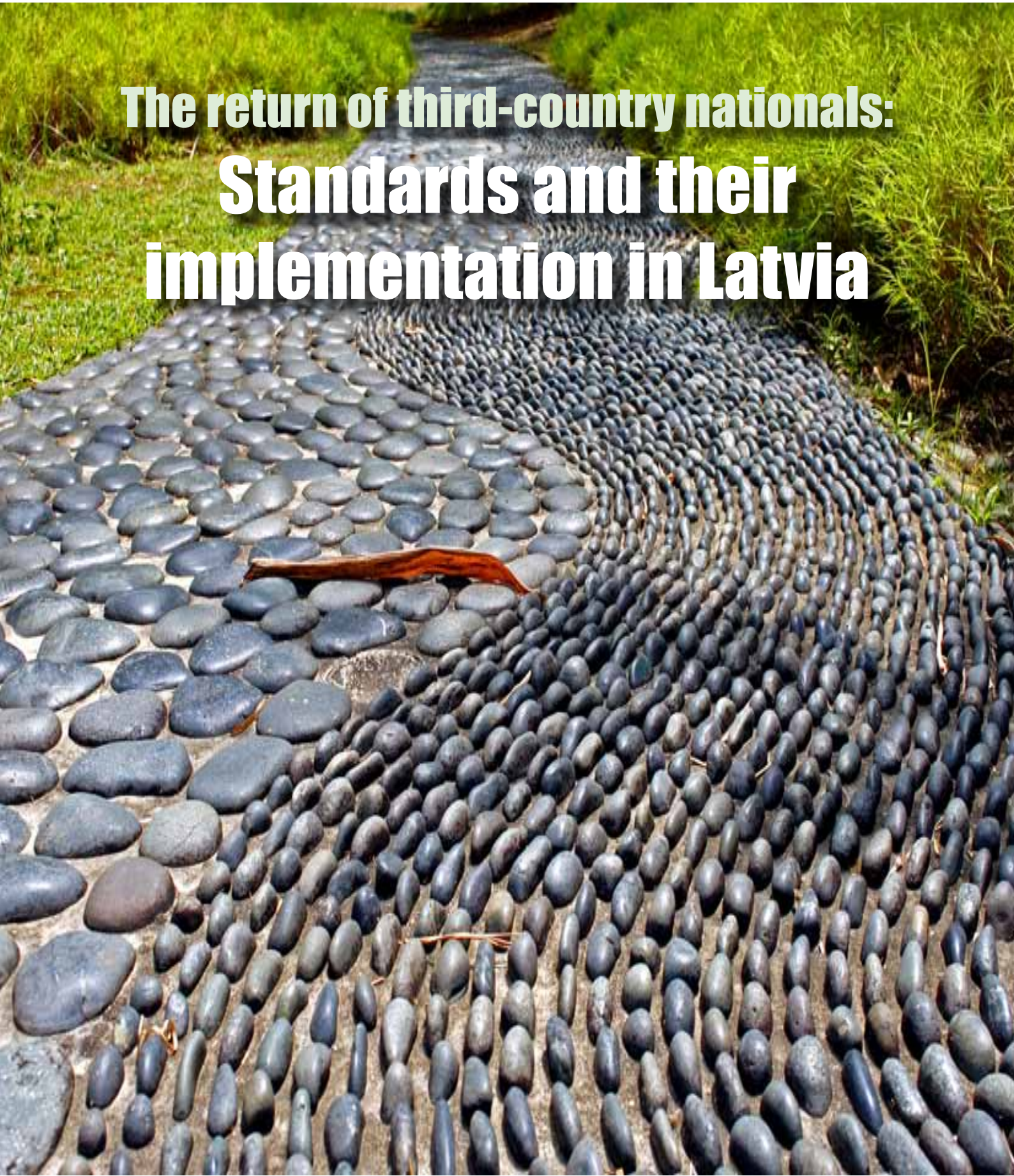
LATVIJAS CILVĒKTIESĪBU CENTRS

LATVIAN CENTRE FOR HUMAN RIGHTS



The return of third-country nationals: Standards and their implementation in Latvia

LATVIJAS CILVĒKTIESĪBU CENTRS
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LISTS OF ABBREVIATIONS

CAHAR - Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons

CEDAW – Convention on the Elimination of all Forms of Discrimination against Women

CESCR – Committee on Economics, Social and Cultural Rights

CJEU - Court of Justice of the European Union

COE - Council of Europe

CPT - European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment

CRC - Convention on the Rights of the Child

EC - European Commission

ECHR - European Convention on Human Rights

ECRE – European Council for Refugees and Exiles

ECHR - European Court of Human Rights

EMN – European Migration Network

ERF – European Refugee Fund

ESC - European Social Charter

EU – European Union

FRA - European Union Agency for Fundamental Rights

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICJ - International Commission of Jurists

IOM – International Organization for Migration

JRS – Jesuit Refugee Service

LAA - Legal Aid Administration

LCHR - Latvian Centre for Human Rights

NGO – non-governmental organisation

OCMA - Office of Citizenship and Migration Affairs

Return Directive - Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

PACE - Parliamentary Assembly of the Council of Europe

SBG - State Border Guard

UNHCR – United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

The objective of this Report is to assess Latvian legislation and practice of return of third-country nationals in light of the Return Directive and other national, EU and international standards. In particular, the study is focused on applicable protection standards concerning the protection of vulnerable groups in the return procedure, detention and alternatives to detention and standards on the existence of effective forced return monitoring system. This Report is based on desk research, legal analysis, including the analysis of administrative and judicial practice, the results of monitoring visits to the detention centre and other information.

Despite a small number of foreigners in the return procedure in the EU context (1,500 – 2,000 persons per year), the global asylum and immigration trends impose increasing responsibility on Latvian authorities to be prepared for implementation of the standards. Latvia has brought the national law in line with the Return Directive to a large extent. However, there are several problematic areas in law and practice that have been identified in the Report.

The Immigration Law does not provide sufficient protection of the principle of non–refoulement – one of the basic principles of the Return Directive. No effect of appeals of the return decisions is guaranteed by the law. As well, the law does not specify any protection of persons, whose return is impossible. Such persons have no social guarantees determined by international obligations. Another serious legal shortcoming that needs to be addressed is the lack of access to state-funded health services for irregular migrants, including minors, pregnant women, as well as women in the postnatal period, who are not detained.

Although the grounds of detention of foreigners have been more precisely formulated by the Immigration Law, the justification of the application of detention grounds and application of alternatives to detention have not been adequately assessed and analysed by the SBG and judges. Such a conclusion stems from the analysis of selected court decisions on detention. The limited availability of legal aid in the appeal of decisions on detention causes serious concerns with regard to the effective remedy due to the short time for appeal of the decisions on detention, insufficient number of lawyers dealing with these issues and the lack of financial means of many foreigners to hire a lawyer.

The system of monitoring forced return done by the Ombudsman's Office is still in the development and elaboration process. Lack of sustainable funding for monitoring the actual expulsion of foreigners is the core challenge in terms of the monitoring effectiveness.

The Report includes following core recommendations for amendments of the Law to the Government of Latvia:

- to ensure that the appeal of the return decisions to the court has suspensory effect;
- to include the definition of vulnerable persons and the reference for the requirement to consider special needs of such persons;
- to include the provision that the authorities first consider the possibility to apply alternatives to detention when taking a decision on detention in each individual case;
- to include a clause that the detention of minors under 18 should be the measure of last resort and for the shortest possible period of time and taking into account the best interests of the child as most important;
- to adopt a provision on the possibility to grant open places of residence for foreigners during the return procedure, particularly for families with children and vulnerable persons; to assign funding for such places;

- to provide access to free legal aid in the appeal of decisions on detention;
- to extend the term of appeal of the decision on detention from 48 hours for up to ten working days.

1. Introduction

1.1. The need for monitoring and good practices: the EU and Latvian context

Protection-sensitive return of illegally-staying third country nationals (according to the terminology used by the Council of Europe and the European Commission – *irregular migrants*), namely, the return which is aimed at tackling illegal immigration while fully respecting fundamental rights and dignity of the persons concerned, has been a priority at the EU level.[1] Along the lines of several international and European standards concerning return of illegally-staying third-country nationals, including the case law of the European Court of Human Rights (hereinafter – ECtHR),[2] the adoption of the Return Directive (2008/115/EC) laid down common standards imposing an obligation of the Member States to transpose them into national legislations by December 2010.[3]

According to the information provided by the European Commission (hereinafter – EC), by the end of 2013, all states bound by the Return Directive,[4] except for Iceland, claimed its full transposition.[5] However, there are still many disparities among the Member States with regard to the implementation of standards and practice of various provisions. Although there are only few studies available on the specific aspects of the issues of return,[6] they reveal great disparities and shortcomings with regard to provisions of the Return Directive among the states, which are bound by the Directive. In the latest study conducted in 2012-2013, the EC

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[1] The Stockholm Programme — An open and secure Europe serving and protecting citizens, European Council, 2010/C 115/01, Action Plan Implementing the Stockholm Programme (COM(2010) 171); European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, SEC(2011)1353 final.

[2] See, *inter alia*, also European Union Agency for Fundamental Rights (hereinafter – FRA), *Handbook on European Law Relating to Asylum, Borders and Immigration*, 2014 and other FRA publications; International Commission of Jurists (hereinafter – ICJ), *Migration and International Human Rights Law, A Practitioner's Guide*, Updated Edition, 2014.

[3] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Article 13 (4), providing for legal assistance in appeal of return decisions, had to be transposed by 24 December 2011 (Hereinafter - the Return Directive).

[4] 30 states, including all EU Member States, except the UK and Ireland, as well as Switzerland, Norway, Iceland and Liechtenstein.

[5] EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final, p. 12.

[6] See the following core studies/reports in the area of return: FRA, *Detention of third-country nationals in return procedures*, 2011; Jesuit Refugee Service-Europe (hereinafter – JRS), *Becoming vulnerable in detention*; ECRE, Save the Children *Comparative Study on Practices in the Field of Return of Minors* HOME/2009/RFXX/PR/1002, Final report, 2011; Matrix Insight Ltd., International Centre for Migration Policy Development *Comparative Study on Best Practices in the Field of Forced Return Monitoring*, JLS/2009/RFXX/CA/1001, 2011; EC, Ramboll, EurAsylum *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries,* HOME/2010/RFXX/PR/1001, 2013; FRA, *Fundamental Rights: Challenges and Achievements in 2012, Annual report 2012*, 2013; International Detention Coalition, *Exploring collaboration & advocacy initiatives with civil society to limit & Prevent immigration detention in the European Union,* European Union Regional Immigration Detention Workshop, report, 2012, 22-23 November 2012, Athens, Greece.

identified various shortcomings among the EU Member States with regard to the judicial review of detention,[7] detention conditions, alternatives to detention, monitoring of forced return, procedural safeguards, legal remedies, etc.[8]

The EC has emphasized a need for monitoring of the implementation of the Return Directive.[9] The same conclusions also derived from a project implemented by NGOs, as the situation with regard to the transposition and implementation of the Directive is changing over time.[10] Moreover, the exchange and the elaboration of good practices with regard to specific provisions of the Directive are also necessary, as the Return Directive gives much discretion to the Member States on the application of the return procedures, in particular, the identification and protection of vulnerable groups (minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence),[11] the length of detention and the application of the alternatives to detention[12], as well as the standards of independent monitoring of forced return.[13] Although some good practices have been identified, much remains to be done in order to develop them in many other EU Member States.

The transposition of the provisions of the EU Return Directive into the Latvian Immigration Law in 2011 has brought several important improvements with regard to the adoption and implementation of the standards related to return of irregular migrants.[14] However, independent studies and monitoring of the implementation of the standards are necessary, as no such comprehensive assessment has been conducted after the transposition of the Directive. The study is needed especially in light of some problematic areas, which were identified in some previous Reports.[15] In particular, special attention must be paid to the application of detention measures, including those related to minors and vulnerable groups, and alternatives to detention in line with international standards; the returnees' access to legal aid and to legal remedies; the preference of voluntary return over the forced return, and monitoring forced return. The development of good practices is essential in the areas, which

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[7] For the purpose of this report, the term **"detention"** is used according to the definition of the UNCHR in respect of asylum seekers: deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities. See: UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p.9.

[8] EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final.

[9] Ibid.

[10] Such a conclusion was made during the international conference "Detention of asylums seekers and alternatives to detention: experiences from Central, Eastern and Northern Europe", which was organized by the Latvian Centre for Human Rights (hereinafter – LCHR) on 15-16 December 2011.

[11] Article 3 para 9 of the Return Directive. See e.g. JRS, *Becoming vulnerable in detention...*, pp. 110-113.

[12] Ibid. See also: A. Edwards, *Back to Basics: The Rights to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series,* UNHCR, Division of International Protection, PPLA/2011/01.Rev.1, April 2011.

[13] Council of Europe (hereinafter – CoE), European NMP Project, European NPM Project's 9th NMP Thematic Workshop: *'Irregular migrants, Frontex and the NMPs'*, Debriefing paper, September 2012.

[14] Immigration Law amendments, adopted on 26.05.2011., in force from 16.06.2011, available at http://www.likumi.lv/doc.php?id=231630. Some additional provisions came into force in January 2014. See: Immigration Law amendments, adopted on 05.12.2013., in force from 01.01.2014, available at http://www.likumi.lv/doc.php?id=231630.

[15] LCHR, *Detention of asylum seekers and alternatives to detention in Latvia*, 2011.

have been highlighted among the respective state institutions and NGOs as those, which needs deeper expertise:[16]

1. identification and protection of vulnerable groups, including unaccompanied minors;
2. alternatives to detention;
3. monitoring of forced return.[17]

1.2. Irregular migration – situation and trends

Irregular migration is a reality in the EU and in the World. According to some estimation, there could be 1.9 to 3.8 million of irregular migrants in the EU in 2008.[18] The amount of apprehended migrants is more precise. According to the information provided by the EC, the number of migrants dropped from 610,000 in 2008 to 440,000 in 2012 due to various reasons, including improved border control and economic factors.[19]

Many irregular migrants are failed asylum seekers (persons whose applications for asylum were rejected by the final instance), including those, who crossed the border without valid travel documents; such persons cannot be removed because of technical reasons (lack of documents, unclear identity, etc.) or humanitarian grounds (e.g. age, family links).[20] Other foreigners have found themselves in an irregular situation because of overstay (a residence permit or a visa has expired), or working in breach of the legal provisions in the field of immigration.[21]

Although the number of irregular migrants in Latvia has increased over the last years, it is still not significant at the EU level. However, in the context of the increase of immigrants and asylum seekers in Europe (according to the UNHCR, there were 216,289 asylum claims in the EU in the first half of 2014, an increase of 71 per cent compared to 2012),[22] Latvia should be more prepared for the implementation of the EU and international standards in the field of immigration. Total number of the return decisions (return orders and the decisions on forced return) has exceeded to 2,000 in 2012 and 2013, with a decrease to about 1,500 in 2014 (additional statistics see in Section 2.2).[23]

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[16] See e.g. LCHR, UNHCR, SBG, *Report on the Border Monitoring Activities*, 2012, p. 12; LCHR, *Synthesis Report, Steps to Freedom. Monitoring Detention and promoting alternatives to detention in the Czech Republic, Estonia, Latvia, Lithuania, and Slovakia*, Riga, 2011, pp.75-81.

[17] The Ombudsman's Office, which has been responsible for monitoring forced return (Immigration Law, Section 50.[7]) since 2011, is currently implementing a project (supported by the European Return Fund, Ministry of Interior is the national administrative body) aiming at the development of the effective mechanism of forced return: http://www.tiesibsargs.lv/petijumi-un-publikacijas/projekti/eiropas-atgriesanas-fonds-2013.-gads (See Section 2.8).

[18] Kovacheva V. and Vogel D., The size of the irregular foreign resident population in the European Union in 2002, 2005 and 2008: aggregated estimates, Hamburg Institute of International Economics. Database on Irregular Migration. Working Paper No.4/2009.

[19] EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final.

[20] Ibid.

[21] EC, Ramboll, EurAsylum, *Study on the situation of third-country nationals pending return/removal*, p.15.

[22] UNHCR, Asylum trends, first half 2014, available at http://www.unhcr.org/pages/49c3646c4d6.html.

[23] OCMA, Statistics, http://www.pmlp.gov.lv/lv/sakums/statistika/lemumi-par-izraidisanu-un-izbrauksanas-rikojumi.html; OCMA, 06.03.2014 Letter to LCHR No 24/1-42/623; OCMA, 09.09.2014 Letter to LCHR No 24/1-42/2358; OCMA, 23.02.2015 Letter to LCHR No 24/1-42/642.

1.3. Objective and structure of the Report

The National Report aims to assess the legislation and practices of return in light of the national, the EU and international standards. In particular, the study is focused on the assessment of the implementation of various aspects of the Return Directive in line with other standards (Section 2).

The study is based on various methods of information collection, including desk research and legal analysis, monitoring visits to the places of detention of foreigners in the return procedure, additional information requests and interviews with various stakeholders, as well as the analysis of good practices in other states (See the description of methodology in Annex I). Finally, the Report offers conclusions and recommendations to national authorities, return practitioners and judges (Section 3 - 4).

2. Overview of the implementation of international and European standards on return in Latvia

2.1. Background

2.1.1. Legislative developments

The immigration is a relatively new area of law in Latvia, and it had raised several concerns before the Immigration Law came into force in 2003,[24] in particular, the unlimited terms of detention without decision of a judge, and poor detention conditions of returnees.[25] The Immigration Law has provided for the legal regulation of immigration detention, in particular by setting maximum terms of detention, which were not introduced by the previous law.[26] The amendments to the Immigration Law, which were adopted later, broadened the scope of the rights of detained foreigners and minors (including unaccompanied minors), and set the rules for judicial review of the decisions on detention.[27] The legal provisions regulating the immigration detention facility were also included into the Immigration Law in 2007 and specified in more detail in the Regulations of the Cabinet of Ministers in 2008.[28]

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[24] Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter - CPT) from 25 September to 4 October 2002, CPT/Inf (2005) 8; I.Pūce, Aizturēšanas juridiskais regulējums un aizturēto tiesības Latvijā, LCHR, available at http://cilvektiesibas.org.lv/site/attachments/02/02/2012/Latvia_immigration_latv.pdf .

[25] Ibid.

[26] Immigration Law, adopted on 31.10.2002, in force from 1.05.2003, available at http://likumi.lv/doc.php?id=68522. The previous "Law on Entry and Residence in the Republic of Latvia" was adopted on 09.06.1992.

[27] Immigration Law amendments, adopted on 21.06.2007, in force from 05.07.2007, available at http://likumi.lv/doc.php?id=159970.

[28] The Regulations No. 742 on internal rules of the detention centre, adopted on 15.09.2008, in force from 20.09.2008 available at http://likumi.lv/doc.php?id=181286; the Regulations No. 434 on norms regulating the holding of foreigners placed in the detention centre and the extent and procedure of receiving guaranteed health care services, adopted on 17.06.2008, in force from 20.06.2008, available at http://likumi.lv/doc.php?id=177015; the Regulations No. 435 on the rules for equipping of the detention centre, adopted on 17.06.2008, in force from 21.06.2008, avaiable at http://likumi.lv/doc.php?id=177095.

The Return Directive was transposed into the Immigration Law in 2011; minor additional provisions were adopted in 2013.[29] The legal amendments included several improvements, including provisions on access to remedies in the appeal of the returns decisions (there were no provisions on contesting the forced removal orders before) and state-funded legal aid, more precise grounds of detention for the purpose of removal, and the rules on alternatives to detention. On the basis of the amendments, the Cabinet of Ministers adopted the rules specifying the return procedure in more detail.[30]

2.1.2. Institutions involved in the return procedure

The return procedure begins with the issue of a return order[31] or a removal order[32] by the Office of Citizenship and Migration Affairs (hereinafter – OCMA) or the State Border Guard (hereinafter – SBG). Both institutions are under the supervision of the Ministry of the Interior (see more on the return orders and the removal orders in the Section 2.2). The OCMA and the SBG are entitled to take decisions on inclusion of a foreigner in the list (i.e., national entry ban) and a decision on prohibition to enter the Schengen territory; [33] the Minister of Interior and the Minister of Foreign Affairs may also take a decision on including a foreigner in the list under certain conditions[34] (See Section 2.5).

The return order or the removal order and the decision included therein on inclusion in the list and prohibition to enter the Schengen territory may be appealed to following instances: a higher authority (the Head of the OCMA or the SBG);[35] Administrative District Court;[36] the Department of Administrative Cases of the Supreme Court Senate by submitting a cassation complaint.[37] The Legal Aid Administration (hereinafter – LAA) is entitled to provide free legal aid in cases of appeal of decisions on return orders and forced return, upon a foregner's request[38] (See Section 2.6).

The SBG has an authority to organise and carry out forced removal (See Section 2.2, 2.4).[39] The SBG also is entitled to take pre-court decisions on detention (up to ten days), to detain foreigners and release them from detention.[40] The State Police official has the right to

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29 Immigration Law amendments, adopted on 26.05.2011, in force from 16.06.2011, available at: http://likumi.lv/doc.php?id=231630. See also: Immigration Law amendments, adopted on 05.12.2013, in force from 01.01.2014, available at: http://likumi.lv/ta/id/263228-grozijumi-imigracijas-likuma.

30 The Regulations No. 454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", adopted on 21.06.2011, in force from 01.07.2011, available at http://likumi.lv/doc.php?id=232351; The Regulations No. 630 "Regarding the Procedures by Which the Republic of Latvia Shall Receive and Provide Assistance to the European Union Member States and Schengen Agreement States for Forced Return by Air, as well as the Procedures by Which Joint Flights Shall Be Organised Among the European Union Member States and Schengen Agreement States", adopted on 16.08.2011, in force from 19.08.2011, available at http://likumi.lv/doc.php?id=234582.

31 An obligation to voluntarily leave the territory of the EU Member States within a specified period of time and return to the country of his or her citizenship, third country, from which he or she entered, or a third country, which he or she has the right to enter (Immigration Law, Section 1, para 1 (4)).

32 In Latvian legislation the forced return is carried out based on a removal order. Immigration Law, Section 1, para 1(5^2).

33 Immigration Law, Section 44, para 1, Section 46, para 3.

34 Immigration Law, Section 61.

35 Immigration Law, Section 50, para 1.

36 Immigration Law, Section $50.^1$, para 1.

37 Immigration Law, Section $50.^1$, para 2.

38 Amendments to the State Ensured Legal Aid Law, adopted on 04.08.2011., in force from 07.09.2011, available at http://www.likumi.lv/doc.php?id=234863.

39 Immigration Law, Section $50.^{3.}$

40 Immigration Law, Section 51, Section 54, Section 59, Section $59.^4$

detain a foreigner for three hours until handing him or her over to the SBG.[41] Since the end of May 2011, when the Accomodation facility for detained foreigners "Daugavpils" (hereinafter – detention centre "Daugavpils" was opened (after the closure of the detention facility "Olaine") the decisions on detention of persons during the return procedure fall under the jurisdiction of the Daugavpils Court, while the Latgale Regional Court in Rezekne reviews the appeals (See Section 2.7).

The IOM provides support for voluntary return (See Section 2.2), and the Ombudsman's Office is responsible for the monitoring of forced return (See Section 2.8). There are very few NGOs providing support in certain areas to irregular migrants.[42]

2.2. Voluntary return and forced return

This Section focuses on issues of return and removal decisions and main safeguards for those whose return is pending. In the Subsection 2.2.1 a short description of the legal provisions regarding the issuance of return decisions before and after the transposition of the Return Directive will be given. Further, new provisions on facilitation of voluntary return and their effect in practice will be described. The Subsection 2.2.2 addresses legal provisions with regard to removal of foreigners, focusing on grounds of removal decisions and the use of coercive measures. Finally, the Subsection 2.2.3 aims to describe practical implementation of basic principles and safeguards for those whose return is pending, highlighting the existing problems in areas of *non-refoulement*, health and family unity.

2.2.1. Return orders and facilitation of voluntary return

The return order, issued by the OCMA or by the SBG, is an administrative act substantiating fact of illegal stay of a foreigner and imposing an obligation on a foreigner to leave voluntarily the territory of the EU Member States within a specified period of time and return to the country of his or her citizenship, third country, from which he or she entered the EU, or a third country, in which he or she has a right to enter.[43] The return order imposes an obligation to a foreigner to leave the Republic of Latvia in the time period from seven to thirty days. Nevertheless, upon a person's request, there is a possibility to postpone the period of leaving Latvia up to one year.[44] After the amendments in the Immigration Law in 2011, it is now possible to issue a return order without the presence of the foreigner. This is possible if the person was staying illegally in Latvia and the illegal stay was detected upon his/her departure while crossing the external border, and there is no possibility to issue a return decision prior to the departure of the transport of an international route.[45]

Before the transposition of the Return Directive, the provisions on voluntary return were rather inexhaustive, namely they stated merely the following: a return decision, requesting to leave the country within seven days, shall be adopted in case of the violation by a

41 Immigration Law, Section 53.

42 LCHR provides legal aid and advice in specific human rights violations cases, but the Latvian Red Cross has assisted in education of minors in some cases (See Section 2.7).

43 Immigration Law, Section 1, para 1 (4).

44 Immigration Law, Section 43, para 1-2.

45 In this case the SBG official inform the foreigner that in relation to him a return decision shall be issued. Immigration Law, Section 41, para 4.

foreigner of the procedure for entering or residing in Latvia.[46] On humanitarian grounds, the state could take a decision to revoke or suspend the execution of the return decision.[47]

When the Immigration Law was amended on 26 May 2011,[48] the chapters of voluntary return and forced return were united. The law amendments also introduced the possibility for the SBG to issue return decisions.[49] The period of leaving the country was extended in line with the Return Directive, allowing to leave the country within the period of seven to 30 days, also permitting to leave earlier.[50] Upon certain circumstances, the foreigner may be issued with a duty to leave less than in seven days, however, until the end of 2014 this provision has not been applied.[51] There are some more favourable provisions regarding Article 7 of the Directive. The Latvian legislation does not require that a third-country national shall submit an application to extend the initial period mentioned above for voluntary return (Article 7(1) of the Return Directive). Latvia has also chosen to grant a period shorter than seven days instead of refraining from the granting thereof (Article 7(4) of the Return Directive), in cases when applying for a residence permit, a foreigner has provided false information or the application for a residence permit is clearly unjustified.[52]

Upon the request of the foreigner, the state authority has the right to extend the time period initially indicated in the return decision for a time period not exceeding one year[53] (See also Subsection 2.2.3). A similar, but more elaborate norm as mentioned above was left in the law during amendments: e.g., the authority may revoke or suspend execution of the voluntary return decision issued or the removal order if the circumstances, which were the basis for the issue of the decision, or on humanitarian grounds, have changed.[54] Until the end of 2014, the SBG had suspended none of these decisions whereas the OCMA - three. However, 21 decisions have been revoked due to the change of circumstances, which were the basis for the issue of the decision.[55]

In Recital 10, the Return Directive requests promotion of voluntary return and asks Member States to provide enhanced return assistance and counselling and to make best use of the relevant funding possibilities offered under the European Return Fund. The "*Twenty Guidelines on Forced Return*" of the Committee of Ministers of the Council of Europe (hereinafter - *Twenty Guidelines*) suggest that state should take measures to promote voluntary returns, which should be preferred to forced returns.[56] Member States should also regularly evaluate and improve, if necessary, the programmes which they have implemented to that effect. There are several reasons why voluntary return is more preferable than forced return. The main reason is to ensure more humane return posing less risks of potentially violating human rights. Voluntary return is also cheaper than forced return, more attractive to returnees (with reintegration assistance), it creates more sustainable return and also contributes to the development in the country of origin.[57] Besides, successful return projects require all or at

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46 Immigration Law (with amendments until 15.06.2011), Section 41, para 1.

