, the record is signed by all the persons participating in the proceeding and by the employee (member) of the administrative authority conducting the proceeding. Refusal of the signature of records, reasons for this as well as objections towards the content of the records must be noted in it. According to the art. 3 (2) of Administrative Code, which sets the basic rules of proceeding, the communication and intense cooperation of the administrative authorities with the parties to the proceeding in order for them to effectively defend their rights, is inevitable. Administrative authorities shall also provide them with the assistance and information so they would not suffer any harm by not being familiar with the laws. According to the art. 21 (2) of Administrative Code all the parties to the proceeding can, upon the call of the administrative authority, state their suggestions or remarks during the oral proceeding. According to the art. 33 (2) of Administrative Code, administrative authorities are obliged to give possibilities to all the parties to the proceeding to comment on the grounds and forms of the findings, or also to suggest any addition.

			2. According to art. 33 (2) of Administrative Code, administrative authority is obliged to give the parties to the proceeding the possibility to comment on the grounds/basis and forms of the findings, or also to suggest any addition before the issuance of the decision. This means that the parties have the right to express their opinions, views, suggestions in any stage of the proceedings before the decision is issued. If an administrative authority fails to give the parties to the proceeding the possibility to comment, this can be a ground for the renewal of the proceeding (retrial) or a ground for enacting new proceeding with revocation of the previous administrative decision. **3.** No, all the proceedings are governed by the Administrative Code, which excludes such practices. **4.** The Ministry of Justice of the Slovak Republic provided a text on the ruling of the Court according to which the violation of the right to be heard (provision of the Administrative Code as cited above) of the detained migrant from Algeria was identified by the Court as a procedural deficiency. The text is available only in Slovak.
	Spain	Yes	**1.** Administrative procedures: Alien Law (Ley Orgánica 4/2000) and its Regulation (Real Decreto 557/2011). Judicial appeals: Law on the Contentious Administrative Jurisdiction (Ley 29/1998). **2.** Steps and timing of the administrative procedure are set out in the Regulation (Real Decreto 557/2011). The migrant is always heard (orally, with interpreter and legal assistance) at the beginning of the procedure. Except in the procedure for illegal entries or non-compliance with an entry ban, there is an additional period of time (48 hours or 15 days, depending on the type of procedure) when the migrant can submit information or propose elements of proof to be considered. After the return decision is issued, administrative and/or judicial appeals are possible. **3.** No. There are no exceptions. **4.** -
	Sweden	Yes	**1.** It´s a general principle according to Swedish administrative Law that every person has the right to be heard - orally or in writing - before individual measures affecting him or her adversely is taken.

			Concerning certain kind of issues, for example refusal of entry or expulsion of anyone who claims for asylum, it´s mandatory to perform an oral interview. In cases concerning refusal of entry or expulsion it´s also mandatory to provide an interpreter if the person don´t speak Swedish. **2.** No **3.** No **4.** We have no relevant documentation to share concerning this issue.
	United Kingdom	Yes	**1.** Home Office guidance makes clear that an interpreter should be used if the person held under immigration powers is unable to communicate fully in English For example page 28 of the Preventing Illegal Working guidance includes If there is doubt about a person's ability to understand English, you must use an interpreter, recognised by the Home Office, to carry out the interview. This means: • a colleague accredited by the Home Office in that language • an official interpreting service, for example, Big Word, or • an interpreter from the national database of casual interpreters maintained by the central interpreters unit (CIU). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488911/Illegal_working_v10.0.pdf Guidance also makes it clear that there is a requirement to ensure that an individual knows the reason for their arrest/detention Chapter 55 of Enforcement Instructions and Guidance includes (55.6.3) It is important that the detainee understands the contents of the IS91R*. If he does not understand English, officers should ensure that the form's contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers). (* extra note- the IS91R is the form served on a person detained under immigration powers so that they know the reasons for the detention) https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals **2.** No. **3.** • Where a person was previously notified of a right of appeal against a decision (regardless of whether the appeal right was exercised) or was served with a section 120 notice (requiring them to give reasons as to why they should be permitted to remain in the UK as soon as reasonably practicable) and has made a subsequent claim which could have been raised in an earlier appeal or response to a section 120 notice but