47 Immigration Law (with amendments until 15.06.2011), Section 41, para 2.

48 in force from 16.06.2011.

49 Immigration Law, Section 41, para 3.

50 Immigration Law, Section 43, para 1.

51 Immigration Law, Section 43, para 3. OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014 and No 24/1-42/642, 23.02.2015.

52 Immigration Law, Section 43, para 3.

53 Immigration Law, Section 43, para 2.

54 Immigration Law, Section 49.

55 In the second half of 2011 – 3, in 2012 – 11, in 2013 – 2, in 2014 – 5. OCMA, Letter to LCHR No. 24/1-42/2358, 09.09.2014 and No.24/1-42/642, 23.02.2015.; SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014.

56 CAHAR, *Comments on the Twenty guidelines on forced return* (CM(2005) 40 final), 20 May 2005, Guideline 1.

57 PACE, Committee on Migration, Refugees and Population, Doc. 12277 *Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants*, 4 June 2010.

least most of the following elements: pre-return advice and counselling of returnees, training/employment assistance, assistance for travelling to and/or re-establishment in the country of origin of returnees and help with their housing in the country of destination, follow-up assistance and counselling during the post-return phase.[58]

Taking into account the above-mentioned, namely, that voluntary return is preferred over the forced return, one of the most important new Latvian legal provision in the Immigration Law, is the one providing the right of a foreigner, against whom a removal order has been taken or a voluntary return decision has been issued, to apply for aid provided by international organisations, associations or foundations, so that s/he could voluntarily return to his/her country.[59] After the 2011 amendments in the Immigration Law, if a removal order has been issued, the state authority is entitled to revoke it, if the respective foreigner has applied for the voluntary return programme and the relevant international organisation, association or foundation has informed the institution, which issued the decision, thereof. Accordingly, if the removal order is revoked, the foreigner shall be issued a return decision.[60]

There is only one project-based programme promoting voluntary return in Latvia. It is financed by the European Return Fund and the state budget, the latter being 25 per cent[61] of the project's funding.[62] Since 2009, these projects are managed in practice by the IOM office in Latvia,[63] such a practice corresponds to the recommendation of the Parliamentary Assembly of the Council of Europe (hereinafter – PACE)[64] In the framework of the project, assistance to foreigners is provided through covering costs for the return and reintegration aid. However, it is possible to provide the reintegration aid merely to only 30 percent of returnees.[65] Priority is given to vulnerable groups of returnees.[66] In 2012, the SBG concluded an agreement with the IOM Regional Office for the European Economic Area, the EU and NATO. According to the information provided by the SBG, this agreement would permit to ensure effective return of third-country nationals.[67]

In line with the information provided by the IOM Riga Office, foreigners have showed greater interest to use the program than the possibility by the Office to offer such assistance. Besides, as for the moment, there is no sufficient funding to undertake any information campaigns promoting voluntary return programme.[68]

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58 Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents*, COM(2002) 564 final, 14.10.2002, p.22. It has been emphasized that information on the existing programmes shall be disseminated to persons residing illegally, better if in different languages, initiating also information campaigns for prospective returnees. CAHAR, *Comments on the Twenty guidelines*, comment to Guideline 1.

59 Immigration Law, Section 45, para 1.

60 Immigration Law, Section 45, para 2.

61 See the website of the Ministry of Interior http://www.iem.gov.lv/lat/es_fondi_un_programmas/solidaritate_un_migracijas_plusmas_parvaldibas_programma/apstiprinatie_projekti/, year 2012, p.3.

62 The projects have been evaluated by and discussed with the Ministry of Interior, SBG and OCMA. However, these evaluations and discussions are not documented and publicly available yet as the IOM had not had enough funding to include such part in regular reports. Information provided by the IOM by e-mail, 27.06.2014 and 01.07.2014.

63 From 2002-2009 this programme did not operate. European Migration Network (hereinafter – EMN), *Annual Report on Migration and International Protection Statistics for Latvia (Reporting Year: 2009)*, Riga, July 2011, p.22.

64 PACE, *Doc. 12277...*, para 9.1.

65 Information provided by the IOM by e-mail, 19.08.2014.

66 EMN, *Good practices in the return and reintegration of irregular migrants: Latvia's entry bans policy & use of readmission agreements between Latvia and third countries*, Riga, May 2014, p.26.

67 SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014,See also the website of the SBG at http://www.rs.gov.lv/index.php?id=1031&top=-4&rel=2465.

68 Information provided by the IOM by e-mail, 19.08.2014.

After the transposition of the Directive in 2011, the number of persons who returned voluntarily under the programme described above has increased significantly (the number of forced returns has decreased accordingly): from 26 persons in 2009 to 94 in 2014.[69] Prior the provision being inserted in the law and some exchange visits abroad, there was not much understanding within the authorities of the benefits of voluntary returns.[70] Therefore, the efficiency of the programme with the increase of voluntary returns described could be assessed as good. Nevertheless, it has to be noted that since 2011 there has been a sharp increase of asylum seekers in Latvia: from 50 – 60 in previous years, up to 335 in 2011, 189 in 2012, 185 in 2013 and 364 in 2014.[71] The IOM office in Riga roughly calculates that about 2/3 claims of voluntary returns come from failed asylum seekers or asylum seekers whose asylum requests are still being evaluated by the institutions, or by persons returned via Dublin regulation. Only about 20 per cent of claims come from irregular migrants detained in the administrative procedure. The rest of the claims come, for example, from persons whose visa or residence permit has expired, etc.[72] Thus, the increase of voluntary returns could not be attributed only to the inception of the new legislation, but also to the general asylum trends.

Although the national legislation does not contain a provision that forced removal is to be taken only as a last resort, the new amendments in the Immigration Law due to the transposition of the Return Directive tend to improve the situation regarding voluntary returns, especially - the possibility to participate actively in voluntary return programmes offering aid upon returning to one's country. Now, the voluntary return is more "accessible" and could be applied more frequently than before the law amendments in 2011. Also, according to the statistics of the OCMA, the numbers of return orders have significantly increased (see Figure 1): from 104 in 2010 (and even less in previous years) to 1004 in 2011, 2010 in 2012, 2047 in 2013 and 1458 in 2014. However, this trend is explained by the authority as being the consequence of a change in legislation that provided for the issue of a return decision also towards persons whose illegal stay is discovered when they are leaving the country.[73] Additionally, the sharp increase of the return orders has been caused by practice of issuing such decisions also for children.[74] Yet a conclusive trend towards the reduction of the number of decisions for forced return exists as the number of these decisions has dropped from 138 in 2009 to 32 in 2013 but went rather high in 2014: 92.[75] The authorities have explained this as a consequence of applying forced removal only as a last resort if a foreigner has not left the country voluntarily or in cases where national security or public order is at stake.[76] Foreigners,

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[69] The programme was commenced in 2009 and the number of third-country nationals returned during 2009: 26, 2010: 16. After that the number increased and during 2011 was 73 persons, while in 2012 – 89, in 2013 - 82, and in 2014 – 94. (Information provided by the IOM, by e-mail, 18.05.2015.).

[70] Information provided by the IOM by e-mail, 13.05.2015.

[71] See the website of the OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/patveruma-mekletaji.html; Information obtained from OCMA by e-mail on 24.02.2015.

[72] Information provided by the IOM by e-mail, 13.05.2015.

[73] See the website of the OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/lemumi-par-izraidisanu-un-izbrauksanas-rikojumi.html; Statistics on 2013 and 2014: OCMA, Letter to LCHR No. 24/1-42/623, 06.03.2014, No 24/1-42/2358, 09.09.2014. and No.24/1-42/642, 23.02.2015.

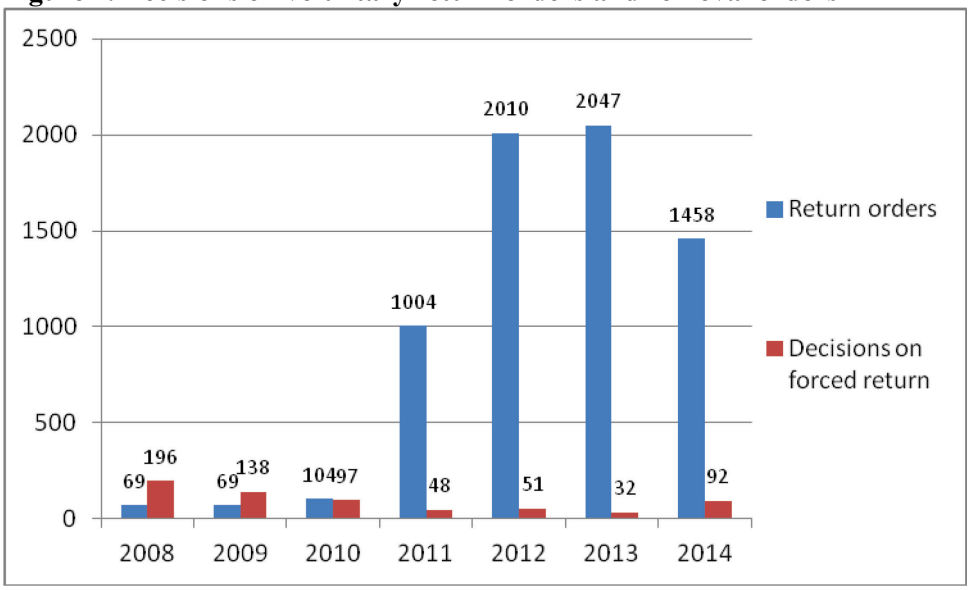
[74] Since the adoption of the 2011 Immigration Law amendments. the return orders have been issued for each foreigner who has violated the Immigration Law, including each minor . OCMA Letter to LCHR No 24/1-42/642, 23.02.2015; Information obtained from a representative of the OCMA on 13 October 2014.

[75] And 97 in 2010, 48 in 2011, 51 in 2012. See the website of the OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/lemumi-par-izraidisanu-un-izbrauksanas-rikojumi.html. Statistics on 2013 and 2014: OCMA, Letter to LCHR No. 24/1-42/623, 06.03.2014, No 24/1-42/2358, 09.09.2014 and No.24/1-42/642, 23.02.2015.

[76] *Practical Measures Taken by Latvia for Reducing Irregular Migration*, Riga, October 2011, p.44.

who initially received removal orders, but later decided to return voluntarily by use of the IOM services, have also been later issued return orders.[77]

Figure 1. Decisions on voluntary return orders and removal orders



Source: Data of OCMA.

Yet there is a need for the government to realize that inconsistent funding could be regarded as an obstacle to effectively implement voluntary return in Latvia. If the funding for the IOM Office for some reasons finishes, there are no alternatives. Therefore, the voluntary return policy in Latvia could not be regarded as sustainable and purposeful.[78] According to the information provided by the OCMA, the number of removal orders would be even smaller, if the IOM would have sustainable funding, with no interruptions between the voluntary return projects.[79]

2.2.2. Removal

The Immigration Law generally complies with the principle of the Return Directive allowing national authorities to issue a removal order if no period for voluntary departure has been granted,[80] or if the obligation to return has not been complied within the voluntary return period (Article 8(1) of the Return Directive).

The removal order is an administrative act, in which the fact of illegal stay of a foreigner is established and, accordingly, imposed on the foreigner forced removal from the territory of EU Member States to his country of citizenship, the third country, from which he has entered, or the third country, which he has the right to enter.[81] In accordance with Article 46 of the Immigration Law, the SBG or OCMA may issue a decision of forced return if there are certain law-prescribed circumstances[82] like the previous unjustifiable failure to execute the

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77 Information obtained from a representative of the OCMA, 13.10.2014. See also: Immigration Law, Section 45, paras 2-3.

78 See also: Baltijas Sociālo zinātņu institūts, *Pētījums par situāciju brīvprātīgās atgriešanās jomā* (ID. NR. IOM/2009-1), Pētījuma rezultātu atskaite, 2009.gada maijs-oktobris, pp.117-118.

79 Information obtained from a representative from OCMA on 13 October 2014.

80 I.e., if there is a risk of absconding, if an application for a legal stay has been dismissed, or if a person concerned poses a risk to public policy, public security or national security.

81 Immigration Law, Section 1, para 1 (5^2).

82 See Immigration Law, Section 51, para 2.

voluntary return decision.[83] A removal order may also be issued, if those law-prescribed circumstances, are detected after the issuance of the voluntary return decision.[84] There are two other options to adopt a removal order:[85] 1) if the Minister for the Interior, in particular cases, stipulated in the law,[86] has taken a decision to forbid a foreigner to enter Latvia; and 2) if the Minister for Foreign Affairs takes a decision that a foreigner is an undesirable person for the Republic of Latvia (*persona non grata*).[87]

Before the transposition of the Return Directive, forced return of a minor was not provided for;[88] this was more favourable provision in respect to minors.[89] Yet, with the 2011 Immigration Law amendments, the law does not provide any exceptions with regard to removal orders of minors, including unaccompanied minors.[90]

According to Article 8(4) of the Return Directive, *"Where Member States use – as a last resort – coercive measure to carry out removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned"*. The use of force and its limitations are specified in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[91] the Council of Europe (hereinafter – CoE) the European Committee for the Prevention of Torture (hereinafter – CPT) standards[92] and also in the *Twenty Guidelines*.[93] These international and European documents, together with case law of the ECtHR,[94] contain guidelines and recommendations on how to carry out removal under dignified conditions, without excessive use of force.

There are no legal norms in Latvian law providing explicitly that coercive measures should be used as a measure of last resort and that the principle of proportionality should be observed, as well as that the removal should be carried out, taking into account foreigner's dignity and physical integrity.[95] However, the national law includes a reference to the EU legal

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83 Immigration Law, Section 46, para 1.

84 Immigration Law, Section 46, para 2.

85 Immigration Law, Section 46, para 5. In these cases, if the foreigner is located in Latvia, the SBG shall adopt a decision of the removal in eight days.

86 See Immigration Law, Section 61, para 1. See Subsection 2.7.1. on the grounds of detention and removal orders in detail.

87 Immigration Law, Section 61, para 2.

88 Immigration Law, Section 48.[2] Reading of the Immigration Law of 15.06.2011. However, a specific "sending" procedure was in place (without consequences and formal procedure of a forced removal) Immigration Law, Section 59.[6] Reading of the Immigration Law of 15.06.2011.

89 In the proposed amendments to the Draft Directive, the Committee on Development even proposed that the best interests of the child dictate that the expulsion of unaccompanied minors be prohibited. European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)0391 – C6-0266/2005 - 2005/0167(COD))*, 20 September 2007 , p.47.

90 Immigration Law, Section 50[8].

91 27 August to 7 September 1990, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx. See also: UN Code of Conduct for Law Enforcement Officials, 17 December 1979.

92 CoE, CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2013.

93 CAHAR, *Comments on the Twenty guidelines*…, Guidelines 15-19.

94 See the overview of the ECtHR case law in: FRA, *Handbook on European law relating to asylum, borders and immigration*, pp. 171-178.

95 The use of coercive measure is regulated by the Border Guard Law, adopted on 27.11.1997, in force from 01.01.1998, available at http://likumi.lv/doc.php?id=46228, Section 17. More specifically the measures of restraint and their use are regulated in the Regulations of the Cabinet of Ministers No.55 „Regarding the Types of Special Means and the Procedures for the Use Thereof by Police Officers and Border Guards", adopted 18.01.2011, in force from 28.01.2011, available at http://likumi.lv/doc.php?id=224905 .

acts, including security provisions for joint removals by air[96] as provided by Article 8(5) of the Return Directive. Although the SBG affirms that the use of coercive measures is included in the training programme of officials working in convoying,[97] the Immigration Law should still add the provision transposing Article 8(4) of the Return Directive.

SBG has informed that, so far, there has been only one complaint regarding the use of coercive measures in the removal process.[98] Since 2011, the Ombudsman's Office has received two allegations of ill-treatment in the pre-departure stage of the removal process; one complaint was found to be ungrounded, but another one is still being examined.[99] The Ombudsman's Office has found no violations while monitoring the first five actual removals taking place in 2013 – 2014; no restraint measure were used in that period[100] (See Section 2.8).

Ombudsman's Office informed that returnees are normally allowed to contact their relatives and friends before departure; if the foreigner has no mobile phone, the SBG provides him/her with an opportunity to make a call for free.[101] The practice seeking cooperation with returnees is in line with the *Twenty Guidelines*.[102]

2.2.3. Basic principles and safeguards pending return

Article 5 of the Return Directive provides for several basic principles, which Member States should take into account when implementing the Directive: 1) the best interests of the child; 2) family life; 3) the state of health of the third-country national concerned, and 4) respect of the principle of *non-refoulement*. The latter is also included in Article 9(1)(a) of the Directive, requesting to postpone the removal if it violates the principle of *non-refoulement*.

During the period, for which the removal has been postponed, as well as during the whole period for voluntary departure granted, Article 14(1) of the Directive determines that as far as possible several principles should be taken into account in relation to third-country nationals: 1) maintenance of family unity with family members present in the Member State's territory; 2) provision of emergency health care and essential treatment of illness; 3) minors should be granted access to the basic education system subject to the length of their stay; 4) special needs of vulnerable persons should be taken into account.[103]

The Directive requests that Member states are obliged, where necessary, to extend the period for voluntary departure by an appropriate period taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.[104] According to the Immigration Law, the authorities, when deciding to extend the time period of voluntary departure, should take into account the circumstances of each case, in particular – duration of stay, family or social ties and if there is a minor child who attends a school in Latvia.[105]

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96 The Regulations of the Cabinet of Ministers No 454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 13.

97 Moreover, an official cannot work in convoying if he has not undergone a specific adjourning course. SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014.

98 SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014 and No.23.1-1/397, 06.02.2015.

99 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

100 Ibid.

101 Ibid.

102 CAHAR, *Comments to the Twenty guidelines*, Guideline 15.2.

103 I.e., excluding detained foreigners. Subparagraph c) - the access to education of minors, are examined in Section 2.4.

104 Article 7(2).

105 Immigration Law, Section 43, para 2.

In practice, the OCMA seems to take into account the circumstances of each case. Since 2011 until the end of 2014, the OCMA extended the period of voluntary return in 23 cases, due to the following reasons: health condition; the need of children to attend a school until the end of the academic year; the need to complete business in Latvia, etc.[106] In two of the analysed OCMA's decisions available for this report, the authority has extended the period for voluntary return based on the state of health of the person.[107] Also the IOM Riga Office has testified that there had been a few cases when family circumstances had been taken into account.[108]

The SBG is obliged to suspend the implementation of the forced removal of the third-country national for a specific period of time if the state of health of the third-country national prevents the implementation of forced removal or if the implementation of forced removal is not possible due to technical reasons, or the issue of the travel (return) document of the third-country national is delayed;[109] these provisions correspond to Article 9(2) of the Return Directive.

According to the information provided by the SBG, since the second half of 2011 there have been no cases where the removal should have to be postponed, as the state of health of the foreigner and possibility to obtain travel documents are evaluated before the execution of the removal.[110] No removal order has been suspended for the period of the appeal of the removal order, as the Immigration law does not provide for suspensive effect of such appeals (See also Subsection 2.6.2).[111]

According to some estimation, there have been about 20 vulnerable persons in the removal process.[112] A definition of vulnerable persons is included in the Cabinet Regulation regarding forced removal of third-country nationals.[113] This Regulation provides that vulnerable third-country nationals may be convoyed to their place of residence or a specialised institution in the country of destination.[114] The latter provision has also been

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106 OCMA, Letter to LCHR No. 24/1-42/2358 on 09.09.2014 and No.24/1-42/642, 23.02.2015; Information obtained from a representative from the OCMA on 13.10.2014.

107 A third-country national had a sudden deterioration of health while in Latvia and did need an extended treatment in a hospital for up to three months; in another decision the person was in need of an additional treatment course for participating in a medical expertise in a criminal case. 12 anonimised return decisions of the OCMA, sent with the letter of 06.03.2014, No.24/1-42/623, not published.

108 Information provided by the IOM by e-mail, 27.06.2014.

109 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 20.1 and 20.2.

110 SBG, Letter to LCHR No. 23.1-1/2511on 20.08.2014.

111 Ibid.

112 There were six minors, five elderly persons, three disabled persons, (including a child) and two single parents in detention in 2012-2013. In 2014, five vulnerable persons – three unaccompanied minors, one disabled person and one seriously ill person, were removed. See: EMN, *The use of detention and alternatives to detention in the context of immigration policies*, EMN focused study, Riga, May, 2014, pp.40–41; SBG, Letter to LCHR No.23.1-1/397, 06.02.2015."According to the representatives of the Ombudsman's Office, since the transposition of the Return Directive,", there have been about 15 vulnerable foreigners, including minors, elderly persons and people with physical and mental disabilities, in the removal procedure. Interview with the representatives from the Ombudsman's Office on 27.08.2014.

113 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 2: "Within the meaning of this Regulation, vulnerable persons are minor third-country nationals, disabled people, third-country nationals who have reached the age when old-age pension is granted in the Republic of Latvia, pregnant women, single-parent families (father or mother only) with minor children and persons who have been subjected to serious psychological, physical or sexual violence".

114 The Regulations of the Cabinet of Ministers Regulation No.454 "Regulations Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 11.4.

implemented in practice in several cases.[115] However, as for now, the only direct reference of vulnerable persons is found in relation to the forced removal of foreigners in the Regulation regarding forced removal of third-country nationals[116] and not in regard to return procedures or adoption of return decision/removal order, as provided by the Return Directive. Consequently, the definition of vulnerable persons and a reference of taking into account of such persons' special needs are to be still included in the laws regulating immigration. At the same time, the authorities are still obliged to reverse to other legal enactments, for example, Administrative Procedure Law, which objective is to ensure the observance of basic democratic principles, especially human rights, in legal relations between the state and a private person.[117]

a) Non-refoulement

Non-refoulement is a well-established principle of international human rights,[118] requiring that no one shall expel or return ("*refouler*") a person against her/his will, in any manner whatsoever, to a territory where s/he fears threats to life or freedom.[119]

The Immigration Law does not include a clause that removal should be postponed if it would violate the principle of non-refoulment, as prescribed by Article 9(1a) of the Return Directive. However, the SBG is obliged to suspend the implementation of a forced removal of the third-country national for a specific period of time, if the circumstances referred to in Section 47 of the Immigration Law are established[120] (a foreigner shall not be removed, if the expulsion is inconsistent with international commitments of the Republic of Latvia[121]). So far none of these decisions have been adopted yet[122] and the interpretation of Section 47 of the Immigration Law and the principle of *non-refoulement* remains unclear.

As the SBG and the OCMA has informed, upon adopting the decisions on return or removal, the institutions evaluate each individual case, taking into account specific circumstances of the case, foreigner's personality and a situation in the receiving country. All information sources available are used to evaluate the circumstances, including conclusions and evaluations of international and non-governmental organizations.[123] The Ombudsman's Office confirmed that the SBG has contacted relatives of foreigners in the countries of origin, in order to find out if relatives are ready to receive the foreigner concerned.[124] Nevertheless, in some cases the Ombudsman's Office expressed concerns regarding possible violations of the

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115 SBG, Letter to LCHR No. 23.1-1/2511on 20.08.2014 and No.23.1-1/397, 06.02.2015; Interview with the representatives from the Ombudsman's Office on 27.08.2014.

116 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 2.

117 Administrative Procedure Law, adopted on 25.10.2001., in force from 01.02.2004, Section 2, para 1, available at http://likumi.lv/doc.php?id=55567.

118 See: ICJ, *Migration and International Human Rights Law*, pp.112-140.

119 UN, 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees, Section 33 (1) See: CAHAR, *Comments to the Twenty guidelines*, Guideline 2. See also ECtHR judgments *Soering v. United Kingdom*, application No. 14038/88, , judgment of 7 July 1989; *Chahal v. United Kingdom*, application No. 22414/93, judgment of 15 November 1996; *Saadi v.Italy*, application No. 37201/06, judgment of 28 February 2008.

120 The Regulations of the Cabinet of Ministers No. 454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paragraph 20.3.

121 Immigration Law, Section 47.

122 OCMA, Letter to LCHR No. 24/1-42/2358, 09.09.2014; SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014.

123 Ibid.

124 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

principle of *non-refoulement*.[125] For instance, in one case, a person with special needs was finally returned to Turkey instead of Syria, which was his country of origin, upon the request of the relatives.[126] The Ombudsman's Office mentioned lack of clear guidelines on countries to which the return should not be implemented at the EU level, as a shortcoming.[127]

From the Directive's transposition in 2011 until the end of 2014, there have been only eight appeals of the return or removal orders to the court, and, concerning *non-refoulement*, only two appeals, which have ended with a judgment so far.[128] (See Subsection 2.6.2 on case-law in detail). In one of these two cases on *non-refoulement*, the court rejected objections to the return to Russia,[129] in another – the court clarified that the situation in Afghanistan, where the person was to be removed, was sufficiently safe and was not inflicting serious harm on the person.[130]

In conclusion, it is recommended that the Immigration Law contains more explicit protection against *non-refoulement*, including the obligation of the authorities to assess the risk of serious harm in the return procedure, as provided by the European standards.[131]

b) Health

The foreigner's right to healthcare, including emergency as well as essential healthcare, such as the possibility to see a doctor or to receive necessary medicines, is an important aspect of return.[132] The right to health is included in several international treaties, binding to Latvia,[133] including Article 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter – ICESCR) providing that states parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[134] According to the UN Committee on Economic, Social and Cultural Rights, all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.[135] Regarding children, Article 24 of the Convention on the Rights of the Child

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[125] Ombudsman of the Republic of Latvia, *Report of the Year 2012 of the Ombudsman of the Republic of Latvia*, Riga, p.72.

[126] Interview with the representatives from the Ombudsman's Office on 27.08.2014.

[127] Ibid.

[128] In three cases judicial proceedings were terminated, in one case the application was deemed as not submitted (i.e., if the applicant fails to rectify the deficiences of the application, for example, by not attaching all of the documents required by the law – See Administrative Procedure Law, Section 192), in one case the application was rejected, in one case the hearing of the case was not finished. In 2014, however, there have been no application regarding appeal of a forced return decision. Information provided by the Administrative District court, Letter to LCHR No.2.1-8/3399, 03.03.2014 and No. 1-5/136, 04.02.2015.; see also: portal www.tiesas.lv.

[129] Judgment of Administrative District Court, No.A420540612, on 07.12.2012, p.6. Related to this case are two other court judgments where the person's appeals of not granting him refugee or alternative status were dealt with. In these other two judgments the court has already had evaluated the possible human right violations in Russia. See judgments of Administrative District Court, No.A420413812, on 23.07.2012 and No.A420547311, on 07.10.2011.

[130] The case relates to an OCMA's decision adopted before the implementation of the Directive. Judgment of Senate of the Administrative District Court, No.A420419511, on 26.04.2013.

[131] CAHAR, *Comments to the Twenty guidelines*, Gudeline 2.1.

[132] FRA, *Fundamental rights of migrants in an irregular situation in the European Union*, Factsheet, Luxembourg: Publications Office of the European Union, November 2011, p.1.

[133] For a more elaborate description of treaties, see: FRA, *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg: Publications Office of the European Union, 2011. See also: CoE, The Human Rights of Irregular Migrants in Europe, Chapter III(iii), CommDH/IssuePaper(2007)1, Strasbourg, 17 December 2007.

[134] International Covenant on Economic, Social and Cultural Rights, 1966 (GA Res 2200 A (XXI)).

[135] CESCR, *General Comment No.19: the right to social security (Article 9)*, E/C.12/GC/19, para 37. Available at http://www.refworld.org/docid/47b17b5b39c.html .

(hereinafter – CRC) establishes that no child has to be deprived of his right of access to healthcare services.[136]

The right to health of persons pending return in Latvia depends to a large extent on where the foreigner (including women and children) is accommodated. The healthcare services are more accessible to those foreigners that reside in the detention centre. This Subsection deals with only those persons who are not detained (for access to medical care in detention, see Subsection 2.7.4).

The Medical Treatment Law stipulates the categories of persons who can benefit from medical treatment services paid from the state basic budget and from the funds of the recipient of services; irregular migrants are not mentioned amongst the recipients.[137] The law explicitly states that other persons shall receive medical treatment services by their own resources.[138] The Asylum Law provides that asylum seekers have right to emergency and primary healthcare for free.[139] Therefore, in case of an illness, the right to health of foreigners (except in detention facilities) staying in the country illegally is limited to emergency health care[140] by their own financial means (i.e., it is not free of charge).[141] Other treatments, including essential treatment of illness, also have to be covered by the foreigner's own financial resources.[142] Such a situation is being criticized by the EU Agency for Fundamental Rights (hereinafter - FRA) whose opinion is that „*[M]igrants in an irregular situation should, at a minimum, be entitled by law to access necessary healthcare. Such healthcare provisions should not be limited to emergency care only, but should also include other forms of essential healthcare, such as the possibility to see a doctor or to receive necessary medicines*."[143] Similar statement is confirmed by the Court of Justice of the European Union in its recent judgment C-562/13, where the Court stated that a person whose removal is postponed, should have access to emergency health care and essential treatment of illness.[144] The current situation in Latvia is also contrary to international standards, which prescribe duty of non-discrimination in regard to the right to health irrespective of person's immigration status.[145]

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136 1989 UN Convention on the Rights of the Child (GA Res 44/25).

137 Article 17, of the Medical Treatment Law lists the following recipients: citizens, Latvian non-citizens (to a limited extent), citizens of Member States of the EU, of European Economic Area states and Swiss Confederation who reside in Latvia in relation to employment or as self-employed persons, as well as the family members thereof, foreigners with permanent residence permit, refugees and persons with alternative status, detained, arrested and sentenced with deprivation of liberty, and spouses of Latvian citizens and Latvian non-citizens who have a temporary residence permit. Medical Treatment Law; adopted on 12.07.1997, in force from 01.10.1997, available at http://likumi.lv/doc.php?id=44108.

138 Medical Treatment Law, Section 17, para 5. This is confirmed also by the Regulations of the Cabinet of Ministers No.591 "Rules for Health Insurance of Foreigners", which contains provisions that a foreigner who requests visa, submits a health insurance document of a certain sum and for a period of planned stay in Latvia. Especially the insurance has to cover emergency treatments and transportation to the hospital (adopted on 28.07.2008, in force from 01.08.2008, available at http://likumi.lv/doc.php?id=179063), Paragraphs 6, 7, 8 and 9.

139 Asylum Law, adopted on 15.06.2009., in force from 14.07.2009, available at http://likumi.lv/doc.php?id=194029, Article 10, para 6.

140 Medical Treatment Law, Section 16.

141 See, for example, that a call of emergency medical service crew to a person who does not receive the state budget-funded health care services, costs 93 euros. The Regulations of the Cabinet of Ministers No.746 "Price List of Emergency Medical Service Fees", adopted on 03.09.2013, in force from 01.01.2014, available at http://likumi.lv/doc.php?id=259613, Annex, para 1.2.

142 Medical Treatment Law, Section 17, para 5 and Section 18.

143 FRA, *Migrants in an irregular situation: access to healthcare*…, p.39.

144 The Court used the words "*avail himself of emergency health care and essential treatment*". *Moussa Abdida*, judgment of 18 December 2014, para 62.

145 ICJ, *Migration and International Human Rights Law...*, pp.248-249.

Therefore, it is strongly recommended to attribute to persons pending return/removal at least the same level of existing medical assistance as for asylum seekers, i.e., emergency care and primary medical care.[146]

Another problem exists in the area of women's healthcare as there is no cost-free access of irregular migrant woman to ante and post natal medical care, as well as medical assistance during delivery. In order to draw attention to this legal limitation, it has to be mentioned that many international and European legal documents provide for women's right to receive the above-mentioned medical assistance for free.[147]

A similar problem exists in relation to medical assistance to children pending return/removal. According to the Medical Treatment Law, only the children of the persons referred to in the Law have the right to receive medical treatment services free of charge; irregular migrants are not mentioned therein.[148] This is contrary to several international and European standards.[149] For example, also the FRA opinion is that every child present on the territory of EU Member State is entitled to the same healthcare services as nationals. This should also include immunisations, which are a major preventive healthcare measure.[150]

However, the situation in Latvia is more favourable regarding unaccompanied minors (as compared to other children), who are accommodated in childcare institutions as in those case they can receive the necessary healthcare for free.[151] Still, the Law on the Protection of the Rights of the Child contains provision that (all) children have the right to free-of-charge health care, as determined by the State programme;[152] the right should be ensured without any discrimination.[153]

In light of these findings, it is recommended to adjust the legal framework of medical assistance to children, defining more specifically which children are entitled to medical assistance. In fact, the state should provide the access to medical care also to children who are not at the moment included in the Medical Treatment Law and to grant the access to healthcare for children pending return at least at the same level as for asylum seekers: emergency and primary healthcare.

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146 It is to be noted that with the adoption of the new Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection**,** the Member States are obliged to include also the essential treatment of serious mental disorders. (Article 19, Para 1. See the text of the Directive: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0033). As for the first half of 2015, Latvia has still to implement this obligation. However, once it is implemented, the state has to consider the application of the same level of medical treatment also to migrants pending return/removal.

147 Article 12(2) of the 1979 Convention on the Elimination of all Forms of Discrimination against Women (hereinafter - CEDAW), Article 24(2)(d) of the CRC asks that states ensure appropriate pre-natal and post-natal health care for mothers. Also European Parliament called on Member States to ensure that all pregnant women and children, regardless of their status, are entitled to and actually receive social protection. European Parliament, *Resolution on reducing health inequalities in the EU*, P7_TA(2011)0081, Brussels, 8 March 2011, para 5 and 22; See also: FRA, *Migrants in an irregular situation: access to healthcare*…, pp.23-26.

148 Medical Treatment Law, Section 17, para 4.

149 Article 24 of the CRC. It obliges states to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care. Article 13 of the European Social Charter (hereinafter - ESC) provides for the right to medical assistance. According to the European Committee of Social Rights (ECSR), this right is applicable also to migrant children in an irregular situation. European Committee on Social Rights*, International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003.

150 FRA, *Migrants in an irregular situation: access to healthcare*…, p.28.

151 The Regulations of the Cabinet of Ministers No.707 "Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians ", Paragraph 4.

152 Protection of the Rights of the Child Law, adopted on 19.06.1998., in force from 22.07.1998, available at http://likumi.lv/doc.php?id=49096, Section 12, para 2.

153 Protection of the Rights of the Child Law, Section 3, para 2.

c) Family unity and private life

According to international standards,[154] the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,[155] and the widest possible protection and assistance should be accorded to the family.[156] Recital 22 of the Return Directive states that, in line with the European Convention on Human Rights (hereinafter – ECHR), respect for family life should be a primary consideration of Member States when implementing this Directive. In line with the case-law of the ECtHR, the state has to draw a just balance between the individual's right to family life and the public interest in controlling immigration.[157] The Court has stated that a number of factors have to be taken into account in this context.[158] The *Twenty Guidelines* provides that the removal order shall only be issued after the authorities, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.[159]

In Latvia specific legal provisions in regard to family unity do exist in relation to the detention of a foreigner (See Subsection 2.7.3 and 2.7.4) and with extension of the time period for voluntary return where the authority may grant additional period up to one year, taking into account also family ties of the person.[160]

From the transposition of the Directive in 2011 until the end of 2014, there have been only few judgements of the Administrative Courts concerning family ties/private life in return/removal procedures[161] or concerning immigration issues involving family life.[162] In some cases of the return/removal, the Minister of the Interior had made a decision to enter the

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154 A thorough summary of the existing International standards with regard of the protection of family and private life in cases of expulsion, see: ICJ, *Migration and International Human Rights Law...*, pp.141-145.

155 International Covenant on Civil and Political Rights (hereinafter – ICCPR), Article 23, para 1.

156 ICESCR, Article 10, para 1.

157 See ECtHR judgments *Tuquabo-Tekle and others v. Netherlands*, application No. 60665/00, judgment of 1 December 2005, para 42 and 51, *Rodrigues da Silva and Hoogkamer v. Netherlands*, application No. 50435/99, judgment of 31 January 2006, para 39.

158 For example: the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Nunez v. Norway, application No. 55597/09, judgment of 28 September 2011, para.70.

159 CAHAR, *Comments to the Twenty guidelines*, comment to Guideline 2. See also Articles 7, 9 and 24 of the EU Charter of Fundamental Rights and FRA opinion that "*[I]mmigration-control measures should not result in the application by Member States of disproportionate restrictions on the right to marry and establish a family, such as blanket prohibitions on marrying or the imposition of restrictions which go beyond an assessment of the genuineness of the relationship*." FRA, *Migrants in an irregular situation: access to healthcare*…, p.13.

160 Immigration Law, Section 43, para 2.

161 Judgment of Administrative District Court, No.A420525512, on 07.05.2014.; Judgment of Administrative District Court, No.A42025612, on 07.05.2014; Judgment of Senate of the Supreme Court, No.SKA-311/2013 (A420540612), on 06.09.2013.

162 For example, concerning residence permit annulment or refusal to extend it or adopting an entry ban. Judgment of Administrative District Court, No.A420560512, on 05.11.2013; Judgment of Administrative District Court, No.A420561412, on 28.12.2013; Judgment of Administrative District Court, No.A420572312, on 03.07.2014; Judgment of Administrative Regional Court, No.A420412811, on 30.06.2014. An important new jugdment arising from cases before the transposition of the Directive: Judgment of Senate of the Supreme Court, No.SKA-546/2012 (A42631208), on 28.11.2012. See the database of Administrative Courts' judgments: www.tiesas.lv/nolemumi.

person in the list and apply entry ban for unspecified time. The court agreed with the authority that after the return the foreigner would not have problems with regard to meeting his family as the latter may travel to the country whose national is the foreigner.[163] At the same time, the courts did not evaluate the probable difficulties more specifically, stating that the person has not mentioned any other cause, which should rise the level of protection.[164] However, in a different case, the court had thoroughly examined the situation of the person, deciding to grant her a temporary residence permit because of her long stay (18 years) in Latvia, age (over 60) and other aspects.[165]

In the absence of published or publicly known cases where the right to family life has been violated, a dimension lacks for the proper analysis of Latvian legal acts. Taking into account that international and European legal documents contain right to family life, the state authorities have to interpret family life in line with the clarifications given by those documents.

2.3. Exceptions of return decisions and the right to stay

This Section addresses the provisions related to issues, which are not covered by the Return Directive and in situations where the return decisions are not issued (Subsection 2.3.1). In particular, the necessity to issue legalisation of the status of persons, to whom return is not possible, is analysed below (Subsection 2.3.2).

2.3.1. Scope of the Return Directive

The Immigration Law has transposed the provisions of Article 2 of the Return Directive with regard to circumstances when the Directive does not apply (a voluntary return decision shall not be issued or a removal order shall not be taken):[166]

1. in accordance with Section 18 of the Immigration Law,[167] a decision has цbeen taken on refusal for the foreigner to enter the territory of the EU Member States;[168]
2. the foreigner, who has been detected as being in the border area, who has illegally crossed the external border and in relation to whom circumstances,

[163] The foreigners were entered in the list due to threats to the national security or public order or that the person may disturb the investigation of a criminal case. The both foreigners previously had lived in Latvia for 10-15 years, had a child and a wife there. However, the court considered that the right to private life could be limited in situations where the safety and security of the public and legal order outweighs limitation of individual's rights. It cited a few judgments of the ECtHR that Article 8 of the Convention cannot be regarded as a guarantee to receive a certain permit of stay in the state. Judgment of Administrative District Court, No.A420525512, on 07.05.2014., p.5; Judgment of Administrative District Court, No.A420560512, on 05.11.2013., p.3; Judgment of Administrative District Court, No.A42025612, on 07.05.2014. See also Judgment of Administrative District Court, No.A420561412, on 28.12.2013.

[164] ECtHR has developed a number of factors which have to be taken into account when family/private life of an individual to be deported is concerned. For example, see *Boultif v. Switzerland*, application No. 54273/00, judgment of 2 August 2001, para 46-48; *Üner v. the Netherlands*, application No. 46410/99, judgment of 18 October 2006, para 58; *Nunez v. Norway* and *Kaplan and others v. Norway*, application No. 32504/11, judgment of 24 July 2014. In these judgments the Court found violation of Article 8 of the ECHR even when the violations of the immigration law were rather serious.

[165] Judgment of Administrative Regional Court, No.A420412811, on 30.06.2014.

[166] Immigration Law, Section 42, para 1.

[167] An official of the State Border Guard shall take and draw up a decision on the refusal to enter the Republic of Latvia in accordance with Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006. Immigration Law, Section 18, para 1.

[168] As provided by Article 2 (2a) of the Return Directive.

allowing him or her to reside in the Republic of Latvia, do not exist, shall be taken back by the third country in accordance with an agreement concluded with the Republic of Latvia or treaty conditions;[169]

3. the foreigner has been imposed an additional punishment by a court judgment – removal from the Republic of Latvia;[170]

4. the foreigner is subject to a return or an extradition process in accordance with international co-operation in the field of criminal law.[171]

According to the Return Directive (Article 4(4) (a)) if the third-country nationals are excluded from the scope of the Directive (Article 2(2) (a)), the treatment and level of protection should not be less favourable in several aspects (limitations on use of coercive measures, postponement of removal, emergency health care and taking into account needs of vulnerable persons, detention conditions). The national law generally does not provide distinctions with regard to treatment and protection of those foreigners, who are excluded from the scope of the Directive.

Article 6(2)-(4) of the Immigration Law provides a list of other conditions, when the return decision is not issued: the foreigner has a valid residence permit of another EU Member State or another document, which gives him or her the right to reside there, and the foreigner is going without delay to the territory of the relevant EU Member State;[172] the foreigner is accepted back by another EU Member State in accordance with the conditions of an international agreement, which have become binding for the Republic of Latvia in the time period up to 13 January 2009;[173] the head of the OCMA or his or her authorised official has, on humanitarian grounds, taken a decision to allow the foreigner to reside in the Republic of Latvia for a specific period of time, but not more than for a year[174] (no information on the implementation of this provision is available[175]).

2.3.2. Dealing with situations, when foreigners cannot be returned

The Return Directive imposes obligation on Member States to address the situation of third-country nationals who are staying illegally but who cannot still be removed; such persons should be provided with written confirmation of their situation.[176] According to Article 14(2) of the Return Directive, Member States provide a written confirmation that the period of voluntary departure has been extended or that the return decision will temporarily not be enforced. The latter provision seems to be included in the Immigration Law only with regard to the postponement of the return order,[177] but does not cover the issuance of a removal order. Immigration Law provides that if a foreigner, towards whom a voluntary return decision is issued or in relation to whom a removal order is issued, does not have a valid travel document and it is impossible to obtain it through diplomatic or consular services, a standard travel document shall be issued to him or her.[178] However, according to the Regulation of the

169 As provided by Article 2 (2a) of the Return Directive.
170 As provided by Article 2 (2b) of the Return Directive.
171 As provided by Article 2 (2b) of the Return Directive.
172 As provided by Article 6 (2) of the Return Directive.
173 As provided by Article 6 (3) of the Return Directive.
174 As provided by Article 6 (4) of the Return Directive.
175 OCMA, Letter to LCHR No.24.1-42/2358, 09.09.2014.
176 Recital 12 to the Return Directive.
177 Immigration Law, Section 43, para 2.
178 Immigration Law, Section 50.[5], para 1.

Cabinet of Ministers, a travel document is issued for the purpose of return if the relevant country agrees to accept the third-country national with the respective document.[179]

The Directive also regulates circumstances in which Member States may decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons (e.g. health conditions or family and private life) to a third-country national staying on their territory.[180] The Return Directive does not impose an obligation to issue a residence permit or other authorisation to all persons, who cannot be returned.[181] However, Article 5 of the Directive provides that in the situations when the Directive is implemented, Member States shall take due account of the best interests of the child, family life, the state of health of the third-country national concerned and respect of the principle of *non-refoulement*. The Directive contains a principle to return or to regularise,[182] and the regularisation becomes an obligation when the principles laid down by Article 5 are concerned.[183]

The practice of regularisation (legalisation of the status) of irregular migrants, who cannot be returned, varies a lot among the Member States, and the EC intends developing guidelines and recommendations in order „to avoid protracted situations and to ensure that people who cannot be removed are not left indefinitely without basic rights and don't risk being unlawfully re-detained".[184]A recent study reveals that in many EU Member States, the law still provides for a *tolerated stay* or residence permit for foreigners whose return is not possible.[185]

In Latvia, the implementation of Article 6 (4) of the Return Directive in law and in practice is unclear, and the OCMA does not have information on the implementation of this provision.[186] There are also no official statistics of the implementation of Article 6 (5) of the Return Directive (refraining from issuing a return decision until the procedure for renewing a residence permit or other authorisation is pending).[187]

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[179] A period of validity shall be determined for the departure document which complies with the departure period specified in the departure order or which is necessary for execution of the decision. The Regulations of the Cabinet of Ministers No. 454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Para 23.

[180] Article 6 (4) of the Return Directive. FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration...*, p.49.

[181] Detention Action u.c., Point of no return, The futile detention of unreturnable migrants, 2014.

[182] FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, p.49.

[183] Siniovas V., UNHCR Associate Liason/Legal Officer, presentation „Return Directive" at the conference „Topical issues of the return procedure and legal aid for illegally-staying third country nationals during the return procedure in Latvia", organised by the LAA on 27.02.2014.

[184] EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final, p.8.

[185] Ibid. According to the Lithuanian *Law on the Legal Status of the Aliens*, a temporary residence permit may be issued or replaced to an alien if the alien may not be expelled from the Republic of Lithuania in accordance with the procedure established by this Law or his expulsion from the Republic of Lithuania has been postponed (Section 40, para 1 (8)). The Law also provides for several situations when the implementation of the decision to expel an alien from the Republic of Lithuania shall be suspended, including the following: foreign country to which the alien may be expelled refuses to accept him; the alien is in need of basic medical aid, the necessity of which is confirmed by a consulting panel of a health care institution; the alien cannot be expelled due to objective reasons (the alien is not in possession of a valid travel document, there are no possibilities to obtain travel tickets, etc.) (Section 128, para 2). If an alien's expulsion from the Republic of Lithuania has been suspended due to the circumstances mentioned above and these circumstances have not disappeared within one year from the suspension of the implementation of the decision to expel the alien from the Republic of Lithuania, he or she shall be issued a temporary residence permit (Section 132).

[186] OCMA, Letter to LCHR No.24.1-42/2358, 09.09.2014; OCMA, Letter to LCHR No 24/1-42/642, 23.02.2015,

[187] OCMA, 06.03.2014 Letter to LCHR Nr.24/1-42/623.

In cases where the Immigration Law does not provide for granting a residence permit, a temporary residence permit still may be issued for a time period of up to five years: 1) by the Minister for the Interior, if it complies with the State interests of Latvia; or 2) by the Head of the OCMA, if it complies with the norms of international law, or is related to reasons of a humanitarian nature.[188] In line with the case-law established by Latvian courts, reasons of a humanitarian nature should be understood narrowly by using opposite arguments – weather a refusal to grant a residence permit would be inhuman, or would cause serious moral or physical suffering for the person concerned.[189] The Senate of the Supreme Court, while referring to the case law of the ECtHR, has indicated that, in order to fulfil the criteria for the issue of a residence permit on humanitarian grounds, suffering due to the health condition should be considered very serious (strong pain or condition, which could lead to death in the nearest future).[190]

Another option for obtaining a temporary residence permit is acquiring the status of a stateless person if a person is not a citizen of any state, as provided by the Law on the Stateless Persons.[191] However, there are no legal norms providing for legalisation of the status and the rights of persons who cannot be returned, in contrast to the practice existing in many other EU Member States.[192]

In Latvia, there were only few cases, where persons, including minors with their families, could not be returned because the states concerned have refused to receive them even if the removal orders were in force.[193] Lack of required travel and other documents has been a serious obstacle for acquiring the temporary residence permit for some foreigners in the return procedure in Latvia. The OCMA has informed that a foreigner has the right to be granted a temporary residence permit only if he or she has a valid travel document (passport).[194]

There have been cases where the OCMA has granted the status of a stateless person to the foreigners. As a result, their removal was cancelled and their status was legalised.[195] In such a case, a foreigner should also submit a passport and other required documents to the OCMA.[196] According to the Law on Stateless Persons, if a person is not able to submit any of the required documents due to reasons beyond his or her control, the OCMA takes a decision to recognise or to refuse recognition of a person as a stateless person on the basis of the documentary confirmed information, which is at the disposal of the OCMA.[197] However, in practice, there have been serious difficulties and even lack of possibility to acquire the documents for some foreigners. In particular, the requirement for a document issued by a foreign competent authority determined by the OCMA certifying that the person is not guaranteed the citizenship thereof, or documentary evidence that it is not possible to obtain such a document, has been problematic for a foreigner to fulfil.[198] The latest provision does not correspond to Article 1 of the 1954 Convention relating to the Status of Stateless Persons, as

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188 Immigration Law, Article 23, para 3.

189 The Judgement of the Supreme Court Senate, Case No. A42396507 (SKA-189/2009), 02.04.2009.

190 Ibid.

191 According to OCMA, as for 01.01.2015, there were 180 stateless persons in Latvia, see: http://www.pmlp.gov.lv/lv/assets/documents/statistika/01.01.2015/ISPP_Pasvaldibas_pec_VPD.pdf.

192 EC, Ramboll, EurAsylum, *Study on the situation of third-country nationals pending return/removal, p. 27.*

193 Information obtained from the LCHR case work in 2008-2014.

194 Immigration Law, Section 4, para 1. Judgement of the Administrative Regional Court, Nr. A420559910, Archive Nr. AA43-0867-13/17.

195 Information obtained from the LCHR case work in 2009 and in 2014.

196 Law on Stateless Persons, adopted on 29.01.2004., in force from 02.03.2004, available at: http://likumi.lv/doc.php?id=84393, Section 4, para 1.

197 Law on Stateless Persons, Section 4, para 2.

198 Law on Stateless Persons, Section 4, para 1 (3).

an individual's nationality should be assessed at the time of eligibility under the 1954 Convention.[199]

In practice many stateless persons cannot obtain necessary documents, as the embassies normally do not provide them. There were situations in Latvia when persons, including juveniles, where not granted the status of the stateless person and they were kept in detention, as their return was not possible.[200] Such situation does not correspond to the principle of the Directive to "return" or to "regularise", in particular, in situations where the best interests of the child should be taken into account. The right to a nationality of the child, in particular of those who would otherwise be stateless, is provided by the CRC, the 1961 Convention on the Reduction of Statelessness and other international treaties.[201]

There was a case where a failed asylum seeker was repeatedly detained by the SBG (due to the failure of the authorities to establish his identity) and several times released by the court. The person was detained until the maximum term of detention expired; then he was repeatedly detained, than released and detained again until the Riga District Court established that repeated detention violated the Return Directive.[202] The court concluded that the foreigner was detained on the grounds provided by the Immigration Law for slightly more than 18 months and thus exceeding the maximum term of detention set by the Return Directive. The court stated that the Directive was not transposed into the national legislation at that moment, and the maximum term of detention (20 months as for the relevant time) provided by the Immigration Law was not exceeded; nevertheless, the Return Directive had to be transposed into the national law by the end of 2010, and therefore should be taken into account.[203] Upon the release of the person, authorities provided him neither food, nor housing. The OCMA rejected his request to grant him the residence permit on humanitarian grounds or the status of the stateless person; he appealed the latter decision in all three court instances. The Senate of the Supreme Court refused to initiate the cassation proceedings with regards to the person's appeal of the Administrative Regional Court's judgement to refuse his request for granting the status of the stateless person, inclusion of his data into the Residents' Register and issue of an ID.[204]

In accordance with the Population Register Law, when released from detention, a person, who has no a valid passport and/or his or her legal status is not determined, cannot be included into the Population Register and assigned a personal code.[205] Accordingly, a person

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[199] According to the UNHCR Guidelines, *"An individual's nationality is to be assessed at the time of eligibility under the 1954 Convention. It is neither historic nor a predictive exercise. The question to be answered is weather, at the point of making an Article 1 (1) determination, an individual is a nation of the country or countries in question."* UNHCR, *Guidelines on statelessness No.1: The definition of „Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, HCR/GS/12/01, 20 February 2012, para 43.

[200] Information obtained from the LCHR case work in 2008-2014.

[201] UNHCR, *Guidelines on Statelessness No.4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*. HCR/GS/12/04, 21 December 2012.

[202] Information obtained from the LCHR case work in 2010.

[203] Ibid.

[204] Information is obtained from the LCHR case work in 2014. The court pointed to the lack of cooperation of the foreigner in the return process and stated that the person's fear to return to his country of origin is groundless and cannot be the reason for legalisation of status in Latvia, as no serious violations of his rights could be expected is he is returned back. However, the court did not assess the fact that no social support is granted to the person and did not take into account the lack of financial resources and impossibility to return the person. See: Administrative Regional Court, Case No.A420559910, 25.09.2013.

[205] The Register includes and updates the information about Latvian citizens, Latvian non-citizens, persons, who have been granted a temporary residence permit in Latvia, a registration certificate or a permanent residence certificate; persons who have been granted the status of a stateless person, the status of refugee or alternative status or temporary protection; persons, in respect to whom a decision on issuing a residence permit, a registration

with no legal status and a personal code has no public social guarantees, including the right to work and the right to social assistance.[206] This situation, where no basic rights are guaranteed to such persons, contradicts international obligations, which Latvia has undertaken.[207]

Although the number of unreturnable irregular migrants is quite small in Latvia, they have to face serious problems and face a risk of social isolation and destitution. Eventually, such a situation might concern larger numbers of migrants. Therefore, there is a need to adopt legal provisions allowing a status legalisation of persons, who cannot be returned, including the situations when there are no valid travel documents, and ensuring minimum social guarantees, including housing. Furthermore, the process of acquisition of the status of stateless person should be simplified to ensure that the requirements for necessary documentation would not be a significant obstacle for the aquisition of the status of a stateless person.

2.4. Return and removal of children

This Section deals with handling children in return procedures. First, the Subsection 2.4.1 will look at the principle of the best interests of the child. Next subsection analyses methods and processes of age assessment in Latvia (2.4.2.). The following subsection describes the assesment of individual risks (2.4.3.). Last but not least, an overview of access to education will be provided (2.4.4.).

2.4.1 The best interest of the child

According to Recital 22 of the Directive, the best interest of the child principle shall be implemented in line with the 1989 United Nations Convention on the Rights of the Child. The Convention states that the 'best interests of the child' should be a primary consideration of Member States. Furthermore, the Convention prohibits any discrimination on the basis of the status of a child, namely irrespective whether a child is unaccompanied or separated, a refugee, an asylum-seeker or a migrant.[208]

While the term "best interests" broadly describes the well-being of a child, it is not possible to give a conclusive definition of what is in the best interests of the child, as this depends on a variety of individual circumstances, such as the age and the level of maturity of the child, the presence or absence of parents, the child's environment, etc.[209] However, some

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certificate or a permanent residence certificate is made. Population Register Law (adopted on 27.08.1998, in force from 24.09.1998), available at: http://likumi.lv/doc.php?id=49641, Section 3.