			was not and there is no satisfactory reason for that failure, the SSHD can certify the claim under section 96 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The effect of certifying a claim under Section 96 is that there is no right of appeal at all. Guidance on section 96 is available on link here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421558/Certification_s96_guidance_1.0_EXT.pdf Further evidence may be submitted by a failed asylum seeker or a migrant who has had their human rights claim refused. Caseworkers must usually consider such further submissions, which may or may not be different from information previously considered, by applying paragraph 353 of the Immigration Rules. Detailed information is available in the asylum policy instruction on further submissions on gov.uk: https://www.gov.uk/government/publications/further-submissions. The application process is covered in section 3 and the consideration process in section 4. **4.** N/A
	Norway	Yes	**1.** Laws: Norwegian Public Administration Act of 10 February 1967: Article § 16. (advance notification) A party who has not already expressed his opinion on the case through an application or by other means, shall be notified before an administrative decision is made and be given an opportunity to express his opinion within a stipulated time limit. If a minor over 15 years of age is a party to the case and is represented by a guardian, this provision shall also apply to the minor himself. The time limit runs from the day on which the notification is dispatched unless otherwise expressly stated. The advance notification shall explain the nature of the case, and otherwise contain such information as is considered necessary to enable the party to protect his interests in a proper manner. Normally, such advance notification shall be in writing. The advance notification in writing may be given by means of electronic communication when the recipient has explicitly approved of this method and has stated the electronic address that is to be used for such a purpose. Should it be especially burdensome to provide notification in writing, notification may be given orally or in some other way. Advance notification may be omitted if: a) such notification is not practicable or would entail a risk that the administrative decision cannot be implemented, b) the party has no known address and tracing him would require more time or effort than is reasonable having regard to the party's interests and to the significance of the notification, c) the party concerned has already been informed by other means of the impending administrative decision and has had reasonable opportunity and time to express an opinion, or if such notification for other reasons is considered to be obviously unnecessary. § 17. (the administrative agency's duty to clarify the case and to provide information) The

			administrative agency shall ensure that the case is clarified as thoroughly as possible before any administrative decision is made. The agency shall insure that minors who are parties to the case have been given an opportunity to express their views insofar as they are capable of forming their own opinions about the case in question. Due weight shall be attached to the minors' views in accordance with their age and state of maturity. IMMIGRATION ACT OF 15 MAY 2008: Section 92 Legal aid In cases concerning rejection, expulsion and revocation of a permit or revocation of a residence document, see section 120, foreign nationals shall have a right to free legal advice without means testing. However, this shall not apply in expulsion cases under sections 66, first paragraph, (b) and (c), section 67, first paragraph, (a), (b) and (c), section 68, first paragraph, (a) and (b), and 122. **2.** A. Timing. The law states that a foreign national that is apprehended for irregular stay in Norway must be brought before a district court no later than the third day after apprehension if the police wish to detain or remand the foreign national into custody. There are cases where foreign nationals are held in custody at ordinary police prison facilities, pursuant to the Immigration Act, in anticipation of return or transfer to the national holding centre for illegal immigrants, Trandum Holding Centre. The stays in prisons are normally of short duration, which is a maximum of 48 hours. Arrest beyond 72 hours requires a decision by a court of law in order to keep the foreign national detained longer than that, in order to determine the need for further detention. The foreign national will as a rule be transferred to the holding centre after that. B. Notification After apprehension, the usual procedure in these cases is that the police formulate an advance letter of notification. In the letter the police state the grounds for a possible administrative decision. The letter is notified to the foreign national via an interpreter if the foreign national doesn´t speak Norwegian. In rare cases the advance notification could be done orally by the police. C. Free Legal Advice/time limits/mitigating circumstances In cases concerning rejection and expulsion on the basis of irregular stay, foreign nationals have a right to free legal advice. The time limit for submitting a reply varies between 2 hours to 14 days, depending on the nature of the case. In the above mentioned case the time limit would most likely be 2 hours. Generally, the time limit will be longer in cases where there is a presumption that the foreign national has a connection to Norway. The foreign national is encouraged to provide information about any mitigating circumstances regarding his irregular stay, and his connection to Norway through family, children etc. D. No Forms The reply could be in writing or in rare cases orally, there isn´t a specific form that the foreign national has to comply with. After the time limit has passed, a decision can be made based on the available information in the case.

			3. Some Exceptions: According to the Public Administration Act, advance notification may be omitted in some cases, cf. article 16 third paragraph, (as cited above). These exceptions are rarely used otherwise, but can be used in cases where the foreign national is apprehended by the police for illegal stay. In those rare cases, an administrative decision to reject or expel a foreign national who does not hold a residence permit or a right of residence may be implemented immediately. • However, the foreign national can request a deferred implementation of the decision where he can submit additional arguments regarding his case. There is no specific time limit for this request, but the foreign national has to be given a real opportunity to respond to the decision. The foreign national cannot be transported out of Norway before a request has been denied. • The foreign national can submit additional arguments and information in an appeal. The time-limit for lodging an appeal is three weeks from notification of the administrative decision. **4.** We are not aware of any recent national jurisprudence about the (non) violation of the right to be heard in connection with cases where a foreign national is intercepted for irregular stay by the police.