[206] According to the Social Services and Social Assistance Law, (adopted 31.10.2002, in force from 31.10.2002, available at: http://likumi.lv/doc.php?id=68488),the right to receive social services and social assistance shall be enjoyed by Latvian citizens and non-citizens and aliens who have been granted a personal identity number, except for persons who have received a temporary residence permit. Persons who have been granted alternative status and the family members thereof have the right to receive the services of overnight shelters, shelters, information, consultation and the guaranteed minimum income benefit (Section 3, para 1).

[207] Including ICCPR, ICESCR and CRC. See: CoE, The Human Rights of Irregular Migrants in Europe, CommDH/IssuePaper(2007)1, Strasbourg, 17 December 2007.

[208] Committee on the Rights of the Child, *General Comment No. 6 (205) Treatment of unaccompanied and separated children outside their country of origin*, p.8. The CRC in its Article 3 states that "*[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." See the use of "best interests" in the CRC: UNHCR, *Guidelines on Determining the Best Interests of the Child*, Provisional Release, May 2006, p.40.

[209] UNHCR, *Guidelines on Determining the Best Interests of the Child*…, p.6.

international institutions have elaborated helpful guidelines, providing principles to be followed in order to ensure the best interests of the child.[210]

The Immigration Law does contain a reference to the best interest of a child during the removal process; in order to define the content of this clause one shall refer to other legal enactments regulating the protection of rights of a child.[211] However, the reference to the best interest of the child in the Immigration Law is limited only to situations dealing with unaccompanied minors. Some general guidelines of the principle could be deducted from the Law on the Protection of the Rights of a Child, for instance, prescribing situations, when a child has to be separated from his family, or prescribing situations, where children from one family should not be separated.[212]

The Law on the Protection of the Rights of a Child generally lays down fundamental rights of a child,[213] and sets forth objectives of protection of the rights of a child.[214] Likewise, the law explains the principle of this protection, for example that the rights and best interests of the child shall take priority in all lawful relations that affect a child.[215] In fields, which affect the interests of the child, appropriate attention, corresponding to the age and maturity of the child, shall be paid to the opinion of the child.[216]

In sum, Latvian legal system does contain the principle of the best interests of the child. Nevertheless, the main law regulating return/removal procedure contains reference to the best interests of a child only with regard to unaccompanied minors. It is true that the identification of the best interests of unaccompanied (and separated) children requires special attention given the particular risks that they face.[217] Yet, it is highly recommended that the principle of the best interests of the child, in a way as it is mentioned in the Directive, is included in the Immigration Law, which is the main legal document regulating return/removal procedures in Latvia. Thus, it is important that the best interest principle in the Immigration Law is attributable towards all children in return/removal processes, and not only to unaccompanied ones.

2.4.2. Age assessment

Identification of a foreigner as a child is one of the first steps a state must undertake in the return procedure. Incorrect identification may result in dramatic consequences like the wrongful detention of a separated or unaccompanied child.[218]

Identification measures include age assessment which, according to the Committee on the Rights of the Child, "should not only take into account the physical appearance of the individual, but also his or her psychological maturity [...]".[219] The main international and European principles for the age assessment could be summarized as follows: 1) physical

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210 See: UNHCR, *Guidelines on Determining the Best Interests of the Child…*, and guidelines of treatment of unaccompanied minors of the Committee on the Rights of the Child: Committee on the Rights of the Child, *General Comment No. 6…,* p.9.

211 Immigration Law, Section 50.[8], para 1.

212 Protection of the Rights of the Child Law, Section 27.

213 1) to life and development, 2) to individuality, 3) to privacy and freedom and security of person, 4) to wholesale living conditions, 5) to education and creativity, 6) social rights regarding profession, employment, health care, social assistance, 7) freedoms – expression, conscience, belief, association, participation, 8) to property, 9)to protection from exploitation, 10) to recreation and free time. Protection of the Rights of the Child Law, Sections 7-17.

214 Protection of the Rights of the Child Law, Section 4.

215 Protection of the Rights of the Child Law, Section .,

216 Protection of the Rights of the Child Law, Section 13, para 3.

217 UNHCR, *Guidelines on Determining the Best Interests of the Child…*, p.8.

218 Hammarberg T., Methods for assessing the age of migrant children must be improved, 09.08.2011.

219 Committee on the Rights of the Child, *General Comment No. 6…*, p.11.

integrity of the child should not be violated, 2) the individual benefit the doubt, 3) the methods shall respect human dignity and be least invasive, 4) evaluation is done by a multidisciplinary panel (of qualified professionals), 5) a guardian should be appointed before the proceedings, 6) the individual shall be informed on the method and possible consequences, 7) there should be clear provisions on the procedures accessible to the public, 8) there is a possibility to challenge the decision.[220]

In Latvia, there are no legal provisions on age assessment, which are made known to the public. The SBG also does not have any internal regulations related to age assessment.[221] In practice, the age assessment by the SBG is ordered: 1) when there is no documental confirmation of the person's age, 2) if there are justified doubts that the person lies about being under the age to avoid removal or asylum proceedings, 3) if there are doubts about the person's, who state herself/himself as minor, age; the person is considered to be under age until the end of the proceedings.[222] However, if these practices are not included in a normative enactment, even in an internal instruction of the SBG, the continual and coherent application of them could not be anticipated, therefore providing no guarantees to the foreigner.

The only relevant legal document concerning age assessment is the one regulating procedures for court forensic expert-examination, stating that age assessment is made by the State Centre for Forensic Medical Examination (hereinafter - the Forensic Centre).[223] There is no reference to other state authorities, except parties involved in criminal or civil proceedings and the court itself, which are authorized to request such an expertise.[224]

Moreover, the Forensic Centre uses a normative enactment "Age assessment method"[225] (hereinafter - the Method), however, this document is not publicly available and may be obtained only by a written request. The Method stipulates that the age assessment is made upon the request of a person in charge of the (criminal) proceedings.[226] A commission makes the age assessment expertise; it consists of radiologists and dentists.[227] The commission interviews the person and conducts a visual inspection of the naked person,[228] and takes an X-ray of the skeleton.[229] The Method contains several positive features, summarized below: 1) that the inquiry can not be made in an interrogative manner,[230] 2) that inspection of minors is

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220 See, for example: UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, para 75,; the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status contained equal prerequisites, Article 17; EC, Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010 - 2014), 6 May 2010; Separated Children in Europe Programme (SCEP), p.11; Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012; European Asylum Support Office (EASO), Age Assessment Practice in Europe, December 2013; FRA, *Separated, asylum-seeking children in European Union Members States — Comparative* report, 2011, pp.53-55.

221 Information provided by the SBG to LCHR by e-mail on 10.11.2014.

222 Ibid.

223 The Regulations of the Cabinet of Ministers No. 51 "Procedures for the performance of court forensic expert-examination", adopted 06.02.2001, in force from 10.02.2001, available at http://likumi.lv/doc.php?id=3087, Paragraph 18.

224 The Regulations of the Cabinet of Ministers No. 51 "Procedures for the performance of court forensic expert-examination", Paragraph 2.

225 No.2-20/VTMEC-1/336, adopted on 7 February 2013 by the Council of Forensic Experts; Information provided by the State Centre for Forensic Medical Examination by e-mail, 03.09.2014.

226 "Age assessment method" No.2-20/VTMEC-1/336, adopted on 07.02.2013., Section VI and Section VIII, 2.1.. Provided by the Forensic Centre, Letter to LCHR No.1029-2014/01.1-12, 24.11.2014.

227 Section VIII,1.2.

228 Section VIII, 2.4., 2.5., 2.6.1.

229 Section VIII, 2.6.3.

230 Section VIII, 2.4.3.

to be carried out in presence of parents, psychologists, social workers,[231] 3) all results have to be in written form,[232] 4) the expertise has to be carried out by highly qualified physicians,[233] 5) the experts have to undergo internal tests of skills and regular training or qualification.[234]

However, there are also a number of shortcomings: 1) there is no specific procedure for detecting whether the person is of age, i.e., not a minor;[235] 2) there are no provisions regulating situations when the age of the person is not clear (i.e., if she is of age of majority), for example, in regulating whether the parents (and psychologists, social workers) have to participate; 3) there are no provisions of ensuring the dignity of the person; 4) there are no rules for contesting the results of the examination. Besides, the Method does not contain other standards as mentioned above (for example, benefit of doubt etc.).

Moreover, in Latvia there are not many cases, where the actual age of a foreigner is in doubt, especially in forced removal proceedings;[236] therefore shortcomings or good practices of the age assessment procedure cannot be convincingly established. Still, evaluating the age assessment procedure in Latvia, some recommendations should be made.

First, the procedure for age assessment should be made known to the public, either by publishing it in the Forensic Centre's and/or SBG's website or adopting a legal act which has to be made public as law.[237]

Secondly, existing international standards should be explicitly implemented in legal enactments regulating age assessment i.e., the Method and/or other legal enactments shall provide that the person, who is being examined, enjoys the benefit of doubt; that human dignity has to be respected and, especially, physical integrity of the child shall not be violated; a guardian should be appointed before the proceedings and the guardian should be present at all stages of the age assessment; the person shall be informed on the method and possible consequences thereof; the person is granted a right to appeal the results of the assessment (examination).

Thirdly, there is a need to evaluate other age assessment methodologies, especially of other European countries and, if necessary, the age assessment method could be updated, taking into account the newest findings in this area.[238]

2.4.3. Individual risk assessment

With regard to a specific individual risk assessment of the situation of the child in Latvia, more specific regulation applies to unaccompanied minors.[239] If return of a minor to

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[231] Section 2.5.4. However, this provision is unclear. It does not contain reference to guardians and it is not clear whether the presence of psychologists and social workers is cumulative. Besides, it is also unclear whether assisting persons for a minor participate also for the interview or only (as is written at the moment) during the inspection.

[232] Section VIII, 3.2.

[233] Section XI, 1.

[234] Section XI, 4. and 5.

[235] In fact, the Method contains a disclaimer that the age could be determined only roughly – for children and teenagers with precision 1-2 years, for adolescents – 2-3 years and for older persons – 5-10 years, Section IX.

[236] SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014. In fact, the Forensic Centre has stated that it has made the age assessment upon the request the SBG in 2008 (5 expertises) and in 2010 (three expertises). Forensic Centre, Letter to LCHR No. 1029-2014/01.1-12, 24.11.2014.

[237] See: Law On Official Publications and Legal Information; adopted on 31.05.2012, in force from 01.07.2012, available at http://likumi.lv/doc.php?id=249322.

[238] In the end of the Method there is a list of sources which had been used to draw up the Method (Section XII). The list contains four sources of Latvian authors with the newest being of year 2004 and four sources of Russian authors with the newest being of year 1990.

the country of origin endangers his life or health, in light of humanitarian considerations, an authorised official shall take a decision to issue a temporary residence permit (until a change of the situation in the host country).[240] Otherwise, general provisions of the Law on Protection of the Rights of a Child are applied (see Subsection 2.4.1.).

Provisions concerning third-country nationals, including children, in forced return process stipulate that the SBG shall suspend the implementation of the forced removal of the third-country national for a specific period of time due to the health condition of the third-country national, technical reasons or contradiction with the international obligations of Latvia.[241] Although the national law contains general provisions on the best interests of the child, it cannot be still ascertained that there are regulations on individual risk assessment concerning directly (only) children in removal process.

Article 10(2) of the Directive provides that "*before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he will be returned to a member of his family, a nominated guardian or adequate reception facilities in the State of return*". The PACE recommends that contacts with family members in the country of origin must be assured, minors must be accompanied on the return journey, and reception in the country of origin must be organised.[242] The PACE also explains that this reception needs to include reintegration assistance together with possible education and other support for the minor and possible income generation support for the family of the minor .[243]

In Latvia, in case of a situation where an unaccompanied minor has to be returned, the SBG with the intermediation of the the Consular Department of the Ministry of Foreign Affairs shall communicate with the diplomatic or consular representative of the relevant state, relevant competent institutions or non-governmental organisations, which monitor the observance of the rights of children in this state, and perform other necessary measures in order to ensure execution of the return decision or removal order and the handing over of the unaccompanied minor third-country national to a family member, legal representative of the parents, representative who monitors the observance of the rights of children in this state, or a representative of the institution, which ensures the child`s emplacement in a suitable accommodation institution.[244]

If forced return has to be applied, the SBG may convoy the minor as far as his place of residence or a specialised institution in the country of destination.[245] When taking a decision on convoying the minor, the authority shall evaluate, whether there is a need to hand the child over to a family member, legal representative or the representative of a specialised institution.[246] As from 1 January 2011, the SBG has adopted three decisions on forced return of unaccompanied minors, all in 2014. Those minors were returned together with their

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239 Providing that the authorities (OCMA and SBG) shall act in such a way as to ensure the child's rights and interests during the whole removal process in accordance with the regulatory enactments regulating the protection of the rights of the child. Immigration Law, Section 50.[8], para 1.

240 The Regulations of the Cabinet of Ministers No.707 "Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians ", para.20.

241 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", para.20.

242 PACE, Committee on Migration, Refugees and Population, Doc. 12277 *Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants*, 10.6.1., 4 June 2010.

243 Ibid.

244 Immigration Law, Section 50.[8], para 3.

245 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", para.11(4).

246 The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", para.12(6).

relatives or acquaintances.[247] Until the end of 2014, the OCMA, has not returned any unaccompanied minor.[248] The SBG and the OCMA affirms that, whilst adopting a return decision, each case is evaluated individually.[249]

It is likely that Latvian legislation covers the minimum standards as included in the Directive, not going beyond them. Taking into account the minimal amount of practice relating to the return of minors, any other conclusions on the effectiveness of Latvian legal provisions of returning/removing unaccompanied minors could not be made.[250]

2.4.4. Access to education

Every child, irrespective of the immigration status, shall have full access to education[251] while the child resides in the state. The right to education of children is protected under various international human rights instruments.[252] For example, according to Article 28 of the CRC, free primary education should be made available to all children.[253] Right to education extends to all persons of school age residing in the territory of the respective state.[254] While primary education is recognized to be as an indispensable one, there is also an increasing agreement on the need to ensure the right of all children to secondary education, as confirmed by the recent case-law of the ECtHR.[255] An important aspect that states must take into account is the principle of granting access to education of children without discrimination on any grounds.[256] The ECHR has stated that education is a particular social right, where stricter scrutiny applies in the assessment of the proportionality of the discrimination based on "nationality" or "immigration status".[257]

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247 SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

248 OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014 and No.24/1-42/642, 23.02.2015.

249 SBG, Letter to LCHR No.23.1-1/2511, 20.08.2014; OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014.

250 OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014.

251 CoE*, Resolution on the Human Rights of Irregular Migrants (Resolution 1509 (2006)*, para 13.6**.** In regard of unaccompanied children. Committee on the Rights of the Child, *General Comment No. 6*..., p.14.

252 Committee on Economic, Social and Cultural Rights has established that the migration status of children - documented or undocumented - may not be used by States to justify different treatment in respect of primary education. CESCR (1999) *General Comment No. 13: The right to education (Article 13)*, 8 December 1999, paragraph 34. See also Article 14 of the EU Fundamental Rights Charter; Article 2 of Protocol No. 1 of the ECHR; Article 14 and Protocol No. 12 , Article 2 of Protocol No. 1;. Also the ECtHR in its case-law has confirmed that the right for children to be educated is one of "the most fundamental values of democratic societies making up the Council of Europe" (*Timishev v. Russia*, application No. 55762/00 and 5597400, judgment of 13 December 2005. Article 17(2) of the ESC requires that its parties provide to children and young persons a free primary and secondary education. See also: ICJ, *Migration and International Human Rights Law*...,, pp.257-261.

253 A list of international documents providing for the right to education see FRA, *Fundamental rights of migrants in an irregular situation in the European Union*…, p.86.

254 CESCR (1999) *General Comment No. 13: The right to education (Article 13)*, 8 December 1999, paragraph 34.

255 For example, ECtHR has said in its rather recent judgment in regard children without permanent residence permit, that states have to ensure accessible primary education providing basic literacy and numeracy but considering that more and more countries were moving towards putting the notion of "knowledge-based" society in practice, secondary education was of ever-growing importance for individual development and society as a whole. *Ponomaryov v. Bulgaria*, application No. 5335/05, judgment of 21 June 2011.

256 ICJ, *Migration and International Human Rights Law,* pp.257-261.

257 ECtHR, *Ponomaryovi v. Bulgaria,* Application No. 5335/05, Judgment of 21 June 2011, para. 49. In: ICJ, *Migration and International Human Rights Law*, p.261.

The Education Law amendments of 2010 established a right for a minor third-country national, who has no legal basis to reside in Latvia, to acquire basic education free of charge[258] during the time period specified for voluntary return or during the time period for which the expulsion is suspended, as well as during his detention.[259] With regard to unaccompanied minors residing in a childcare institution, the legal provisions only note that she/he shall attend the educational institution according to her/his physical and mental development.[260] However, there is no specific legal act regulating, how the access to education for children pending return should be organized. Furthermore, such a legal instrument does exist regarding children of asylum-seekers. From the age of five they are prepared for the acquisition of primary education and ensured, access to primary and secondary education.[261] Therefore, access to education of children pending return/removal has to be deducted from the Cabinet of Ministers Regulation containing general legal provisions applicable to all children.[262] The lack of specific provisions on education for irregular migrants may cause some problems, as certain documents are neccessary in order to access the education system.[263] However, the Ministry of Education has informed that in practice schools would not rigorously ask all documents and information mentioned in the Cabinet Regulation and would apply similar practice to the one attributable to asylum-seekers.[264]

Since 2011, there have been only three children of irregular migrants in the detention centre, who attended a primary school; no major problems with access to education of these children were identified.[265] However, it could be noted that in 2014 the education was not provided to minors from Vietnam because of the language barrier. In addition, it was not possible to prepare Vietnamese minors for the access of the basic education because of the limited time period of their stay in Latvia before their return.[266]

To sum up, Latvian legal provisions do ensure access to education to children pending return as provided in the Directive. However, such an access is limited to basic (primary) education. Therefore, Latvian legal regulation is not in line with the developing standards of International Human Rights Law, which requests that also secondary education has to be made accessible to all children without any discrimination.

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258 Education Law, adopted on 29.10.1998., in force from 01.06.1999, Section 12, para 5, available at http://likumi.lv/doc.php?id=50759. In Latvian legislation there are defined four levels of education: 1) pre-school education; 2) basic education; 3) secondary education; and 4) higher education. See: Education Law, Section 5, para 1.

259 Education Law, Section 3, para 3.

260 The Regulations of the Cabinet of Ministers No.707 , para.25.

261 The Regulations of the Cabinet of Ministers No.174 "Procedures for the Provision of Minor Asylum Seekers with Opportunities for Acquiring Education", adopted on 23.02.2010 in force from 27.02.2010, available at http://likumi.lv/doc.php?id=205791.

262 The Regulations of the Cabinet of Ministers No. 149, adopted on 28.02.2012 in force from 09.03.2012, available at http://likumi.lv/doc.php?id=245006.

263 Paragraph 5.1. of the general legal act requests that a child has the personal identity number which children pending return/removal normally would not have. Besides, Paragraph 7.1. requests that there is a document confirming education acquired (if any) or, in case has been issued in another state, a decision on recognition of the education document shall be shown.

264 Information provided by the Education Department of the Ministry of Education, by e-mail, 27-28 August 2014.

265 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

266 SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

2.5. Entry bans

2.5.1. Issuance of an entry ban

There are two situations when the Directive (in its Article 11(3)) provides the issuance of an entry ban: 1) if no period for voluntary departure has been granted, or 2) if the returnee does not comply with the obligation to return. In other cases, return decisions may be accompanied by an entry ban. Entry ban is defined in Article 3(6) of the Directive, and it means a prohibition of an entry into the territory of the Member States for a specified period.

Latvian legal provisions correspond to these guidelines of the Directive and provide more favourable legislation, since the OCMA and the SBG has the discretionary power to decide whether the entry ban is to be applied in case the foreigner has not complied with a return decision.[267]

The authorities have a discretionary power to decide whether a voluntary return decision shall be accompanied with an entry ban[268] in a number of occasions.[269] The entry ban is not included in the voluntary return decision if the third-country national has been recognised as a victim of trafficking of humans, or has been involved in promoting illegal immigration but has co-operated with the relevant state institutions.[270]

If it is detected that the third-country national has entered Latvia illegally and no circumstances have existed in relation to him, which would allow him to reside therein,[271] a return decision and a removal order contains the national entry ban (inclusion in the list) and the entry ban into the Schengen territory.[272]

Regarding minors, the authorities have a discretionary power to decide, whether to include the person in the list and to prohibit her to enter the Schengen territory.[273] The SBG has noted that an entry ban was not applied to a foreigner upon forced removal because of his serious illness.[274]

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[267] Immigration Law, Sections 44, para 1 and 61, paras 4 and 5. Statistics on entry bans see: EMN, *Good practices in the return and reintegration of irregular migrants...*, p.15.

[268] Immigration Law, Section 44, para 1.

[269] 1) a third-country national's visa has been annulled or revoked; 2) a decision has been taken to refuse the issue or registration of a residence permit or to annul a residence permit; 3) during the preceding year the third-country national has violated the procedures for entry and residence of foreigners in Latvia or in another Schengen Agreement Member State or customs regulations; 4) the third-country national has failed to execute a voluntary return decision within the specified period of time; 5) the third-country national has helped another foreigner to illegally enter Latvia and it has been determined by a court judgment or by an injunction of the public prosecutor regarding punishment, or a decision on termination of criminal proceedings by conditionally releasing from criminal liability; 6) the third-country national has served a punishment for a criminal offence committed in Latvia; 7) in accordance with the provisions of Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 a decision on refusal to enter the territory of the Member States of the European Union has been taken on the grounds that the third-country national presents a forged travel document, visa or residence permit; 8) the third-country national was forcefully removed from Latvia and expenses related to the forced removal, detention and keeping under guard have not been reimbursed to the state; 9) the third-country national has served a punishment for a criminal offence committed in the Latvia, which is related to illegal crossing of the state border or illegal stay. Immigration Law, Section 61, para 4-5. An overview see: EMN, *Good practices in the return and reintegration of irregular migrants.*

[270] However, this condition does not apply to a third-country national who poses a threat to the state security, public order or safety. Immigration Law, Section 44, para 2.

[271] Immigration Law, Sections 41, para 5 and 46, para 4.

[272] In Latvia entry bans normally consists of two "parts" - the list of those third-country nationals for whom entry in Latvia is prohibited (the list), or a notification to include the person in the Schengen information system in order to refuse entry and residence in the territory of the Schengen Agreement Member States (prohibition to enter Schengen territory). Immigration Law, Section 4, para 3.

[273] Immigration Law, Section 46, para 3.

[274] SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

Importantly, a person may be included in the list by a decision of other competent authorities, for example, the Minister of the Interior, if certain circumstances exist, e.g., respective institutions have reasonable suspiction that a third-country national participates in anti-state or criminal organisations or that the person has been convicted of a certain criminal offence;[275] it could also be Minister of Foreign Affairs, or diplomatic or consular authorities, who may take such a decision.[276]

Article 11(2) of the Directive stipulates that the length of an entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may, however, exceed five years, if the third-country national represents a serious threat to public policy, public security or national security.[277]

The Immigration law requires that an entry ban applied by the OCMA, SBG or Director of the Consular Department or a diplomatic official of the representation who is authorised to perform consular functions, is for a period of time from 30 days up to three years, thus being more lenient than provided by the Directive.[278] An entry ban could be determined for a specified or unspecified period of time if the decision has been taken by the Ministry of the Interior or Ministry of Foreign Affairs.[279] However, the Latvian legal acts do not include specific criteria for determining the length of the entry ban, this situation which could not be fully in line with the Directive – for example, Recital 14 of the preamble of the Directive contains a provision that particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban. The authorities have explained that upon issuing an entry ban following circumstances are taken into account: cause of the violation and its circumstances, the circumstances mitigating or aggravating the liability, violation of the Immigration Law in previous border crossings, and the subjective attitude of the foreigner. [280] However, if these criteria are not reflected in any legal act, this may increase arbitrariness in issuing entry bans.

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275 Immigration Law, Section 61, para 1. The full list is the following: 1) competent State institutions have a reason to believe that a foreigner participates in anti-state or criminal organisations or is a member thereof; 2) competent State institutions have a reason to believe that a foreigner causes a threat to national security or public order and safety or, by entering Latvia, may hinder pre-trial investigations or the work of law enforcement institutions in discovering a criminal offence; 3) competent State institutions have a reason to believe that a foreigner has committed or is planning to commit a serious or extremely serious crime; 4) a foreigner has committed a crime against humanity, an international or war crime or has participated in mass repression if such has been determined by a court judgement; 5) competent foreign authorities have provided information which prohibits a foreigner from entering and residing in the Republic of Latvia; or 6) the entry and residence of a foreigner into the Republic of Latvia is not desirable for other reasons on the basis of an opinion delivered by competent State institutions; 7) the foreigner has been convicted of a criminal offence committed in the Republic of Latvia, for which deprivation of liberty for at least one year has been provided.

276 If a foreigner is an undesirable person for Latvia (*persona non grata*) or if a decision has been taken either to refuse the issue of a visa, to annul or revoke a visa, or the foreigner has assisted another foreigner to submit documents for requesting a visa in order to unlawfully receive a visa, respectively. Immigration Law, Section 61, para 2-3.

277 The CJEU has ruled that continuation of an entry ban more than five years would be inconsistent with the objective pursued by Article 11(2) of Directive. Except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security. Case *Filev anf Osmani* C-297/12 , judgment of 19 September 2013, para 35-45.

278 Immigration Law, Section 63, para 1.

279 Immigration Law, Section 63, para 3.

280 SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.; OCMA, Letter to LCHR No.24/1-42/642, 23.02.2015.

Neither the OCMA, nor the SBG gathers statistics on the length of entry bans applied, which makes it impossible to make any conclusions or recommendations in this regard. [281]

2.5.2. Justification and withdrawal of an entry ban

The Immigration Law, regulating the application of entry bans, does not contain an explicit reference to the proportionality principle. However, as an entry ban is being applied during an administrative procedure,[282] legal provisions regarding the latter must be taken into account. The Administrative Procedure Law, containing rules, which a state authority has to comply with, states that in administrative proceedings, especially in adopting decisions on the merits, institutions shall facilitate the protection of the rights and legal interests of private persons.[283] The law contains also an article defining proportionality principle.[284]

Further, the practical implementation and ensurance of these principles are enhanced by the possibility to appeal the initial decision to a higher authority and later in the court, including via the cassation procedure in the Senate of the Supreme Court.[285] In practice, the OCMA in all twelve decisions available for this report[286] has quoted most of the relevant articles of the Administrative Procedure Law. Three decisions shows that the authority has taken into account human rights of the foreigner.[287]

As this case-law of the OCMA indicates, there is a good tendency of taking into consideration proportionality and human right issues. The OCMA has stated that it does not apply entry ban to minors, to persons who have not seriously violated the rules of residence in Latvia and to persons who have violated the rules of residence due to health problems,[288]

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281 OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014; SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

282 Administrative Procedure Law, Section 1, para 3 and Section 3, para 1. For the cases when each authority is entitled to include a person in the list, please see above.

283 Administrative Procedure Law, Section 5.

284 Administrative Procedure Law, Section 13. Moreover, if a law permits an authority to decide whether to apply a sanction (for example, an entry ban), it has to consider the usefulness of it, regarding: 1) the necessity, 2) the suitability, 3) the need for and 4) the conformity of the administrative act. Administrative Procedure Law, Section 66.

285 Immigration Law, Sections 50 and 50.[1]

286 Anonimised decisions of the OCMA, sent with the letter of 06.03.2014., No.24/1-42/623. In most of these decisions, some kind of a right/permit/visa of a third-country national for staying in Latvia had become invalid or did not exist. In four decisions an entry ban has not been applied (because (amongst other reasons) the foreigner concerned wanted to leave the country voluntarily; in three decisions – that the person violated the Latvian immigration law for the first time.), in two - entry ban of one year (because a foreigner gave false information for entering Latvia (abusing asylum procedure by immediately leaving for Sweden); in second case because, upon asking asylum in Latvia, the foreigner left the country without authorization), in two other - entry ban of three years was applied (because the foreigner had not complied with the previous voluntary return decision or that because he entered Latvia illegally notwithstanding that he already was banned from entering the Schengen zone.), in one case - entry ban of six months (to a student who did submit false information regarding his relationships with the educational institution).

287 For example, a long term previous stay in Latvia and strong ties with it was a prerequisite of not applying an entry ban or – a person in need of an additional therapy after the operation was spared of the imposition of an entry ban.

288 See also: EMN, *Good practices in the return and reintegration of irregular migrants* , pp.8-11 and 17. In the time period from second half of 2011 to the end of 2014 the period of an entry ban has been lessened or revoked in 38 decisions. OCMA, Letter to LCHR No 24/1-42/623, 06.03.2014, No 24/1-42/2358, 09.09.2014 and No 24/1-42/642, 23.02.2015; SBG, Letter to LCHR No. 23.1-1/397, 06.02.2015. Other statistical data see: EMN, *Good practices in the return and reintegration of irregular migrants* …, p.15.

besides, it always evaluates family and private life aspects, for instance, when the foreigner has parents or other close family members in Latvia.[289]

As the OCMA does not publish its case-law, it is not possible to draw precise conclusions. Since the implementation of the Directive in June 2011 till the end of 2014, there is no case-law of the Administrative court relating to direct appeals of entry bans.[290] It could be explained by the fact that Latvian legislation does not provide a direct challenge of entry bans. The entry ban is usually contested as a part of the whole return decision/removal order. The respective authorities do not gather separately information on the challenges of entry bans.[291]

Nevertheless, some insight of the court's view of the OCMA's decisions could be drawn from some earlier applications (which were made before the second part of 2011). Thus, in two judgments the Administrative District Court upheld the decisions of the OCMA imposing an entry ban of five years, thus agreeing with the authority's assessments.[292] An important statement regarding entry bans was made several years ago when the Senate of the Supreme Court has said in its judgment that even if the authority does not have discretionary power to decide whether or not to issue an entry ban, i.e., when the law provides only for a certain decision to be made, the authority nonetheless has to take into account the person's right to family life. Therefore the authority, upon issuing any administrative act, must evaluate whether it does not disproportionally restrict person's fundamental rights.[293]

Noteworthy is the comparison between the Article 11(3) of the Return Directive and the Latvian Immigration Law (see Table 1 below). Namely, it differs in several aspects. First, the Immigration Law provides no obligation in contrast to the Directive in case a third-country national can prove that she/he has fully executed the voluntary return decision. Instead, the Immigration Law provides that the SBG or the OCMA may withdraw the entry ban or reduce the time period prohibiting entry.[294] Further, Latvian authorities may withdraw or suspend execution of the whole return decision or the removal order and the entry ban included therein, if, first, the circumstances have changed, which were the basis for the issue of the relevant administrative act, including, for example, contradiction to international obligations of Latvia (as *non-refoulement*) exists, or, secondly, on humanitarian grounds.[295] There are cases where only the entry ban was withdrawn, maintaining the return order. The SBG has explained that it

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289 OCMA, Letter to LCHR No 24/1-42/623, 06.03.2014 and OCMA Letter No 24/1-42/2358, 09.09.2014.

290 Administrative District court, Letter to LCHR No 2.1-8/3399, 03.03.2014 and No. 1-5/136, 04.02.2015.

291 OCMA, Letter to LCHR No 24/1-42/2358, 09.09.2014; SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

292 In one case the authority did apply the maximum period because the person unlawfully entered Latvia, hide her identity and left the country without authorization after his application for refugee/alternative status was dismissed. (Judgment of Administrative District Court, No.A420419511, on 19.09.2012, p.5). The Senate of the Supreme Court maintained the abovementioned judgment, stating that the authority had included in its decision a reference to the provisions of the Administrative Procedure Law, as well as an assessment by substance. I.e. that the foreigner has been detained on basis of violation of the entry and residence regulations, that he does not have a lawful cause to stay in Latvia, that he has hid his identity and has submit false information, that legitimate aim to ensure the lawful order in the state could be reached by applying the entry ban for the maximum period. (Judgment of Senate of the Supreme Court, No.A420419511, on 30.01.2013, p.8. In another case the foreigner concerned appealed the decision of the OCMA on grounds that there are new facts in his case, i.e., after his forced removal, he has married a Latvian national and has a right to a family life. However, the court agreed with the authority that the marriage has to be considered fake. (Judgment of Administrative District Court, No.A420538011, on 01.08.2013.

293 Judgment of Senate of the Supreme Court, 08.03.2007., No.SKA-89/2007, available at http://at.gov.lv/files/uploads/files/archive/department3/2007/ad080307_1.doc, p.5.; judgment of Sentate of the Supreme Court, 25.10.2007., No.SKA-409/2007, available at http://www.tiesas.lv/nolemumi, p.6.

294 Immigration Law, Section 44, para 3.

295 Immigration Law, Section 49.

could happen, if the circumstances had changed, which were the basis for the issuance of the entry ban (for example, the foreigner received a residence permit) and humanitarian reasons (for example, the entry ban limited the possibility to receive medical treatments). The SBG could not mention a case where the entry ban has been suspended. [296]

Table 1. Provisions on withdrawing or suspending an entry ban.

Return Directive (Article 11(3))	***Latvian Immigration Law***
Member States ***shall consider*** *withdrawing or suspending an entry ban* where a third-country national (…) can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.	The institution ***may*** *withdraw the entry ban or reduce the time period* specified therein prohibiting entry, if the foreigner can prove that the voluntary return decision has been fully executed. (Article 44, para 3)
Member States ***may refrain from issuing****, withdraw or suspend* an entry ban in individual cases *for humanitarian reasons*.	The institutions ***may withdraw or suspend execution*** *of entry ban, if the circumstances*, which were the basis for the issue of the relevant administrative act, *have change,* including such circumstances have been determined, which are referred to by Section 47 of this Law (as *non-refoulement*), *or on humanitarian grounds*. (Article 49)
Member States *may withdraw or suspend an entry ban* in individual cases or certain categories of cases *for other reasons*.	

Although the general pre-requisites of the Return Directive are implemented in the Latvian legislation, there are some uncertainties as to when the Directive is imperative whereas Latvian legislation provides for a discretionary power. Especially, it concerns the duty of the state to consider withdrawing or suspending an entry ban if the foreigner demonstrates that she/he has left the Member State in compliance with the return decision. Instead, a good practice is not to apply the entry ban in certain categories of cases: to minors, to persons who have not seriously violated the rules of residence in Latvia and to persons who have violated the rules of residence due to health problems. However, it is highly recommended that the OCMA publishes anonimized decisions, at least in the following situations - where the OCMA functions as a higher authority for challenging the decision, decisions concerning interpretation of legal norms and decisions introducing new practices. Besides, the authorities should also gather information (statistics) on the length of entry bans, at least on the average length of the entry bans applied.

2.6. Procedural safeguards

This Section looks at the procedural safeguards available for persons in the return procedure, in particular, it focuses on the access to information on the return order, its reasoning and the right to appeal (Subsection 2.6.1), as well as the effective remedy (Subsection 2.6.2). The issue on effective remedy is dealt, including such related issues as the right to legal assistance and representation, the access to courts and the suspensive effect of the court decisions.

[296] The SBG has withdrawn Schengen entry bans: in 2011 -11, in 2012 – 18, in 2013 – 13, in 2014 – 5; withdrawn national entry bans: in 2011 – 14 and reduced 2, in 2012 – 15, in 2013 – 12, in 2014 – 3. SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

2.6.1 Information on the reasons of the return decision and remedies

The right to information on the reasons for expulsion is covered by such legal provisions on effective remedy as Article 13 of International Covenant on Civil and Political Rights (hereinafter – ICCPR)[297] and Article 13 of the ECHR,[298] including Article 1 of Protocol No. 7, which lists procedural safeguards relating to expulsion of aliens.[299] The access to information provides for the right to submit reasons against expulsion, and the ECtHR has found violations of Article 13, if the reasons of expulsion were not communicated to aliens (due to their formalistic nature);[300] violations of Article 1.1(a) Protocol 7 were also found.[301]

Article 12 (1) of the Return Directive requires that the return and entry-ban decision is issued in writing, that it gives reasons in fact and in law on which the decision is based and that it contains information about available legal remedies. Article 12 (2) of the Directive requires a provision of a written or oral translation of the main elements of the return decisions, including information on the available legal remedies in a language that the third-country national understands or may reasonably be presumed to understand. In line with the *Twenty Guidelines*, the authorities are also encouraged to indicate the bodies from which further information may be obtained concerning the execution of the removal order and the consequences of non-compliance with the removal order.[302]

Latvian law generally complies with the provisions of the Directive, since the amendments of the Immigration Law in 2011 included the obligation of the national authorities to provide information regarding the returnee, the nature of the violation, the decision on inclusion of the foreigner in the list and the decision on the entry ban into the Schengen territory, the procedures for contesting the decision, the date of drafting thereof and the position, given name and surname of the official, who issued the decision.[303] Although the Immigration law does not explicitly require that the return decision or the removal order gives reasons in fact and in law, it mentions "the nature of the violation", which the OCMA in practice has interpreted as a duty to provide such reasons with references to the law and facts.[304] The return decisions also include the consequences of non-compliance with the decision: the issue of a removal order if the foreigner has unjustifiably failed to execute the voluntary return decision.[305]

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297 *"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.".*

298 *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.".*

299 *"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion, b) to have his case reviewed, and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority."* For more analysis of European standards, see: FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*..., pp. 109 – 114.

300 ECtHR, *C.G. and Others v. Bulgaria*, Application No. 1365/07, Judgement of 24 April 2008, ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, Judgement of 21 January 2011.

301 ECtHR, *Nolan and K. v. Russia*, Application No. 2512/04, Judgement of 12 February 2009. For more detailed analysis see: ICJ, *Migration and International Human Rights Law*..., p.154; FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*..., pp.95-115.

302 CAHAR, *Comments to the Twenty Guidelines*, Guideline 4, para 2.

303 Immigration Law, Section 41, para 5, Section 46, para 4.

304 OCMA, sample of 11 anonymised return decisions (adopted during the time period from 01.07.2011 till the end of 2013) provided to LCHR on 06.03.2014.

305 Ibid; Immigration Law, Section 46, para 1, Section 51, para 2(8).

The Immigration Law imposes an obligation on the OCMA and the SBG officials to acquaint a foreigner in a language, which he or she understands or which he or she should justifiably understand, if necessary, using the services of an interpreter, with the return decision or the removal order, with the decision on inclusion in the list and the decision on prohibition to enter the Schengen territory included therein, explaining the essence thereof and the procedures for contesting the decision, as well as informing about the rights to legal aid.[306] In line with Article 12 (2) of the Return Directive, upon the request of a foreigner, the institution, which issued the relevant administrative act, shall ensure the translation of the main components of the return decision or removal order (the establishment of facts, justification of the administrative deed, legal obligation imposed on the addressee, an indication where and in what period of time the administrative deed may be contested or appealed). The relevant institution shall provide an oral or written translation in a language, which the foreigner understands or which he or she should justifiably understand, if necessary, using the services of an interpreter.[307]

A foreigner is required to sign a statement within the return decision, which states that the foreigner has received the return decision and has been informed in the language, which the foreigner understands, about its nature and the procedure for contesting the decision. The return decision is signed also by translators and respective officials from the SBG or the OCMA; foreigners are normally provided with an oral translation of the return decisions.[308] However, in practice, foreigners in forced return procedure often complain about poor quality or insufficient translation of the removal orders and the related information on the remedies. This fact is established by the Ombudsman's Office in the survey, which was conducted in the framework of the project on forced return monitoring.[309] The SBG notes there are still insufficient amount of interpreters of languages, which are rarely used in Latvia, and translation is not always of high quality.[310] This is confirmed by the practical experience LCHR has obtained while dealing with cases of asylum-seekers often lacking translators of rarely used languages and dialects.

Article 12(3) of the Directive also requires the Member States to make available generalised information sheets explaining the main elements of the standard form in at least five of languages which are most frequently used or understood by irregular migrants in the Member State concerned. As the respective authorities inform, this norm is implemented by providing returnees with a standard form of a return order and a removal order, which is translated into five languages.[311]

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306 Immigration Law, Section 48, para 1. The same provisions applies to decisions contested to a higher authority (first instance appeal) (Immigration Law, Section 50, para 1), see more on remedies in Subsection 2.6.2.).

307 Immigration Law, Section 48, para 2.

308 OCMA, sample of 11 anonymised return decisions (adopted during the time period from 01.07.2011 till the end of 2013) provided to LCHR on 06.03.2014; additional information obtained from a representative from OCMA and from SBG on 13.10.2014.

309 33 foreigners in forced return procedure were interviewed in 2013 and 16 foreigners – in the first half of 2014. Tralmaka I., Survey of persons in forced return procedure, presentation at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.

310 Information obtained from the discussions at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.

311 OCMA, Letter to LCHR No 24/1-42/642, 23.02.2015; SBG, Letter to LCHR No 23.1-1/397, 06.02.2015.

2.6.2. Effective remedy

As pointed out by the International Commission of Jourists, the ECHR has indicated the following aspects of the effective remedies in the deportation cases: access to case documents and information on the forthcoming legal procedures; translated material and interpretation in case of a need; effective access to legal advice and, if necessary, to legal aid; the right to participate in adversarial proceedings and reasons for the decision to expel.[312] The internationally agreed principle is that the remedy must be prompt, effective, accessible, impartial, independent, enforceable, and lead to cessation of or reparation for the human rights violation concerned.[313] Article 47 of the EU Charter of Fundamental Rights (hereinafter – EU Charter) provides that: *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."*[314]

a) The right to appeal

Article 13 (1) of the Return Directive provides for rights to appeal against or seek review of decisions related to return before a competent body composed of members who are impartial and who enjoy safeguards of independence.

Before the transposition of the Return Directive, the Immigration Law provided for the right to appeal the return orders to a higher authority and to the court,[315] but not decisions on forced return.[316] The amendments of the year 2011 brought significant improvements with regard to the remedy: both the return order or the removal order and the decision included therein on inclusion in the list and prohibition to enter the Schengen territory may be appealed to the following instances: a higher authority (within seven days after their coming into effect);[317] the Administrative District Court (within seven days after coming into effect thereof);[318] the Department of Administrative Cases of the Supreme Court Senate by submitting a cassation.[319]

In practice, the number of return decisions, which have been appealed to the higher authority, has been rather small.[320] Four appeals of return orders and four appeals of removal orders were submitted to the Administrative District Court during the time period from 1 July 2011 till the end of 2014.[321] Two applications to the Administrative District court challenging

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312 ICJ, *Migration and International Human Rights Law...*, p.168.

313 Ibid, p.147.

314 For detailed analysis on effective remedy see: FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, pp. 99-102; pp.109-113.

315 Immigration Law (with amendments until 26.05.2011), Section 42, available at: http://likumi.lv/doc.php?id=68522 .

316 Ibid, Section 46, para 3.

317 Immigration Law, Section 50, para 1.

318 Immigration Law, Section 50.[1], para 1.

319 Immigration Law, Section 50.[1], para 2.

320 During the time period from 1 July 2011 until the end of 2014, 26 return decisions issued by OCMA have been appealed to the higher authority; 64 return decisions issued by the SBG have been appealed or reviewed in the respective period. OCMA Letter to LCHR No. 24/1-42/2358, 09.09.2014; OCMA, Letter to LCHR No.24/1-42/642, 23.02.2015; SBG, Letter to LCHR No.23.1-1/397, 06.02.2015.

321 Administrative District court, Letter to LCHR No 2.1-8/3399, 03.03.2013; Administrative District court, Letter to LCHR No 1-5/136, 04.02.2015 M.Romanova „Topical case-law in the expulsion procedure of

the removal decisions and the procedure of the implementation of the removal decision were adopted in 2014; the appeal for recognising the removal decision as illegal was left without examination, as the complainant had not undergone the first instance of the appeal procedure (the higher authority).[322] Two judgements of the Supreme Court Senate related to the return decisions are publically available (See Subsection 2.2.1).[323] Most foreigners have not expressed the wish to appeal the return decisions, due to the willingness to return voluntarily.[324] However, the short time periods between the adoption and informing on the return order and the actual expulsion (in several cases from one up to five days) has been a barrier for filling appeals for some foreigners; some of them have been informed on the removal decisions already at the airport before departure or shortly before departure.[325] The latter information is confirmed with the two court judgements, which indicated that the returnees were informed on the removal decision a day before the deportation.[326]

b) Suspensive effect of the return decisions

In order to avoid potential violation of the *non-refoulement* principle, it is highly important to ensure suspensive effect of appeals of return decisions as an effective remedy;[327] and the remedy shall provide rigorous scrutiny of claim of potential violation of *non-refoulement*.[328] Although the Return Directive does not impose the obligation of the Member States for automatic temporary suspension, of the enforcement of return decisions,[329] in its recent judgement, the Court of Justice of the European Union (hereinafter – CJEU) stated that the right of the defendant to be heard and the right to have access to the file (enshrined in Article 41(2) the EU Charter[330]) should be observed even if the applicable legislation does not expressly provide for such a procedural requirement."[331] The EC is concerned about the fact that in most EU Member States the foreigner has to apply for the temporary suspending effect which may be rejected by the judge.[332]

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foreigners", presentation at the conference „Topical issues of the return procedure and legal aid for illegally-staying third country nationals during the return procedure in Latvia", organised by the State Legal Aid Administration on 27.02.2014.

322 Judgement of the Administrative District Court No. A420525512, on 7.05.2014; Judgement Of the Administrative District Court No. A420525612, on 7.05.2014.

323 Judgment of Senate of the Supreme Court, No.A420419511, on 30.01.2013; Judgment of Senate of the Supreme Court, No.A420540612, on 6.09.2013.

324 Information provided by the SBG at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014; Interview with representatives from the Ombudsman's Office on 27.08.2014.

325 Interview with representatives from the Ombudsman's Office on 27.08.2014.

326 Judgement of the Administrative Regional Court No.A420525512, 07.05.2014; Judgement of the Administrative Regional Court No. A420525612, 07.05.2014.

327 ICJ, *Migration and International Human Rights Law...*, pp.169-170.

328 CAHAR, *Comments to the Twenty Guidelines*, Guideline 5, para 2. See: ECtHR, *Auad v.Bulgaria* (11 October 2011, Application No. 46390/10), para 120.

329 The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation (Article 13 (2)).

330 Article 41 (Right to good administration)

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; - the obligation of the administration to give reasons for its decisions.".

331 Case C-383/13 PU on 10 September 2013, para 32.

332 EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, p. 23.

As concerns the suspensive effect of appeals of return decisions to a higher authority, the 2013 Immigration Law amendments deleted the provision ensuring that no suspensive effect is granted in such cases.[333] Although the clause on the suspension of the return decisions and entry bans in the appeal cases is not included in the law, the OCMA states that such decisions are suspended if a person has submitted an appeal to the higher authority.[334] However, the law states that submission of an application to the court shall not suspend the operation of the return decision or the removal order and the decisions included therein and decision on the entry ban in the Schengen territory.[335] The Administrative Procedure Law still provides for the right of an applicant to request provisional regulation, if there is cause to believe, *inter alia*, that the appeal decision of an administrative body could cause serious damage, or it is *prima facie* unlawful.[336] An applicant may also ask the court for oral examination of the application.[337]

Since the transposition of the Return Directive, in no cases contesting the removal order had suspensive effect.[338] The fact that the appeals of the return decisions to the court, as an independent and impartial authority, in potential *non-refoulement* cases have no automatic suspensive effect contradicts the principle of effective remedy provided by the EU Charter and may potentially lead to a violation of the ECHR, in light of the absolute nature of the right to life and the prohibition of torture and inhuman or degrading treatment or punishment.[339]

c) *Access to legal assistance and representation*

According to Article 13 (4) of the Return Directive, Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge, in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.[340] The right to free legal assistance, in particular where

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333 Immigration Law, Section 50.

334 OCMA Letter to LCHR No. 24/1-42/2358, 09.09.2014; EMN, *Policy report on Migration and asylum situation in Latvia, Reference year 2013*, Riga, March 2014, p. 54.

335 Immigration Law, Section 50.[1], para 1.

336 Administrative Procedure Law (adopted 25.10.2001), available at: http://likumi.lv/doc.php?id=55567, Section 195. In such a case, the court may take a decision which, pending judgment of the court, substitutes for the requested administrative act or actual action of the institution; the court can also impose a duty on the relevant institution to carry out a specific action within a specified time period or prohibits a specific action. Ibid, Section 196, para 1, 2.

337 Ibid, Section 186, para 3(4).

338 SBG, Letter Nr. 23.1-1/719 to LCHR on 03.03.2014; SBG, Letter Nr.23.1-1/2511 to LCHR on 20.08.2014.

339 ICJ, Migration and International Human Rights Law, Migration and International Human Rights Law, p. 170. See a recent judgement of ECtHR: *A.C. and Others v. Spain*, Application No. 6528/11, Judgement of 24 April 2014, where "the effectiveness of a remedy within the meaning of Article 13 of the Convention did not depend on the certainty of a favourable outcome for the applicant. However, without the Court's intervention, the applicants would have been returned to Morocco without the merits of their case having been examined as thoroughly and rapidly as possible, since their applications for judicial review did not as such have automatic suspensive effect capable of staying the execution of the orders for their deportation". (European Database of Asylum Law, http://www.asylumlawdatabase.eu/en/content/ecthr-ac-and-others-v-spain-application-no-652811).

340 The Directive provides that Member States may provide in their national legislation and or/representation is granted with some limitations, e.g. only for procedure before a court or tribunal and not for any onward appeals or reviews; only to those who lack sufficient resources; only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants; only if the appeal or review is likely to succeed, etc. See: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. See also: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

the subject of removal order does not have sufficient financial means for necessary legal assistance is also provided by the *Twenty Guidelines*.[341] In practice, extending the legal aid subject to conditions of Article 15 (3) to (6) of Directive 2005/85/EC reduces the effectiveness of remedies in many EU Member States and is a reason of a paucity of appeals of return decisions, as pointed out by the EC.[342]

In Latvia, the state legal aid is granted for appeal of a return decision and a removal decision, as provided by Article 13(1) of the Return Directive.[343] The legal aid is granted in the following cases:

- a foreigner does not have sufficient resources, he or she is residing in the Republic of Latvia and execution of the voluntary return decision or removal order issued in relation to him or her is suspended;[344]
- he or she has been detained in the cases and according to the procedures specified in the Immigration Law and is residing in the Republic of Latvia in specially equipped premises or an accommodation centre.[345]

An application regarding a request for state ensured legal aid and income to the institution, which took the decision on the contested return order or removal order, shall suspend the period of time for appeal thereof until the day when the foreigner, on the basis of a decision on the granting of state ensured aid, has been granted the first legal consultation or a decision has been taken on refusal to grant state ensured legal aid.[346] The LAA takes a decision on granting the legal aid or refusal to grant legal aid within ten days following the receipt for legal aid from the OCMA or SBG.[347] The law also specifies conditions, providing a possibility for foreigners, who have not requested legal aid in accordance with the procedure specified by the Immigration Law, to request legal aid in accordance with the procedure specified by the State Ensured Legal Aid Law.[348] In such a case, the LAA shall examine the submission 21 days (in matters which affect the rights of children, within 14 days) from the day when a submission for legal aid or a submission for further legal aid was received.[349]

Despite the fact that the right to legal aid in the appeal procedure is established by law, there is only one case as to early 2015 where a foreigner requested legal assistance for contesting a return decision before the court.[350] A possible reason for a lack of appeals is the fact that most foreigners are not willing to appeal the decisions; however, insufficient information on the right to appeal and the legal aid, short time limits for appeals (seven days)

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341 CAHAR, *Comments to the Twenty Guidelines...,* Guideline 5.

342 EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, p. 23.

343 With reference to Article 12(1) of the Directive.

344 In this case, when a foreigner is not detained, he or she shall, within the time period for appeal of a decision on the contested return order or removal order, submit to the institution, which took such a decision, a filled-in application regarding the request of State ensured legal aid and income (the sample form is determined by the Cabinet of Ministers). The OCMA or SBG, upon receipt of the application regarding the request for State ensured legal aid and income, shall, without delay, but not later than the following working day, forward it to the LAA. Ibid, Immigration Law, Section 50.^{2}, para 1, 2, 3.

345 In this case, the SGB is responsible for ensuring communication of the detained person requesting legal aid with the legal aid provider; if the legal aid provider provides legal aid at its place of practice, the communication of the legal aid applicant with the legal aid provider shall be ensured by the LAA. State Ensured Legal Aid Law (adopted 17.03.2005), available at: http://likumi.lv/doc.php?id=104831#p33.1&pd=1, Section 5 (2^{1}) The SBG, without delay, but not longer than the following working day after a decision has been taken on the contested removal order, invite a provider of legal aid from the list prepared by the LAA; in such a case the legal aid provider shall be paid by the LAA. Immigration Law, Section 50.^{2}, para 1, 2, 3.

346 Immigration Law, Section Section 50.^{2}, para 4

347 State Ensured Legal Aid Law, Section 23 (1^{1}).

348 State Ensured Legal Aid Law, Section 22 (7^{1}).

349 State Ensured Legal Aid Law, Section 23, para 1.

350 LAA, Letter to LCHR No 1-6.2.15/6, 04.02.2015.

as well as a short time period between the return decision and the actual deportation have been barriers for those foreigners, who would like to make an appeal and request legal aid.[351]

One of the core matters of concern with regard to the right to effective remedies is linked to legal and practical shortcomings in ensuring legal representation to the court, if a foreigner is expelled before the court hearing. In such a case, a person may formalise his or her representation with a notarised power of attorney.[352] If a person is represented by a sworn attorney, representation is formalised with a written proxy without a notarised power of attorney. A natural person may also authorise his or her representative orally at the institution; the institution shall draw up such authorisation in writing and the authoriser shall sign it.[353] In practice, there were serious barriers for formalising representation with a notarised power of attorney, due to the fact that the persons were detained, had no ID documents and had no necessary resources, including for interpretation services, etc. Accordingly, it is highly recommended to change the rules of formalising representation for such persons.[354] It is also important to ensure that a foreigner has a real opportunity and time before his or her removal to have formalise representation either through a sworn advocate or at the place of detention (institution).

2.7. Detention and alternatives to detention

This Section analyses the permissible grounds of detention for the purpose of removal (2.7.1), safeguards against arbitrary detention, including alternatives to detention, access to information and remedies (2.7.2), detention of children (2.7.3) and detention conditions (2.7.4).

2.7.1. Grounds of detention

According to the Article 9.1 of the ICCPR and Article 5.1 of the ECHR, the grounds for any deprivation of liberty must be set forth in law in a clear and exhaustive manner. The ECHR permits immigration detention only in two specific situations: to prevent unauthorised entry to the country, and upon pending deportation or extradition (Article 5.1(f)).[355] Detention during deportation should be only for the purpose of expulsion. According to the case-law of the ECtHR, detention solely for the reasons of national security or transfer for prosecution and trial in another state would be arbitrary.[356] The considerations of national security and public order are also listed as grounds of detention, which in the recent case law of the CJEU cannot be based on the Return Directive.[357] According to the FRA's opinion, *"Deprivation of liberty based on crime prevention [...] should be governed by the same rules, regardless of the legal status of the person concerned has in the host country. These grounds should therefore not be regulated by alien or immigration law, but in other pieces of legislation"*.[358] In its recent

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351 Information obtained from the SBG and the Ombusdsman`s Office at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014; Interview with representatives from the Ombudsman's Office on 27.08.2014.

352 Administrative Procedure Law, Section 38, para 1.

353 Ibid.

354 Information obtained from the case work of LCHR during the time period from 2010 until 2013.

355 ICJ, Migration and International Human Rights Law, Migration and International Human Rights Law, pp. 178 – 180.

356 Ibid, p. 188. See: *Bozano v. France,* ECtHR, Application No. 9990/82, Judgment of 18 December 1986, para 60; *M.S.S. v. Belgium,* ECtHR, Application No. 50012/08, Judgment of 31 January 2012.

357 CJEU*, Kadzoev* C-357/09, 30 November 2009; CJEU, *Hassen El Dridi* C-61/11, 28 April 2011, para 70.

358 FRA, *Detention of Third-Country Nationals in Return Procedures...*, p. 24.

judgement, the CJEU has concluded that extending detention is not justified solely due to the lack of identity documents: *"[…]it is for the referring court alone to undertake an individual assessment of the facts and circumstances of the case in question in order to determine whether a less coercive measures may be applied effectively to that third-country national or whether there is a risk of him absconding."*[359]

According to the Return Directive, Member States may only detain a third-country national in the return procedure only in order to prepare the return and/or carry out the removal process, notably if:

- there is a risk of absconding;
- the person concerned avoids or hampers the preparation of return or removal process.[360]

Until the new amendments entered into force in 2011, for detention to be possible, the Immigration Law did not require that the person concerned is served with an order to leave the territory.[361] In fact, being illegal immigrant *per se* was sufficient for the justification of detention of various categories of foreigners, including those residing in the territory of Latvia for decades, but who have failed to regularize their status, e.g. change their Soviet passports in the 1990s.[362] To a large extent such a practice could explain the large proportion of the detained foreigners (see Figure 2 and Figure 4). In 2014, the number of detained foreigners has increased due to the significant increase of cases of illegal border crossing, above all of Vietnamese citizens (169 in 2014, 97 – in 2013).[363]

After the transposition of the Return Directive, the Immigration Law establishes that detention of a foreigner may take place only for the purpose of return: an official of the SBG has the right to detain a foreigner, except a minor foreigner who has not reached the age of 14 years, if: 1) the removal procedure is applicable to him or her in accordance with Section 41 (provision on the return orders), 46 (provision on the removal orders) or 50.[6] (provision on recognition of return decisions taken by another Member State) of this Law; 2) he or she is subject to the return to a third country or to another EU Member State in accordance with a treaty or agreement, which provides for the readmission of such persons who are staying illegally in the territory of the relevant state.[364] The Immigration Law includes the obligation of the SBG to detain foreigners to carry out the removal of foreigners, including those who have been imposed an additional punishment by a court judgement for criminal offence committed – removal from the Republic of Latvia.[365] Foreigners, who have been imposed an entry ban by the Ministry of the Interior or the Ministry of Foreign Affairs and are issued the removal order by the SBG, are also detained.[366]

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359 CJEU, *Mahdi 146/14 PPU,* 5 June 2014.

360 Article 15 (1).

361 The SBG had the right to detain a alien, except a minor alien who has not reached the age of 14 years: 1) if he has illegally crossed the State border of the Republic of Latvia or otherwise violated the procedures prescribed by regulatory enactments for the entry and residence of aliens into the Republic of Latvia; 2) if the competent State authorities including the State Border Guard have reason to believe that the alien causes a threat to national security or public order and safety; 3) in order to implement a decision regarding the forced removal; 4) in order to implement an additional punishment – expulsion from the Republic of Latvia (Immigration Law (with amendments until 15.06.2011), Section 51, para 1).

362 In some cases, persons were not detained e.g. due to the age or health status. LCHR, *Human Rights in Latvia in 2005*, p. 256.

363 SBG, Information obtained by e-mail, 03.03.2014.

364 Immigration Law, Section 51, para 1.

365 He or she may be detained after the court judgment has been pronounced, if a security measure – imprisonment – has not been applied to the foreigner in the particular case. Immigration Law, Section 51, para 5(1).

366 Immigration Law, Section 51, para 5(2).

The 2011 Immigration Law amendments have also included a list of circumstances for the determination whether there is a reason to believe that a foreigner will hamper or avoid the return procedure or whether a risk of absconding exists.[367] Any of the following circumstances may justify a decision of detention, which is taken by the SGB,[368] and subsequently - by the judge:[369]

1) the foreigner is hiding his or her identity, provides false information or refuses to co-operate in other ways;

2) the foreigner has crossed the external border, avoiding border checks, as well as has used a forged travel document, forged visa or residence permit;

3) the foreigner cannot indicate a place where he or she will reside until the end of the relevant removal procedure and submit a written certification of the apartment or house owner regarding determination to ensure the accommodation of the foreigner, or cannot present the sum of money that would be sufficient for booking a hotel until his or her removal;

4) a competent State or foreign institution has provided information, which is the basis for considering that the foreigner threatens the State security, public order or safety;

5) the foreigner is involved in promoting illegal immigration;

6) the foreigner has been convicted of a criminal offence committed in the Republic of Latvia, for which the sentence intended is related to the deprivation of liberty for at least one year;

7) the foreigner has previously avoided a removal procedure in the Republic of Latvia or in another Member State of the European Union;

8) the foreigner has unjustifiably failed to execute the voluntary return decision;

9) the foreigner has unjustifiably failed to fulfil the specified obligation to register with the relevant unit of the State Border Guard;

10) the foreigner has previously arbitrarily left an accommodation centre for detained foreigners or detention premises;

11) the foreigner has entered the Republic of Latvia, without observing the decision to include in the list or decision on the entry ban in the Schengen territory.[370]

In accordance with the EU law, the risk of absconding needs a clarification in law. However, Article 51(2) of the Immigration Law includes a list of criteria, which might be extended not only to establishement of the risk of absconding, but also to other two elements (there is a reason to believe that a foreigner will hamper or avoid the return procedure). The practice with regard to criteria for evaluating the risk of absconding differs a lot among the Member States, although several grounds, including the lack of documents and the lack of cooperation in determining one's identity, are common in many states.[371] However, as noted

[367] Immigration Law, Section 51, para 2.

[368] Immigration Law, Section 51, para 2.

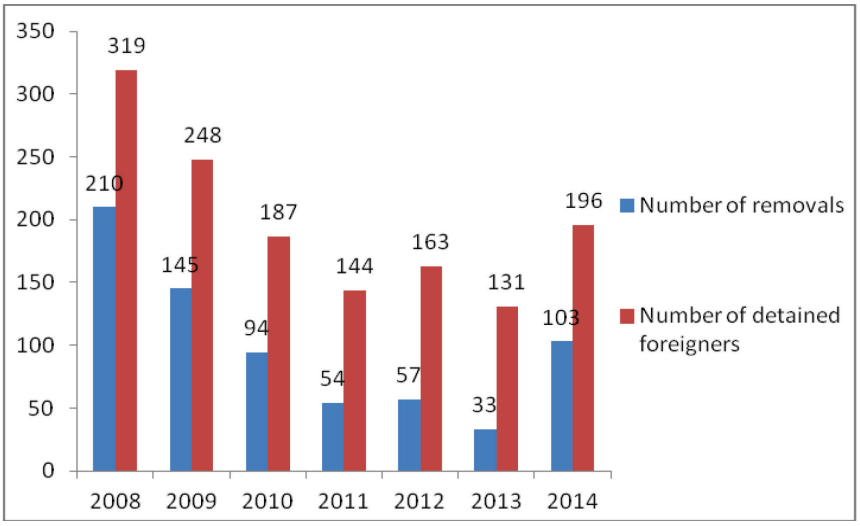
[369] Immigration Law, Section 54.[1]

[370] Immigration Law, Section 51, para 2. According to the SBG, the circumstances, which are listed above, have been elaborated as criteria for evaluating the risk of absconding and were based on the recommendation of the EC. Information provided by the SBG by e-mail on 19.05.2014.

[371] EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final, p. 15.

above, considerations of national security, public order or safety and criminal offence of foreigner[372] are problematic in light of applicability of the Return Directive.

Figure 2. **Number of detained illegally-staying third country nationals in the removal procedure**



Source: Data of the SBG.

In practice, the detention of foreigners has not been strictly consistent with the fact that the detention is applied only for the purpose of carrying out the execution of a removal order, as prescribed by the European standards.[373] The detention provisions of the Immigration Law have also been applied to persons found to be illegally present on the territory of Latvia who have not applied for international protection and are not (yet) subject to a return decision.[374] The SBG normally detains the foreigners due to their illegal stay before the return decision is adopted.[375] The average time period from apprehending an irregular migrant until the issue of a return decision was nine days in 2013.[376] The return order is adopted soon after detention if a foreigner's identity is established; however, other foreigners, whose personal data should be further clarified, receive the return order or the removal order later, according to the internal rules of the SBG, as the return decision can be taken only for a person whose identity and data have been approved.[377]

Thus, the detention seems to be automatic in case of lack of approved information on identity; such situation contradicts the principle of necessity and proportionality of detention in each individual case (see below) and the CJEU findings in the Mahdi case,[378] namely that lack of "identity documents cannot on its own, be a ground for extending detention" (para 73), and does not constitute by itself a 'risk of absconding', which is one of the grounds for detaining that person initially.

372 Immigration Law, Section 51, para 2 (4), (6).
373 CAHAR, *Comments to the Twenty Guidelines...,* Guideline 6.
374 EMN, *The use of detention and alternatives to detention* ..., pp.12-13.
375 Information provided by the SBG by e-mail on 10.11.2014.
376 EMN, *The use of detention and alternatives to detention*…, p.30.
377 Information provided by the SBG by e-mail on 10.11.2014.
378 Mahdi case (CJEU, Case C 146/14 PPU, 5 June 2014).

The extensive term of pre-court detention (up to ten days), as compared to the provisions of the Criminal Procedure Law in the case of criminal suspects (48 hours),[379] contributes to the risk of arbitrariness of detention before the removal decision is adopted and does not comply with the recommendation of the UNHCR not to extend the period of the initial detention for more than 24-48 hours.[380]

The detention of the third-country nationals still needs to be grounded in at least of one the circumstances listed in Section 51 para 2 of the Immigration Law, and such a principle has been confirmed by the national case law on detention.[381] As indicated by the Latgale Regional Court, "*the SBG should indicate the grounds of the detention of a foreigner in its application, but a judge of the District (City) court should make an assessment and adopt a relevant decision according to Section 51, 54, 54[1] and 55 of the Immigration Law.*"[382]Also, the Administrative Regional Court has ruled in its recent judgment that the principle of providing justification is one of the most important instruments for ensuring procedural fairness in the detention cases.[383]

The SBG explains that most foreigners are detained due to the first three circumstances established by the list mentioned above.[384] The analysis of a sample of the decisions on detention, issued by the Daugavpils Court and Latgale Regional Court[385] reveal that the most frequently used ground of detention by the SBG is the fact that the foreigner is not able to indicate the place where he or she is going to reside until the end of the relevant removal procedure. This detention ground is often applied in combination with other grounds. However, the application of the grounds of detention has often been insufficiently motivated by the SBG. There are cases where the Daugavpils District Court pointed to the fact that the SBG has not mentioned any grounds of detention, which would give a reason to believe that a foreigner will hamper or avoid the return procedure or when a risk of absconding exists.[386] Some court decisions did not include explanation on the reasons, why the foreigner posed a threat to national security, public order and safety; in one of them the Daugavpils Court did not support the SBG's request to detention of a foreigner, as the SBG failed to provide factual information on the fact that the foreigner poses a threat to national security: *"this sentence is declarative and was not supported with any facts"*.[387] In almost all decisions analysed, there is a reference to the Immigration Law's provision on illegal stay, which the foreigner has violated, as an additional justification of his or her detention, although it is not listed as such a ground of detention in the law: *"Due to residing in the Republic of Latvia without a valid*

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379 Criminal Procedure Law (adopted 21.04.2005, in force from 01.10.2005), available at: http://likumi.lv/doc.php?id=107820, Section 263.

380 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p.27.

381 See, for example, decision of the Daugavpils Court of 8 June 2012, No. 12-038512; decision of the Daugavpils Court of 4 January 2013, No. KPL 12-000613; decision of the Daugavpils Court of 27 April 2012, No. 12-028212.

382 Decision of the Latgale Regional Court of 21 June 2012, No. 12-028112; Decision of the Latgale Regional Court of 16 May 2012, No. 12-028212.

383 Judgment of Administrative Regional Court, No.A420520811, on 15.08.2014, available at www.tiesas.lv/nolemumi. The SBG has to indicate in the detention protocol not only the factual circumstances of the case and legal norms but also the justification of the necessity and proportionality of detention (para 12); whereas the risk of absconding shall be justified with specific circumstances of the case (para 13.4).

384 SBG, Letter to LCHR No. 23.1-1/2511, 20.08.2014.

385 The analysis of 19 decisions of the Daugavpils Court and 2 decisions of the Latgale Regional Court, adopted in the period from 2012 until 1st half of 2014 was conducted by the LCHR lawyer Ieva Vasilevska. The anonymised court decisions were provided by the Daugavpils Court; (e-mail on 12.06.2014 and 07.08.2014) some decisions were obtained from the LCHR case work with clients.

386 Decision of the Daugavpils Court of 27 April 2012, No. 12-028212; decision of the Daugavpils Court of 4 January 2013, No. KPL 12-000613; decision of the Latgale Regional Court of 21 June 2012, No. 12-028112.

387 Decision of the Daugavpils Court of 8 June 2012, No. 12-038512.

travel document, a valid visa, a residence permit, a residence permit of a long-term resident of the European Community in the Republic of Latvia, the foreigner violates Section 4, para 1 and 2 of the Immigration Law [...].”[388] It should be noted that the mere fact of violation of the Immigration Law is not listed as a detention ground in the Immigration Law. In some decisions, the SBG mentioned undetermined identity as an additional justification of detention, which is not included into the list of circumstances with regard to possible risks of absconding or attempts of a foreigner to hamper or avoid the return procedure.[389] The application of the ground *“the foreigner has crossed the external border, avoiding border checks, as well as has used a forged travel document, forged visa or residence permit”* was not clear, as there was no indication, which, if any, forged documents the foreigner has used and why such a ground constituted the risk of absconding, hampering or avoiding return.[390]

In most cases, also the Daugavpils Court, similarly to the SBG, has not assessed the grounds of detention according to Section 51, §2 of the Immigration Law.[391] Most often, the court has agreed with the SBG and concluded on the detention grounds very shortly, e.g.: *„After listening the arguments of the SBG's representative [..], evaluating the submitted materials, the judge is making the conclusion that person A has violated the residence rules specified by the law of the Republic of Latvia; moreover, he cannot indicate a place for residing until the end of the relevant deportation procedure.”*[392] Such a short motivation and argumentation is not sufficient for justification of deprivation of liberty and the principle that detention should be applied as a measure of last resort and strictly according to the law, specifying the grounds of detention in exhaustive manner. The judicial practice reveals that more should be done in practice in order to ensure that detention is only applied according to the Return Directive, namely, if there is a well-grounded risk of absconding or a reason to believe that foreigner will avoid or hamper the return procedure.

2.7.2. Safeguards against arbitrary detention

The international human rights framework obliges states to avoid unlawful or arbitrary detention. Several international documents[393] and the case law of the ECHR[394] and the CJEU[395] point to the duty of the states to ensure that detention is only applied after a careful examination of its necessity in each individual case, as a proportional response and for the shortest possible time. States should first consider less invasive or coercive measures to

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388 See e.g., the decision of the Daugavpils Court of 26 November 2013, No. KPL12-093013/12; the decision of the Daugavpils Court of 17 September 2013; No. KLP 12-065413.

389 Decision of the Daugavpils Court of 27 April 2012, No. 12-028112; Decision of the Daugavpils Court of 13 September 2012, No. KPL 12-059712; Decision of the Daugavpils Court of 25 February 2014, No. 12-087113.

390 Decision of the Daugavpils Court of 31 July 2013, No 12-055013.

391 See e.g. the following cases: decision of the Daugavpils Court of 13 September 2012, No. KPL 12-059712; decision of the Daugavpils Court of 24 August 2012, No. 12-054812; decision of the Daugavpils Court of 26 July 2013, No. 12-054813; decision of the Daugavpils Court of 26 November 2013, No. KPL 12-093013/12; decision of the Daugavpils Court of 31 July 2013, No. 12-055013;decision of the Daugavpils Court of 25 February 2014, No. 12-087113.

392 Decision of the Daugavpils Court of 13 September 2012, No. 12-059712.

393 See for instance, Human Rights Council, 13th session, *Report of the Working Group on Arbitrary Detention*, para 64, UN General assembly, A/HRC/13/30, 18 January 2010.

394 See for instance the judgments of the ECtHR, *Amuur v. France*, application No. 19776/92, judgement of 25 June 1996; *Saadi v. UK*, application No. 13229/03, judgement of 29 January 2008; *S.D. v. Greece*, application No. 53541/07, judgement of 21 June 2009; *Shamsa v. Poland,* application No. 45355/99 and 45357/99, judgement of 27 November 2003; *Mikolenko v. Estonia,* application No. 10664/05, judgement of 8 January 2010; *A and Others v. the UK,* application No. 3455/05, judgement of 19 February 2009.

395 CJEU*, Kadzoev* C-357/09, 30.11.2009; CJEU, *Hassen El Dridi* C-61/11, 28.04.2011.

achieve the objectives posed by detention.[396] The *Twenty Guidelines* include the following provision: *„A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if [...], after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems."*[397] Also, the Return Directive sets forth the principle that detention may be justified if other sufficient but less coercive measures cannot be applied effectively in the specific case.[398] Thus, first alternatives to detention should be considered in each individual case.[399]

According to the Return Directive,[400] detention ceases to be justified when it appears that a reasonable prospect of removal no longer exists for legal or other considerations;[401] the conditions, which led to recourse to detention, no longer exist,[402] and the maximum period of detention has expired. [403]

a) Necessity and proportionality of detention

The Immigration Law does not refer to the necessity and proportionality test and does not include a list of criteria for balancing the interest of the state and the individual when assessing the necessity of detention.[404] The Immigration Law does not contain the principle that any detention should be for the shortest period possible, and only maintained as long as removal arrangements are in progress and executed with due diligence.[405] However, in 2011, a provision was added to the Immigration Law stating that a judge while deciding on detention, extending the term of detention or refusing to extend the term of detention, takes into consideration circumstances clarified during the return procedure as well as whether the circumstances which served as grounds of detention are still in force.[406]

Another clause provides for release of a foreigner by the SGB official if the circumstances serving as grounds of his or her detention do not exist anymore, or there is no possibility to obtain documents, which are necessary in order to fulfil the return procedure of a foreigner.[407] In one case foreigners were kept in detention due to the fact that they could not indicate a place of residence, even if their removal was not possible.[408] However, in 2014, one of those persons was released, because she was granted the status of a stateless person, but the other was released because it was not possible to obtain necessary documents.[409]

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396 See the analysis of standards in: Edwards A., *Back to Basics.*

397 CAHAR, *Comments to the Twenty Guidelines…,* Guideline 6.1.

398 Article 15 (1).

399 FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, p. 147.

400 Siniovas V., UNHCR Associate Liason/Legal Officer*,* presentation „Return Directive" at the conference „Topical issues of the return procedure and legal aid for illegally-staying third country nationals during the return procedure in Latvia", organised by the LAA on 27.02.2014.

401 Article 15(4); see also: CJEU*, Kadzoev* C-357/09, 30.11.2009.

402 Ibid.

403 Article 15(5), (6).

404 See the analysis of the practices in the EU in: FRA, *Detention of Third-Country Nationals in Return Procedures...*, p.25.

405 Return Directive, Article 15(1).

406 Immigration Law, Section 54^1, para 1.

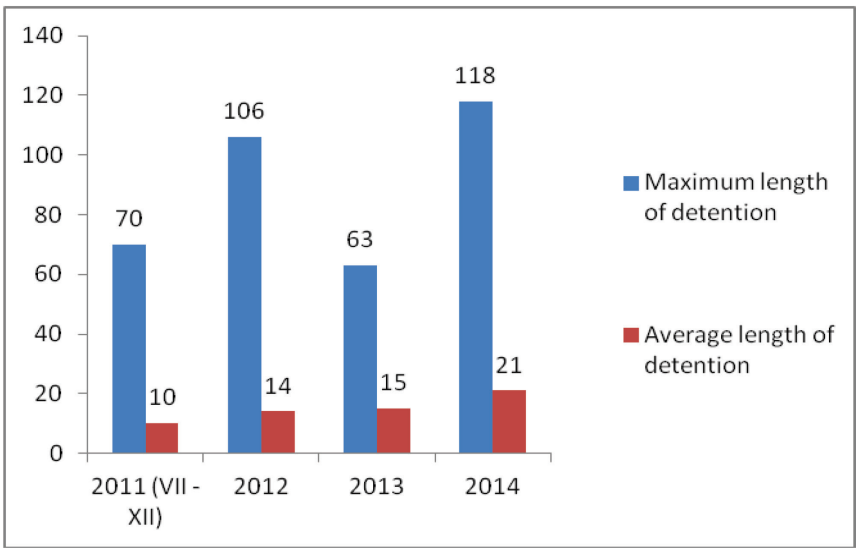
407 Immigration Law, Section $59.^4$ para 4.

408 Information obtained from the LCHR case work in 2012-2014.

409 SBG, Letter to LCHR No.23.1-1/397, 06. 02.2015.

In line with the minimum standards set forth by the Return Directive, the maximum term of detention[410] has been reduced from 20 months to six months, with a possibility for extension up to additional twelve months ("if a foreigner refuses to cooperate or obtaining documents from the third states is delayed").[411] In practice, the maximum term of detention has not reached six months, and the average term of detention was less than a month, although increasing over the last years (See Figure 3). The SBG informed that all persons in the forced return (removal) procedure were detained in line with the provisions of the Immigration Law; however, persons for whom alternatives to detention were applied were detained only for the purpose of carrying out their removal (according to the Immigration Law, Section 51(5)).[412]

Figure 3. Maximum and average length of detention in the return procedure (in days)*



Source: Data provided by the SBG.
**Note: It should be noted that the maximum length of detention of asylum seekers has been longer as compared to foreigners in the return procedure (maximum length of detention in 2014 – 271 days, average length of detention – 17days). Data of the SBG.*

b) Alternatives to detention

Alternatives to detention may have a wide variety of forms and they may impose various degrees of limitation of the freedom of movement.[413] The UNHCR insists that detention and alternatives to detention should be governed by law and regulations and be subject to human rights standards, including the periodic review by an independent authority and the right to submit complaints and remedies.[414] Moreover, alternatives to detention should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release.[415]

Most of the EU Member States apply regular reporting obligations to authorities, surrending the documents and order to take up accommodation in premises specified by the

410 Article 15 (5) and (6).
411 Immigration Law, Section 54, para 7.
412 SBG, Letter to LCHR No.23.1-1/719, 03.03.2014.
413 *Edwards A., Back to Basics...,* pp.51-81.
414 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p.22.
415 Ibid, 23.

authorities.[416] The internationally recognized conclusion is that treating persons with respect and dignity and ensuring the access to basic social and economic rights facilitate the effectiveness of alternatives to detention and foreigners' cooperation.[417]

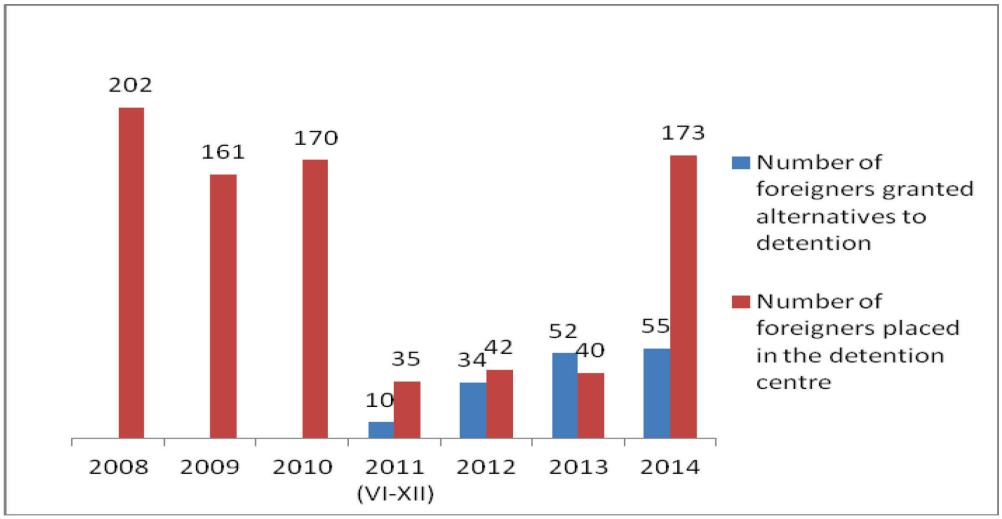
The 2011 Immigration Law amendments have established the right of the SBG authorities, when deciding on detention of a foreigner, to apply one of the following alternative means of detention due to reasons of humanitarian nature:

1. regular registration at the specified unit of the SBG;
2. handling over of a travel document and other personal identification documents at the disposal of the foreigner to an official of the SBG.

The Immigration Law still does not include an explicit obligation of the authorities firstly to consider the alternatives to detention. Moreover, the law provides for the alternatives to detention only "due to reasons on humanitarian nature". The law also does not provide detailed rules governing the application of the alternatives; there are also no guidelines or criteria governing each alternative. The provisions for appeal of the decision on alternatives to detention to court are also not provided in the Immigration Law.[418]

Although the alternatives are increasingly applied (see Figure 4), they are usually granted due to the health condition or family reasons of the foreigner concerned, etc.[419] No in-depth studies on alternatives to detention have been conducted; according to the European Migration Network's (hereinafter – EMN) study, the rate of absconding was about four per cent as compared to one per cent of foreigners in detention in 2011 – 2013.[420] Foreigners, to whom alternatives to detention are applied, do not receive any state support, such as food, accommodation and medical care.[421]

Figure 4. **Statistics on alternatives to detention***



Source: Data provided by the SBG.

416 EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, p.15.

417 Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, Summary Conclusions, *Geneva, Switzerland, 11-12 May 2011.*

418 However, the decision on alternatives to detention may be appealed in the order set by the Administrative Procedure Law providing for the right of individuals to appeal the decisions of the state authorities to the Administrative courts.

419 SBG, Letter No.23.1-1/719 to LCHR, 03.03.2014.

420 EMN, *The use of detention and alternatives to detention…*, p.37.

421 Ibid, p.31.

*Note: *Statistics in the Figure 4 does not include asylum seekers whose numbers in the detention centre has increased (30 – in 2010, 238 – from the end of May until the end of 2011, 127 – in 2012, 166 – in 2013 and 310 – in 2014. The alternatives to detention for asylum seekers were established by the Asylum Law amendments (in force since 21.11.2013) and were applied for 20 persons in 2014.*[422]

The analysis of the court decisions on detention reveal that in most cases, the SBG has not assessed the possibilities to apply alternatives to detention or such an assessment is not reflected in the analysed courts' decisions. In some cases, the SBG referred to the impossibility to apply the alternatives to detention since the foreigner concerned had no place of residence and finacial means; no possible reasons of humanitarian nature were analysed in these decisions.[423]

In the analysed courts' decisions, in several cases the judge has indicated that alternatives to detention cannot be applied in a concrete case without any in-depth analysis by merely stating the following: *"The judge has not identified a possibility to apply alternatives to detention".*[424] In one case the Daugavpils Court refused to detain a foreigner because the SBG had not assessed an opportunity to apply alternatives to detention due to the reasons of humanitarian nature (such possible reasons were not clear from the text of the decision): „*The SBG as the state authority has not observed the pre-court procedure, as the possibility to apply alternatives to detention for the individual concerned has not been discussed. Besides the ground of detention, which was mentioned by the SBG „[the foreigner] cannot present the sum of money that would be sufficient for booking a hotel until his or her removal" has been disproved by the objective information of the individual concerned. Therefore, the state authority has the possibility to apply alternatives to detention for the foreigner."*[425] In other decisions, the court has not made any assessment on the alternatives to detention.[426]

Thus, the practice of assessing the necessity and proportionality of detention and opportunities to apply alternatives to detention is inconsistent and insufficient; therefore, it does not comply with the international and European standards mentioned above, namely, that detention is applied as a measure of last resort. In most of the analysed court decisions, the judges have not referred to international or European human rights norms, with a few exceptions of reference to Article 5(f) of the ECHR, which allows deprivation of liberty of a person with a view of deportation/extradition. In most cases, the Daugavpils Court has automatically extended detention for two months, with an exception of one case, where the detention period was extended for 15 days; in this case, the court pointed to the unjustified delay in the preparation of return.[427]

There is an increasing awareness of a need for alternative places of residence apart from the detention centre where to place persons pending return, in particular, vulnerable groups (families with children, etc.). Such places could be established in the accommodation centre for asylum seekers, or assigned by municipalities or NGOs.[428] In June 2014, the SBG

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422 Asylum Law amendments (adopted 24.10.2013), available at: http://likumi.lv/ta/id/261718-grozijumi-patveruma-likuma; SBG, Letter to LCHR No 23.1-1/397, 06.02.2015.

423 Decision of the Daugavpils Court of 27 April 2012, No. 12-028112; Decision of the Daugavpils Court of 27 April 2012, No.12-028212.

424 Decision of the Daugavpils Court of 19 April 2012, No. KPL 12-027212. See also: the decision of the Daugavpils Court of 13 September 2012, No. KPL 12-059712; the decision of the Daugavpils Court of 24 August 2012, No. 12-054812.

425 Decision of the Daugavpils Court of 7 March 2012, No. KPL 12-025214/12.

426 Decision of the Daugavpils Court of 31 May 2012, No. 12-028112; Decision of the Daugavpils Court of 19 June 2012, No. KPL 12-041012; Decision of the Daugavpils Court of 26 July, No. 12-054813.

427 Decision of the Daugavpils Court of 9 January 2014, No. KPL 12-003314/12.

428 Interview with a judge from the Daugavpils Court on 12.06.2014.

initiated the amendments to the Immigration Law,[429] which were drafted in response to the situation where a family with several small children could not be accommodated in another place than the detention centre.[430] These amendments will guarantee accommodation and alimentation to those foreigners who have a return decision or a removal order but who are not detained and also to foreigners subject to the return to a third country or to another Member State of the EU, or the foreigners who have been imposed an additional punishment by a court judgment – removal from Latvia.[431]

c) The right to information

The right to be informed promptly in a language understood by the person concerned on the reasons of his/her arrest, derives from Article 5(2) of the ECHR and 9(2) of ICCPR. Those rules are applicable to foreigners during the deportation procedure.[432] Article 15(2) of the Return Directive states: *"Detention shall be ordered in writing with reasons being given in fact and in law"*. Similarily, the *Twenty Guidelines* notes: *"The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies […]."*[433]

When detaining a foreigner, the Immigration Law provides that the SBG or State Police official shall draw up a detention report.[434] The official, who has drawn it up, and the detainee, shall sign the report. If the detainee refuses to sign the report, it shall be noted in the report.[435] In practice, information on the access to information on the reasons on detention is very limited. The detention report is written in Latvian, and foreigners are usually orally informed by the SBG on the main points of the detention order.[436] However, language barrier and poor quality of translation in many cases has constituted an obstacle for communication between the detainees, including asylum seekers, and the SBG.[437] While the SBG has signed the agreements with the translators' offices in Riga, a prompt availability of translators of some rarely used languages is problematic due to the far location of the detention centre form

[429] Draft Law "Amendment to the Immigration Law", 26.06.2014, available at http://tap.mk.gov.lv/lv/mk/tap/?pid=40326153 .

[430] Annotation to the Draft Law "Amendment to the Immigration Law", 26.06.2014, available at http://tap.mk.gov.lv/lv/mk/tap/?pid=40326153.

[431] In order to receive the support, the foreigner has to meet certain preconditions, as the lack of sufficient financial means to maintain themselves and their children, disclose his identity, provides truthful information and cooperates with the SBG. The SBG will have to contract with crisis centres or shelters (service providers). Then, upon an application from the foreigner, if the latter meets the necessary preconditions prescribed by the law, the SBG during one day will make a decision whether the foreigner is entitled to receive the support. Further, the foreigner will contract with the service provider. The support will be provided to the foreigner up to six months. This period may be extended to one year, if it was not possible to organize forced removal in six months or time period for executing return order has been prolonged. Now these amendments need to be coordinated within certain ministries, approved in the Cabinet of Ministers and then sent to the Parliament. Draft Law "Amendment to the Immigration Law", 26.06.2014.

[432] ECtHR, *Abdolkhani and Karimnia v. Turkey, Application No.* 30471/08, judgement of 22 September 2009; See more analysis in: ICJ, *Migration and International Human Rights Law...*, p.212.

[433] CAHAR, *Comments to the Twenty Guidelines...,* Guideline 6(2).

[434] Including the date and place of drawing up thereof, the position, given name and surname of the person who has drawn up the report, information regarding the detainee, time and motives of detention. Immigration Law, Section 52, para 1, para 2.

[435] Immigration Law, Section 52, para 2.

[436] Information obtained from the SBG during a monitoring visit to the detention centre "Daugavpils" on 11.06.2014.

[437] Information from LCHR case work in 2009 – 2013.

Riga. Therefore, sometimes the SBG uses translators' services by telephone.[438] A positive development is that in late 2014, the SBG has prepared translation of the blank of the detention report into five languages.[439]

d) Judicial review and effective remedy

The right to judicial review is another core safeguard against arbitrary detention; this fundamental right is protected, above all, in Article 5(4) of the ECHR,[440] 9(4) of ICCPR,[441] Article 47 and Article 41(2) of the EU Charter (See Subsection 2.6.2). In order to meet the international standards, the accessibility and effectiveness of the remedy are the core safeguards: *"[t]his remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.*[442] The effective remedy should ensure adversarial proceedings and "equality of arms" between the parties and legal assistance should be available, as confirmed by the ECtHR case-law.[443]

According to Article 15 (2) of the Return Directive, detention shall be ordered by administrative or judicial authorities. The Directive provides for the right of a foreigner to a speedy judicial review; the third-national concerned shall be released immediately if the detention is not lawful. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex-officio; in case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority (Article (3)). In the *Mahdi* case, the CJEU stated that any decision on the extending the maximum period of the initial detention must be in written form, including the reason in fact and law.[444]

The national law includes the provisions on periodic judicial review, which are generally in line with the Return Directive. An official of the SBG has the right to detain a foreigner for more than ten days only pursuant to a decision of a judge (See Table 2). However, the term of the initial (pre-court) detention still raises concerns for beeing too long as compared to the Criminal Procedure Law in the case of criminal suspects (48 hours) and not ensuring the right to a speedy judicial review (see Subsection 2.7.1).

The detained foreigner or his/her representative can appeal the decision of the judge on detention within 48 hours after the decision is received by the person detained.[445] The Immigration Law obliges the authorities to inform the detainees at the moment of detention on

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438 Information obtained from the SBG during a monitoring visit to the detention centre "Daugavpils" on 11.06.2014.

439 English, French, Spanish, Arabic and Russian. Information obtained from the SBG by e-mail on 10.11.2014; SBG, Letter to LCHR No 23.1-1/297, 06.02.2015.

440 *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*.

441 *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*.

442 CAHAR, *Comments to the Twenty Guidelines...,* Guideline 9, para 2.

443 See e.g. ECtHR, *Suso Musa v. Malta,* Application No. 42337/12, judgement of 21 July 2013, para 61. See: ICJ, Migration and International Human Rights Law, Migration and International Human Rights Law, p.223.

444 According to the court, the "supervision" by a judicial authority dealing with an application for extension *"must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings."*CJEU, *Mahdi 146/14 PPU,* 5 June 2014, para 64.

445 Immigration Law, Section 55, para 6.

the foreigner's right to appeal decisions on detention to the court, to contact the consular institution of his or her country and to receive legal assistance.[446] The detained foreigner has also the right to become acquainted with the materials related to his or her detention; the right to communicate in the language he or she understands, or which he or she is reasonably expected to understand, if necessary, by utilizing the services of an interpreter.[447]

In practice, the right to challenge the decisions on detention has been poorly implemented. There are just a few cases, in which the Daugavpils Court has refused to detain foreigners and disagreed with the SBG (in two cases in 2013 and in four cases – in 2012).[448] During the period from 1 June 2011 until the end of January 2014, the Latgale Regional Court received 86 appeals with regard to detention of foreigners and asylum seekers, including those submitted by the SBG.[449] Such a number is very small if the overall number of persons placed in the detention centre (about 650) is taken into account in the relevant period.[450] There were just two cases in the period from 2011 until the end of 2014 when foreigners appealed the SBG decision on detention (up to ten days) to the court.[451]

While the first instance (Daugavpils District) court reviews the detention cases in oral proceedings, in which the detained foreigner always participate, the Latgale Regional Court as the appeal body, reviews the applications in written procedure.[452] In practice, the written procedure limits the right of the foreigner to be heard in the appeal body and to access the procedure; although the participants are given the possibility to submit additional information or to express an opinion on the complaint of another party,[453] it is conducted in the Latvian language, according to the Law on Judicial Power.[454]

There are no legal provisions concerning the state provided legal aid to foreigners (similarly to asylum seekers) in the return procedure to appeal the decisions on detention or extending detention. Detainees have the right to receive legal assistance paying themselves for it.[455] However, most of the detainees do not have necessary financial means for hiring a lawyer.[456] In all 21 analysed decisions of the Daugavpils Court, only one foreigner was represented by an advocate.

In line with a practice by the Latgales Regional Court, if a foreigner, who does not have financial means for hiring a lawyer, requests an advocate during the first instance court hearing, the court informs about his or her request the senior counsel of Daugavpils, who, in its turn, assigns an advocate to the person concerned; the costs covering an advocate's work are covered from the state budget.[457] Similarly, an advocate can be assigned in Rezekne, if a foreigner requests an advocate at the Latgales Regional Court.[458] Such an option, although providing an opportunity for the detained foreigners to request an advocate, still cannot be considered as ensuring effective "equality of arms", as state-funded legal assistance is not regulated by the law and may be granted upon a foreigner's request. Together with a short

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446 Immigration Law, Section 56, para 1.

447 Immigration Law, Section 56, para 2, 3.

448 SBG, Letter to LCHR No. 23.1-1/719, 03.03.2014.

449 Latgale Regional Court, Letter No.1-5 to LCHR, 20.02.2014.

450 SBG, Letter to LCHR No. 23.1-1/2511, 20.08.2014.

451 SBG, Letter to LCHR No. 23.1-1/719, 03.03.2014; SBG. Letter to LCHR No 23.1-1/397, 06.02.2015.

452 Information obtained from the Latgale Regional Court by e-mail on 31.10.2014.

453 Ibid.

454 Law on Judicial Power, Section 21 para 1, adopted on 15.12.1992, in force from 01.01.1993, available at http://likumi.lv/doc.php?id=62847.

455 Immigration Law, Section 59^2, para 2 (3).

456 Interview with a judge from the Daugavpils court on 12.06.2014.

457 Information provided by the Latgale Regional Court on 31.10.2014.

458 Ibid. In practice, the general principles of the Criminal Procedure Law, which provides for the right of a person, who has the right to legal representation, to request a legal representative (Section 80), are applied. Interview with the jusges from the Latgale Regional Court on 12.06.2014.

period of appeal of a decision on detention (48 hours) and a limited number of lawyers, specialising on immigration issues in the region,[459] the availability of legal assistance raises serious concerns with regard to effective remedies of foreigners during the return procedure.[460]

Table 2. **Decision-making authorities and appeal procedure in detention cases during the return procedure**

Decision-making authorities	**Decisions**	**Appeal**	**Term of appeal**	**Suspensive effect of detention**
SBG	Decision on detention for up to 10 days For more than 10 days only pursuant to a decision of a judge	Appeal to the district court	The Immigration Law does specify the term of appeal of the decision of the SBG	no
State Police	Decision on detention for 3 hours before handling a foreigner to the SBG	The Immigration Law does not include provisions on the right to appeal the decisions of the State Police	-	no
District (city) court (Daugavpils Court)	Decision on detention up to 2 months or regarding the refusal of detention; Decision on extending detention for up to 2 months or refusal to extend the detention period	yes	48 hours	no
Regional court (Latgale Regional Court)	Decision on examination of a complaint about the decision of the District (city) court	The decision of the Latgale Regional Court is final and cannot be appealed	-	no

Source: Immigration Law, Section 53, Section 54, Section 55.

[459] Interview with a judge from the Daugavpils court on 12.06.2014. Information obtained from LCHR case work in 2011 – 2014.

[460] See ECtHR, *Suso Musa v. Malta,* Application No. 42337/12, judgement of 21 July 2013, para 61: *"The Court notes that, although the authorities are not obliged to provide free legal aid in the context of detention proceedings (see Lebedev v. Russia, no. 4493/04, § 84, 25 October 2007), the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy".*

2.7.3. Detention of children

The Immigration Law includes a clause that the OCMA or the SBG official shall, without delay, inform the State Police and the Child Custody Court if a minor is not accompanied by parents or his or her legal representative and is staying in the Republic of Latvia illegally. Those institutions shall act so as to ensure the rights and interests of the child in accordance with regulatory enactments regulating the protection of children's rights during all the return procedure.[461]

However, the Immigration Law allows for the detention of children, including unaccompanied minors, who have reached the age of 14.[462] In case of the detention of unaccompanied minors, the SBG should immediately inform the Consular Department, the State Police and the custody court.[463] The Immigration Law does not include a definition of children in line with the definition provided by the CRC (minors are defined as persons below the age of 18) and the Protection of the Child Law;[464] it also does not include a clause that unaccompanied minors and families with minors shall be detained as a measure of last resort and for the shortest appropriate period of time, as provided by the Return Directive.[465] Similarly, there are no legal provisions that the best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.[466] The lack of such provisions contravenes Guideline 11 of the *Twenty Guidelines* as well as the EU action plan on unaccompanied minors (2010-2014), which envisages that where detention is exceptionally justified, it is to be used as a measure of last resort, for the shortest appropriate period of time, and taking into account the best interest of the child as a primary consideration.[467]

The Immigration Law contains provisions concerning the detention of unaccompanied minors up to the end of the period of detention in the relevant state Police structural unit (prevention centre - accommodation for children);[468] *"[i]f the SBG in co-operation with the Consular Department until the end of the time period of detention have not been able to ascertain the identity and citizenship or country of residence of the minor, the State Police shall ensure the accommodation of the minor alien in a child care institution."*[469]

However, the Regulation of the Cabinet of Ministers of the year 2003 provides a different detention order for unaccompanied minors: an unaccompanied minor, whose identity is not ascertained, may be detained at the structural units of the SBG, separately from the adult persons and with provision of necessary food and medical care (the latter provisions are not mentioned in detail); if the identity of a minor has not been established during the period of 72 hours, a minor shall be placed in the closest prevention centre.[470] In its turn, if the identity of a child was still not ascertained during one month period, the State Police authorities must issue

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461 Immigration Law, Section 50^{8}, para 1.

462 Immigration Law, Section 51, para 1.

463 Immigration Law, Section 54, para 6.

464 Convention on the Rights of the Child, 1989 (GA Res 44/25); The Protection of the Child Law, Section 3, para 1.

465 Article 17 (1).

466 Article 17 (5) of the Return Directive.

467 EC, *Communication from the European Commission from the Commission to the European Parliament and the Council Action Plan on Unaccompanied Minors (2010 – 2014),* Brussels, 6.5.2010, COM (2010) 213 final, 6 May 2010, p. 9.

468 Immigration Law, Section 59^{5}, para 1, A prevention institution is the structural unit of the State Police, in which a child, who has violated the law or who has socially deviant behaviour, may be placed in cases, provided by the law. The Protection of the Child Law, Section 38, para 3.

469 Immigration Law, Section 59^{5}, para 2.

470 Cabinet of Ministers Regulation No.707 „Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians", adopted on 16.12.2003, in force from 20.12.2003, available at: http://likumi.lv/doc.php?id=82267, Section 9, 12.

an order for sending a child in the child care institution in the relevant territory.[471] It should be noted that detention of minors at the temporary SBG territory units, with poor conditions and not equipped for the minors' needs,[472] would be contrary to the principle of the Return Directive that unaccompanied minors, as far as possible, shall be provided with accommodation in institutions provided with personnel and facilities, which take into account the needs of persons of their age.[473] The Regulation also does not provide any limitations with regard to the age of a minor when detention is possible. According to the SBG, the Rules of 2003 are still applied in practice, although there was only one case, when an unaccompanied minor was placed into a child care institution during the time period from mid 2011 until the end of 2014; three unaccompanied minors were placed in the detention centre "Daugavpils".[474]

The provisions with regard to automatic detention of unaccompanied minors in case of unascertained identity contravene Article 37 of the CRC[475] and the CJEU findings in the *Mahdi* case[476] regarding lack of "identity documents" on its own as an insufficient reason to detain persons.

Both the Human Rights Committee and the ECtHR have taken into account Article 3 (best interest of the child) and Article 37 of the CRC, when examining the lawfulness of the detention of children.[477] In particular, the ECtHR stated that it is in the best interests of the child to limit detention of families with children as far as possible and consider the possibilities to apply alternatives to detention.[478] Similar considerations with regard to the best interests of the child were confirmed by the Latgale Regional Court in a case of detention of a woman with her six under aged children: *"If detained, the children would be denied the real opportunity for normal development and to enjoy their childhood; it could harm the mental condition and mental health of the child, as the similar rules apply to the detained child and the detained adults (..). According to Section 6 of the Protection of the Child Law, in legal relathionships concerning the child, the best interests of the child are the priority."*[479]

The SBG has informed that 18 minors were detained during the removal procedure from mid 2011 until the end of 2014.[480] There is a playroom and a walking area for children in the family block of the detention centre "Daugavpils".[481] In 2014, three minors, who stayed together with their parents in the detention centre and were not detained, went to a local school

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471 Ibid, Section 13.

472 See information provided by the Ombudsman's Office: Siļčenko J. „Conditions at the SBG' s short-term detention facilities" at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.

473 Article 17 (4).

474 SBG, Letter to LCHR No. 23.1-1/2511, 20.08.2014; SBG, Letter to LCHR No. 23.1-1/397, 06.02.2015.

475 According to the Committee, "*[i]n application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time."*Committee of the Rights of the Child, General Comment No.6 (2005) Treatment of unaccompanied and separated children outside their country of origin, para 61.

476 *Mahdi case* (CJEU, Case C 146/14 PPU, 5 June 2014).

477 ICJ, *Migration and International Human Rights Law*, p. 191.

478 ECtHR, *Popov v France*, Applications nos. 39472/07 and 39474/07, judgement of 19 January 2012, para 91, 119.

479 Decision of the Latgale Regional Court of 16 May 2012, No.12-028212 Decision of the Daugavpils court of 27 April 2012, No.12-028212.

480 SBG, Letter to LCHR No. 23.1-1/2511, 20.08.2014; SBG, Letter to LCHR No. 23.1-1/397, 06.02.2015.

481 According to the Return Directive, minors shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on their stay, access to education (Article 17 (3)).

and also to outdoor activities.[482] Upon the initiative of the SBG staff, two educators from the Latvian Red Cross also visited children in the detention centre.[483] However, it was not possible to ensure education for Vietnamese minors due to the language barrier.[484]

Although the number of the detained children has been low, the law still should include a clause that unaccompanied minors and children accompanied by family member can be detained only in exceptional cases and for the shortest appropriate period of time. The Regulation of the year 2003 should be put in line with the Immigration Law providing that a minor should be placed in the prevention unit of the State Police only in exceptional cases. The alternatives to detention for families with children should be provided in law and in practice.

2.7.4. Detention conditions

a) Short-term places of detention

The SBG is in charge of the places of detention, including the detention centre "Daugavpils" and short-term detention facilities, including the airport, regional branches and the SBG headquarters in Riga. The Ombudsman's Office has pointed to the fact that the short-term detention places are not suitable for detention for more than a few hours, due to the poor conditions.[485] However, there are no time limits set by the law for holding a person in the temporary detention rooms of the SBG. In 2014, the foreigners were placed in the temporary detention rooms in the premises of the SBG Riga Board only in exceptional cases.[486] Although only a small number of foreigners have been placed in the short-term detention places and normally only for a few hours,[487] the number of detainees in such places could be higher due to potential increase of the number of the third-country nationals and insufficient number of places in the detention centre.[488] Therefore, the situation with regard to the places of detention should be improved by looking for alternative accommodation places for foreigners with appropriate conditions in compliance with international and domestic standards.

b) Detention centre "Daugavpils"

The detention centre is located in Daugavpils, the second largest Latvian city after Riga, about 230 km to the South-East from Riga nearby the Belorussian and Lithuanian border. The detention centre was opened after renovation works of the SBG's premises and the closure of the detention centre "Olaine" in 2011. The detention centre provided for 70 detainees is a two-floor building located at the territory of the Daugavpils SBG's branch. Both asylum seekers and irregular migrants (hosted separately) are placed in the detention centre. There are separate blocks for women, men and families with children.[489] The situation in

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[482] Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

[483] Ibid.

[484] SBG, Letter to LCHR No. 23.1-1/397, 06.02.2015.

[485] Ombudsman of the Republic of Latvia, *Report of the Year 2012* ..., p.72; See also: LCHR, SBG, UNHCR, *Access to the Territory and the Asylum Procedure in Latvia*, 2011.

[486] Interview with the representatives from the Ombudsman's Office on 27.08.2014.

[487] Ibid.

[488] EMN, *The use of detention and alternatives to detention* ..., p.18.

[489] See description of the detention condition in the detention centre „Daugavpils" in: LCHR*, Detention of asylum seekers and alternatives to detention in Latvia*, Riga, 2011, pp. 51-54.

Latvia generally corresponds to the principle that detention shall take place in specialised detention facilities.[490]

According to the *Twenty Guidelines*, *"care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a "carceral" environment."*[491] However, the CPT, in its 2011 visit report recommends that staff working in the Centre do not openly carry truncheons in detention areas, as in the CPT's opinion, *„this is clearly not conductive to the development of positive relations between staff and inmates"*.[492] According to the SBG, there are the following restraint measures: truncheons, handcuffs and gas spray, although no restraint measures were used in the first half of 2014.[493] The SBG did not receive any complaints on the use of restraint measures from the detainees.[494]

The use of the isolation cells, however, has raised concerns with regard to asylum seekers, due to a lack of regulation of the procedures and safeguards as well as a lack of guidelines on managing hunger strikes.[495] As concerns the foreigners in the removal procedure, the Immigration Law provides for conditions when a detainee can be placed to a specially equipped room (isolation room or a disciplinary cell) if a person has violated the internal rules or if there is the reason to believe that a person can violate the rules.[496] A person can be placed to the specially equipped room for a period of time of up to ten days by the order issued by the head of the centre[497] or by the head of shift of the centre for a period of time of up to 24 hours during the absence of the head of the centre.[498] According to the SBG, the order of the decision on putting a person into an isolation cell (which is signed by the foreigner) includes the information on contesting the decision, [499] although such a provision is not explicitly provided in legal acts regulating immigration detention.[500] There are two isolation rooms for persons violating the rules in the centre.

According to the information provided by a representative of the SBG, if a person violates the internal rules, first, it is discussed with him or her, and if necessary he or she is placed in the isolation room.[501] In 2014, one person was placed into the isolation room during a few days for smoking in breach of the internal rules;[502] several asylum seekers were placed into the isolation cell for smoking in toilet after 11 pm also in 2013.[503] There was a hunger strike of eleven asylum seekers in May 2014; many of them shortly after cancelled the hunger strike. The persons were placed in the medical isolation room for monitoring the health condition and also for preventing their possible involving of other detainees in the hunger strike.[504] The law allows holding a person in a medical isolation room for up to two months.[505]

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490 Return Directive, Article 16 (1).

491 Guideline 10.

492 Report to the Latvian Government on the visit to Latvia carried out by the CPT from 5 to 15 September 2011, available at: http://www.cpt.coe.int/documents/lva/2013-20-inf.eng.pdf, 19.

493 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

494 Ibid.

495 LCHR, SBG, UNHCR, *Access to the Territory and the Asylum Procedure in Latvia*, pp.31-34.

496 Immigration Law, Section 59[1], para 3 (4).

497 The Regulations of the Cabinet of Ministers on internal rules of the detention centre Nr. 742, Section 37.

498 Ibid, Section 38.

499 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

500 The Regulations of the Cabinet of Ministers on internal rules of the detention centre Nr. 742.

501 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

502 Ibid.

503 Information obtained from the LCHR case work in 2013.

504 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

There are several concerns with regard to the asylum seekers' lack of information on the right to submit a complaint about the placement in the isolation ward or any other issue and the procedure how to do that.[506] Some detainees claimed that no written response from the SBG was received.[507] The detainees can put letters and complaints addressed to the head of the centre into a special box on the informational desk; the complaints are registered in a special register on letters, complaints and suggestions.[508] The complaints are not separately divided in the register. Although the period of examining submissions is generally regulated by the Law on Submissions,[509] the procedure of submitting and examination of complaints at the detention centre is not regulated by special legal acts.

According to the COE standards, special high security or safety measures shall be applied only in exceptional cases on individual basis with clear procedures to be followed and the right of the detainee to submit a complaint with an opportunity to appeal the decision of the authority to an independent body.[510] Therefore, the grounds of placing persons in isolation cells should be carefully examined in each individual case. Although the administrative measures, including the placement into an isolation ward, can be appealed in accordance with the Administrative Procedures Law,[511] a clear procedure for submitting a complaint and appeal should be established by the law regulating immigration detention.

The material detention conditions have been assessed as very good by the CPT.[512] However, the CPT has called for extending a range of activities for foreigners held for prolonged periods in the detention centre.[513] The interviewed foreigners also pointed to a lack of useful activities during prolonged residence in the detention centre.[514]

The Immigration Law (Section 59.[2] para 2) provides for the right of detainees to communicate with their state consulate, to inform family members, kin or other persons regarding his or her whereabouts and with his or her means, to receive legal assistance, to meet with family members or kin, as well as with representatives of international and non-government human rights organisations. Such provisions correspond to the Return Directive (Article 16 (2, 4)). Additionally, the Ombudsman's Office is authorised to visit the detention facilities for the purpose of monitoring forced return (See Section 2.8). The lawyers, some NGOs (LCHR and the Red Cross) and the Ombudsman's Office have sometimes visited the

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505 The Regulations of the Cabinet of Ministers on internal rules of the detention centre Nr. 742, Section III 11.

506 LCHR, SBG, UNHCR, *Access to the Territory and the Asylum Procedure in Latvia*, p.33; information obtained from the LCHR case work in 2013.

507 Information obtained from the LCHR case work in 2013. Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

508 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

509 The Law on Submissions, adopted on 27.09.2007, in force from 01.01.2008, available at: http://likumi.lv/doc.php?id=164501.

510 Committee of Ministers, European Prison Rules, Appendix to Recommendation Rec (2006)2 to the Member States on the European Prison Rules, 11 January 2006, Section 53.1 – 53.7. See also: 19th General Report on the CPT's activities covering the period 1 August 2008 to 31 July 2009 [CPT/Inf(2009)27], Section 88.

511 Administrative Procedure Law, adopted on 25.10.2001., in force from 01.02.2004.

512 Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 15 September 2011, p. 19.

513 Ibid, p.20.

514 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014. There is a gym, a room for religious rituals, a library, and a recreation room with a television set. There is a walking area with benches and a basketball hoop.

detention centre.[515] However, the far location of the detention centre from Riga is a significant barrier for the legal aid providers to visit the centre on a regular basis.

The detainees' communication with the outside world has been rather poor due to limited access to the telephone (a pay taxophone with an opportunity to give free calls which are paid by their recipients was demolished in the end of 2013). Although the mobile phones are kept by the staff, the detainees are allowed to use them upon permission; they may also ask for use of the staff's mobile with their own phone card. If a foreigner has no financial means he or she may make short calls from the SGB's staff phones.[516] Similarly, the staff members normally assist the detainees to send letters by fax and to print necessary documents upon request.

The information on the applicable rules, including the rights and obligations of the detained foreigners (Article 16 (5) of the Return Directive) is provided in the Regulations of the Cabinet of Ministers on internal rules of the detention centre. This regulation is available in English only, while the Immigration Law is available in English and Russian in the detention centre.[517] The information on the regime and leaflets on the asylum procedure are available in several languages in the detention centre. The contact information of the UNHCR, the Ombudsman's Office and the LCHR is available in the hall of the detention centre. [518]

Although according to the Return Directive, *"particular attention shall be paid to vulnerable persons"* (Article 16 (3)), the provisions on detention of the Immigration Law do not include any reference to the term "vulnerable groups". As mentioned in Subsection 2.2.3, the definition and some provisions on vulnerable groups are related to forced removal and are included the Cabinet of Ministers Regulations. The legal norms provide for daily nutrition norms for minors, infants, pregnant women, women after childbirth and while breastfeeding, as well as persons, who are sick with tuberculosis, AIDS, malnutrition of a moderate or severe stage and other diseases and receiving outpatient treatment.[519] The Ombudsman's Office has had several concerns with regard to the situations of vulnerable groups.[520] The interviewed foreigner said that a disabled person was largely assisted by other detainees.[521] At the same time, the national law guarantees emergency health care and essential treatment of illness in line with the Return Directive (Article 16 (3)).[522] Two medical practitioners are working in the

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[515] Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

[516] Ibid.

[517] SBG, Letter to LCHR No 23.1-1/397, 06.02.2015; Information obtained from the SBG by e-mail, 03.03.2015.

[518] Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

[519] The Regulations of the Cabinet of Ministers No. 434 "Regarding the Residence Norms of Third-country Nationals Placed in an Accommodation Centre, as well as the Amount and Procedures for Receipt of Guaranteed Health Care Services".

[520] E.g., there is no a requirement for identification of many diseases (AIDS, tuberculoses, hepatitis, etc.), which could potentially worsen the individuals' health condition and potentially pose a threat to other detainees' or the staff's health. Although the detention centre is equipped with an elevator for ensuring the movement of handicapped persons, the Ombudsman's Office expressed its concerns that persons in wheelchair had difficulties to enter the catering unit; placing of such persons on the second floor was found problematic, as, in case of fire the use of elevator is prohibited due to security reasons. There were also concerns on the lack of specially trained personal for work with disabled persons. Tivaņenkova S., Results of a survey on conditions of the detention centre „Daugavpils", presentation at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014; Ombudsman of the Republic of Latvia, *Report of the Year 2013*, pp.98 – 99.

[521] Information obtained during a monitoring visit on 2.09.2014.

[522] Immigration Law, Section 59.[2], para 7. The detainees are provided with emergency medical assistance, primary health services, including dental assistance in case of acute toothache (provided by the medical practitioner of the accommodation centre and dentist) and secondary health services (which are to be provided

detention centre. The primary health care is provided in the centre; if necessary, a person is sent to the hospital or outpatient clinics. Medical examination of each foreigner is conducted upon their arrival to the centre and before their departure; the medical personal gives a reference on the health condition to the escort members.[523] Although a doctor's assistant speaks four languages, there is sometimes a need to invite a translator; SBG's or other detainees have also been invited for assistance. However, the latter practice should be prevented to ensure privacy and confidentiality in medical examination.[524]

Regarding costs of detention, by analogy, detained asylum-seekers on average receive the following (detention conditions, food, health care, basic utilities): for food and basic utilities - 167,00 euro a month (78 per cent are funded by the EU projects), health care - 73,00 euro a month (two per cent are paid by the EU funds), and food - 5,15 euro a day. [525]

2.8. The system of effective monitoring forced return

2.8.1. Institutions involved in monitoring forced return

According to the FRA, the system of monitoring forced return is effective if the monitoring process covers all stages of removal, including pre-departure period, departure and reception in the destination country; the organisation conducting monitoring is independent from the authorities enforcing return; monitoring is carried out on on-going (not project) basis.[526] The methodologies of monitoring vary to the large extent among the Member States; according to FRA, one-third of the EU Member States still needed to put in place an effective monitoring system.[527] The EC concluded that seven Member States did not establish the monitoring system in 2014.[528] In Latvia, both legislation and practice of monitoring have been introduced, although the monitoring system is a new function and has not developed yet, as acknowledged by the Ombudsman's Office.[529]

The Immigration Law provides that the Ombudsman's Office shall observe the process of forced removal.[530] The process of monitoring forced return includes the following stages:

1) visiting of the foreigners in the places of their detention in order to evaluate the detention conditions, including the provision of medical assistance and the satisfaction of other needs;

2) survey of the foreigner in order to determine his or her awareness of the progress of the removal process, his or her rights and the possibility for implementation thereof;

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immediately by a specialist). The Regulations of the Cabinet of Ministers No. 434 "Regarding the Residence Norms of Third-country Nationals Placed in an Accommodation Centre, as well as the Amount and Procedures for Receipt of Guaranteed Health Care Services", Section 15 – 20.

523 Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

524 The Ombudsman's Office has made the same conclusion. Tivaņenkova S., Results of a survey on conditions.

525 Latvijas Republikas Valsts Kontroles Revīzijas ziņojums "Patvēruma politikas un imigrācijas kontroles īstenošana", 09.02.2015, [35.3].

526 FRA, *Fundamental rights: challenges and achievements in 2013*, p.45.

527 Ibid.

528 EC, Communication from The Commission to the Council and the European Parliament on EU Return policy, p. 21.

529 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

530 Immigration Law, Section 50.[7]

3) observation of return of the personal property of the detained person seized at the time of detention, transportation from the detention centre to the departure point, handing-over and registration of luggage, as well as participation in the actual implementation of the forced removal process in order to evaluate the observance of the human rights of the foreigner to be removed.

The Ombudsman is entitled to involve associations or foundations in the observation of forced removal process, the purpose of operation of which is related to the observation of the process.[531]

2.8.2. Methodology of forced return

The Ombudsman's Office has started the monitoring in June 2011. Until late 2013, the process of monitoring, however, was focused on survey of the foreigners and monitoring the detention conditions, but not on monitoring the actual removals. In 2012, a questionnaire of survey of the foreigners was elaborated in the framework of the ERF project, administered by the Ministry of the Interior.[532] The questionnaire includes the following issues: information, provided to the foreigner, on the removal decision and the right to appeal the removal decision; interpretation of the decision; possible cases of ill-treatment; the implementation of the *non-refoulement* principle; possible humanitarian circumstances, etc.[533]

The Ombudsman's Office conducts a survey of each foreigner in the removal procedure, upon receiving the information on the removal decision from the SGB and the OCMA (the survey is conducted either in person or by telephone). In 2012 – 2014, almost all foreigners in the removal procedure were surveyed by the Ombudsman's Office (see Table 3).[534] In some cases, because the information on the removal order was delayed or due to impossibility to find an interpreter during a short time period, the Ombudsman's Office could not conduct interviews with the foreigners.[535] The foreigners are normally interviewed shortly before departure in Riga or Jurmala; the information from the interviews is kept in a special data base.[536]

Table 3. Statistics on foreigners' survey

	Removal decisions obtained	Foreigners surveyed
2011 (VII – XII)	22	12
2012	58	49
2013	33	29
2014 (I – VIII)	29	20

Source: Ombudsman's Office.

In the framework of the ERF project, it is planned to complete the elaboration of methodology (guidelines) of monitoring the detention conditions and monitoring actual

[531] Immigration Law, Section 50.[7], para 3. So far, no NGO has been involved in the monitoring process, although the initial discussions on a possibility for cooperation have been made by the SBG, before the Immigration Law amendments, and the Ombudsman's Office has considered such cooperation after the approbation of the monitoring system. Ombudsman' s Office, Annual Report on the year 2011 by Ombudsman of the Republic of Latvia, Riga, 2012, p.62.

[532] Ombudsman of the Republic of Latvia, *Report of the Year 2013...*, p. 94.

[533] Interview with the representatives from the Ombudsman's Office on 27.08.2014.

[534] However, only about a half were actually reached in second half of 2011, due to fact that many removal decisions, adopted before the Immigration Law amendments, were not received by the Ombudsman's Office and also because several foreigners applied for asylum. Ibid.

[535] Ombudsman of the Republic of Latvia, *Report of the Year 2012...*, p.72.

[536] Interview with the representatives from the Ombudsman's Office on 27.08.2014.

removals.[537] The Ombudsman's Office has monitored the detention conditions in the detention centre, the temporary detention rooms in the premises of the SBG Riga Board and detention rooms in twelve border control points and other temporary detention facilities of the SBG and the State Police.[538] During the time period from July 2011 until August 2014, the Ombudsman's Office has conducted eight visits to the detention centre "Daugavpils", usually shortly before the beginning of heating season[539] or upon the foreigners' complaints on detention conditions.[540] Monitoring of actual removals has started at the end of 2013;[541] until October 2014, the Ombudsman's Office has conducted monitoring of five actual removals, including four removals by aircraft and one – by land.[542] The long destination flights have not been monitored so far, as the SBG normally escorts the returnees until the transit country, due to security reasons and because it is considered that no special control is needed after the transit.[543]

The cooperation with the SBG was assessed as good, and in 2014, the Agreement between the SBG and the Ombudsman's Office was signed in order to specify the practical aspects (responsible officials, the order for booking flight tickets, etc.) of cooperation in monitoring forced return.[544] However, insufficient funding has been one of the major obstacles for monitoring actual removals, which is conducted in the framework of the ERF projects.[545] Additionally, the long periods for obtaining a visa to some countries (above all, Russia) have made the presence of the Ombudsman's Office's staff on the board of the aircraft impossible in several removals; the lack of interpreters specializing in rarely used languages has also been a barrier in monitoring.[546] So far, the selection of cases for monitoring actual expulsion has been determined by the practical possibility for travel (availability of a visa, funding) as well as prioritising the removal of vulnerable groups (disabled persons, families with minors, etc.) and the situation of potential conflicts (a probability of aggressive behaviour of a foreigner).[547]

The return practitioners from the Ombudsman's Office have been particularly interested to obtain knowledge on the operational (return) stage and specific aspects of such operations, including return of vulnerable people, transfers by air, by sea, etc.; the experience of other states in monitoring forced return would be highly valuable.[548]

2.8.3. The mandate of the Ombudsman's Office and reporting

According to the Immigration Law, the monitors (the representatives of the Ombudsman or NGOs) are prohibited from interfering with the forced removal process during

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537 Ibid. The project "Elaborating the mechanism of monitoring forced return", implemented by the Ombudsman's Office during the time period from on July 2013 until July 2015 , is co-funded by the EU in the amount of EUR 93,600 (75% of the total funding).

538 Information obtained at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.

539 In 2011, there were complaints on the lack of heating in October. Interview with the representatives from the Ombudsman's Office on 27.08.2014.

540 Ibid.

541 Tralmaka I., Piespiedu kārtā faktiskās izraidīšanas procesa novērošana.

542 Ibid. See also: Piļāne I., „Monitoring the process of actual removal", presentation at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014. The Ombudsman's Office has monitored four removals to the following destinations: Moscow; London (UK as a transit state), Baku (two times) and Silene Border Control Point.

543 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

544 Ibid.

545 Information obtained from the Ombudsman's Office by e-mail on 27.11.2013.

546 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

547 Ibid.

548 Ibid.

the course of its observation.[549] However, the monitors should inform the SBG on information at their disposal regarding circumstances, which may influence the organisation or implementation of the forced removal process, as well as threaten personal safety or health.[550] The monitor has the right:

1. to obtain information from the relevant state institution, which is involved in the forced removal process of foreigners, regarding organisation of the return process of the foreigner and the measures performed;
2. to invite specialists (for example, lawyers, medical practitioners, interpreters) for provision of the necessary consultations to the foreigner subject to forced removal;
3. to organise assistance for improving living conditions, pastoral care, as well as the provision of other support.[551]

A monitor is obliged to inform without delay the official of the SBG, who is implementing the forced removal process for the relevant foreigner, regarding the planned activities in writing.[552]

Although the recommendations of the Ombudsman's Office are not binding, the monitor is authorised to ask the SBG to check information obtained during monitoring (e.g. alleged ill-treatment or the opinion of a medical practitioner, etc.) and to give its opinion.[553] After monitoring of a forced removal process, the monitor is requested to prepare a report on the shortcomings identified and recommendations for improvements to the Ministry of the Interior.[554] Two reports to the Ministry of the Interior have been prepared until August 2014.[555] The Ombudsman's Office has not published public reports on monitoring forced return. However, information on monitoring results was included into the 2013 Annual report of the Ombudsman as well as presented at some public events, with the participation of migration authorities, the SBG and NGOs.[556]

3. Conclusions

3.1. Compliance with standards – general evaluation

The transposition of the Return Directive in Latvia in 2011 has brought the national law in line with Return Directive and the international standards in several aspects. In particular, the Immigration Law explicitly provides for the preference of the voluntary return over the forced return and more concrete grounds for the adoption of a removal order as compared to the previous version of the Law. The Law has also extended the right to remedies and state-funded legal aid during the appeal of return decisions, including removal orders, which could not be contested before.

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549 Immigration Law, Section 50.[7], para 4.

550 Immigration Law, Section 50.[7], para 5.

551 Immigration Law, Section 50.[7], para 6.

552 Immigration Law, Section 50.[7], para 7.

553 For example, the Ombudsman's Office invited medical practitioners in a case when a person was put into a psychoneurological hospital, in order to check if he was fit for travel after therapy; in another case concerning the return of an old disabled unconscious person, a doctor provided recommendations on her transportation until the destination place. Interview with the representatives from the Ombudsman's Office on 27.08.2014.

554 Immigration Law, Section 50.[7], para 8.

555 Interview with the representatives from the Ombudsman's Office on 27.08.2014.

556 The seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014, and at the conference „Problematic aspects of the Return Directive", organised by Latvian Contact Point of the European Migration Network on 29.10.2014.

However, there are still several important shortcomings in the Law:

- The lack of suspensive effect of the return decisions' appeals to the court does not ensure protection of the principle of *non-refoulement*, as confirmed by the ECtHR case-law and also the right to be heard, set by the EU Charter. The national law also does not include an explicit clause that removal should be postponed if it would violate the principle of *non-refoulement*, as prescribed by Article 9(1a) of the Return Directive.
- There are no legal norms providing that coercive measures are used as a last resort and the principle of proportionality should be observed, as well as that removal should be carried out taking into account foreigner's dignity and physical integrity.
- The Immigration Law does not provide legalisation status of foreigners who cannot be returned, including situations when there are no valid travel documents. This shortcoming should be still addressed according to the Return Directive and also international obligations for ensuring minimum social guarantees.
- The law does not contain criteria for determining the duration of entry bans.

Despite the fact that the Immigration Law introduces several new legal provisions, the practice of their implementation is limited so far. While the IOM projects have facilitated the voluntary return to large extent, there are concerns on the sustainability of funding. The right to contest the return decisions is poorly implemented in practice and more should be done to ensure that all foreigners receive information about decisions and the right to remedies in a language, which they understand and have reasonable time to prepare an appeal. The authorities do not gather statistics on the duration of entry bans, which makes it difficult to evaluate the country's policy in this area.

3.2. Protection of vulnerable groups

Although several safeguards for the protection of vulnerable groups pending return have been included in the national law in line with the Return Directive, there are still several issues raising concerns in light of international and European standards. The Immigration Law includes neither a definition of vulnerable groups, nor specific measures for their protection. However, the provisions about the possibility to extend the period of voluntary return taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links, have been applied. There have also been cases when vulnerable persons were convoyed to their place of residence or a specialized institution in the country of destination, as provided by the Cabinet Regulation.

The lack of access to state-funded health services of irregular migrants, including minors, who are not detained, is a serious shortcoming, which needs to be addressed in order to fulfil the international obligations, including the CRC, and ICSEC and ESC. The lack of cost-free access of irregular migrant woman to ante and post natal medical care, as well as medical assistance during delivery is not in line with the CRC and the CEDAW.

The clause of the best interests of the child is included into the Protection of the Rights of the Child Law and the Immigration Law with regard to unaccompanied minors. Furthermore, the principle of the best interest of the child of all children in return/removal process is not established by the legal acts regulating the immigration field, as required by the Return Directive. The age assessment practice, although very small, still needs to be brought in line with recently established good practices and standards, in particular, due to the lack of publicity of the regulations on age assessment and safeguards for ensuring benefit of doubt, dignity of the child, his or her representation by a legal guardian and the right to appeal of the assessment's results. Although the Latvian legal acts do ensure access to basic (primary)

education to children pending return, the developing international standards request that also secondary education has to be made accessible to all children without any discrimination.

3.3. Detention and alternatives to detention

Although the grounds of detention of foreigners are more precisely formulated, some of them, such as considerations of national security, public order or safety and criminal offence of foreigner, raise concern, as it contradicts the recent case-law of the ECHR and the CJEU. The term of pre-court detention (ten days) is excessively long and is normally applied in cases when a person's identity is not ascertained; such a practice raises concerns about the risk of arbitrariness of detention and limits the possibility of a speedy judicial review. The justification of the application of the detention grounds by the SBG and the judges has been insufficient, as revealed by the analysed court decisions on detention. Despite the improvement of the conditions in the detention centre, systematic detention still cannot be considered as a good practice, as it limits the freedom of movement, which may be restricted only with necessity and proportionality test.

Although the alternatives to detention are introduced by the law and the number of the applied alternatives is convincingly increasing, there is no explicit obligation of the authorities first to consider the alternative measure before taking decision of detention in each individual case. This shortcoming is also reflected in practice, when the application of alternatives is not appropriately assessed and analysed often by the SBG and by the court. The lack of alternative place for residence and financial means of the foreigners is a major obstacle for application of the alternatives to detention. The alternatives to detention should be further searched, in particular due to the limited capacity of the detention centre "Daugavpils" and poor condition in the short-term detention facilities.

The limited availability of legal aid in the appeal of decisions on detention raises serious concerns with regard to the effective remedy, due to the short time for appeal of the decisions on detention, insufficient number of lawyers and lack of financial means of many foreigners to hire a lawyer. The written procedure of examination of appeals by the second instance court to the large extent limits the possibility to be heard and does not ensure the equality of arms – a basic principle of an effective remedy.

Although the number of detained minors has been low, the law still allows the detention of minors older than 14 years without any clause that minors shall be detained as a measure of last resort and for the shortest appropriate period of time, as provided by the Return Directive and the international standards.

3.4. Effective system of monitoring forced return

The transposition of the Return Directive has entitled the Ombudsman's Office to conduct independent forced return monitoring at all stages of return, including the actual expulsion. However, the system of monitoring forced return is still in the process of elaboration, and a lack of sustainability of funding for monitoring actual expulsion is the core challenge in terms of the effectiveness of monitoring.

4. Recommendations[557]

To the government:

1. Adopt the following amendments to the Immigration Law in order to bring it in line with the Return Directive and international standards:
   - Include a provision that return decision will not be taken and implemented if it would violate the principle of *non-refoulement*;
   - Ensure that the appeal of the return decisions to the court have suspensive effect;
   - Add the provision that coercive measures are used as a last resort and the principle of proportionality should be observed, as well as that removal should be carried out taking into account foreigner's dignity and physical integrity;
   - Include the definition of vulnerable persons and a reference of taking into account of such persons' special needs;
   - Review the grounds of detention and ensure that a foreigner is not detained solely for the considerations of national security, public order or safety;
   - Reduce the term of pre-court detention from ten days to 48 hours;
   - Include the provision that the authorities first consider the possibility to apply alternatives to detention when taking a decision on detention in each individual case;
   - Include a clause that that the detention of minors under 18 should be the measure of last resort and for the shortest possible period of time and taking into account the best interests of the child as a primary consideration;
   - Adopt a provision on the possibility to grant open places of residence for foreigners during the return procedure, particularly for families with children and vulnerable persons; assign funding for such places;
   - Provide access to free legal aid in the appeal of decisions on detention;
   - Extend the term of appeal of the decision on detention from 48 hours for up to ten working days;
   - Include a provision on the right to appeal a decision on alternatives to detention.
2. Adopt legal provisions ensuring that foreigners, who are not detained pending return/removal, have at least the same level of medical assistance as for asylum seekers, i.e., emergency care and primary medical care. Ensure that irregular migrant women pending return/removal have access to ante and post natal medical care, as well as medical assistance during delivery. Ensure that every irregular migrant children pending return/removal has access to medical assistance on the equal grounds as nationals.
3. Create an updated approach to age assessment, adopting necessary legal enactments, including therein the existing international and European standards.
4. Establish a clear procedure for submitting a complaint and appeal of a decision on placing in an isolation cell at the detention centre.
5. Provide sustainable funding for voluntary return projects by the IOM and ensure that there are no interruptions among the projects.
6. Provide sustainable funding of the Ombudsman's Office for monitoring a forced return.

[557] Some LCHR recommendations have been topical since 2011. See: LCHR, *Detention of asylum seekers and alternatives to detention in Latvia…*, pp.60-62.

To the State Border Guard:

- Ensure that the decisions on detention are taken only for the purpose of removal, on the basis of the removal decision;
- Provide sufficient justification of the grounds of detention and analyse opportunities to apply alternatives to detention in each individual case.

To Office of Citizenship and Migration Affairs:

- Gather statistics on the length of entry bans and their challenge.

To Daugavpils Court:

- Provide sufficient justification of the grounds of detention and analyse opportunities to apply alternatives to detention in each individual case.

To Latgale District Court:

- Examine the appeals in detention cases in an open procedure.

Annex I

Description of methodology

The report is based on the methodology elaborated by the project partners during the kick-off meeting in October 2013.

1. **Legal analysis.** The legal analysis addressed the existing legal acts, administrative practice and judicial practice in the country.[558] Current legal discussions on relevant topics also were taken into consideration. The LCHR made several information requests to responsible state authorities and other return practitioners (the SBG, the OCMA, the IOM, etc.), as well as to courts (the Administrative District Court, the Daugavpils Court and the Latgale Regional Court) with regard to the implementation of the Return Directive's provisions and available statistics.
2. **Monitoring visits.**[559] The monitoring visit to the detention centre "Daugavpils" was conducted on 11.06.2014, with additional interviews on 02.09.2014.[560] The methodology of monitoring visits, elaborated by the CPT, the Association for the Prevention of Torture and materials published by the LCHR were consulted and applied.[561] During the monitoring visits, interviews with two the SBG's delegated staff members (the Acting Head of the detention centre Inese Vārna and the Head of the Daugavpils Second Category Service of the SBG's Daugavpils Branch Juris Kusiņš),

[558] 12 anonymized return decisions provided by the OCMA and 21 decisions of the Daugavpils Court and the Latgale Regional Court (provided by the Daugavpils Court in anonimized way and obtained from the LCHR work) were analysed. Additionally information on the judicial practice was obtained from the Administrative District Court and through the data base of anonimized Latvian courts' decisions www.tiesas.lv.

[559] On 11.06.2014, the monitoring visit was conducted by the LCHR staff Svetlana Djačkova, Kristīne Laganovska and Jekaterina Kirjuhina. On 02.09.2014, the additional interviews with foreigners were conducted by Svetlana Djačkova and Ieva Vasiļevska.

[560] Due to the small number of detained foreigners on 11.06.2014, additioanl interviews with foreigners were made on 02.09.2014.

[561] Monitoring places of detention: a practical guide for NGOs, http://idcoalition.org/wp-content/uploads/2009/06/mpd_guide_ngo_en.pdf; Monitoring Immigration Detention - practical manual, http://www.apt.ch/en/resources/monitoring-immigration-detention-practical-manual/?cat=62 .

four foreigners in the return procedure and one asylum seeker were conducted. The interviews with foreigners were conducted in the atmosphere of confidentiality and informed consent. Additionally, observations of the premises of the detention centre were made.

3. **Interviews and other information.** Additional information was obtained through interviews with various stakeholders (three representatives from the Ombudsman's Office, a judge from Daugavpils Court, three judges from the Latgale Regional Court, a representative of the SGB and a representative of the OCMA), from the LCHR's case work for providing legal aid to foreigners and asylum seekers in 2009 – 2014, from the previous studies and reports by various institutions and the LCHR, as well as from public events, organised by the state authorities in the area of return in 2014.[562]

Annex II
List of core EU and international law documents

EU Law

1. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32005L0085
2. Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115
3. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.180.01.0096.01.ENG

EU policy documents

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2. Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents*, COM(2002) 564 final, 14 October 2002. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002DC0564
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4. European Commission, Communication from The Commission to the Council and the European Parliament on EU Return policy, Brussels, 28.03.2014, COM(2014) 199 final.

[562] Conference „Topical issues of the return procedure and legal aid for illegally-staying third country nationals during the return procedure in Latvia", organised by the LAA on 27.02.2014; Seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014; Conference „Problematic aspects of the Return Directive", organised by Latvian Contact Point of the European Migration Network on 29.10.2014.

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8. European Parliament, *Resolution on reducing health inequalities in the EU*, P7_TA(2011)0081, Brussels, 8 March 2011. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0081+0+DOC+XML+V0//EN
9. *The Stockholm Programme — An open and secure Europe serving and protecting citizens*, 2010/C 115/01. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.115.01.0001.01.ENG

UN documents

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3. Convention on the Rights of the Child, 1989 (GA Res 44/25). Available at http://www.ohchr.org/en/professionalinterest/pages/crc.aspx
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