



Ad-Hoc Query on compulsory execution of precept to leave

Requested by EE EMN NCP on 13th April 2011

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Responses from Austria, Belgium, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Slovak Republic, Slovenia, Sweden (14 in Total)

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1. Background Information

Estonia's Police and Border Guard Board are interested in finding out MS practices regarding compulsory execution of a precept to leave during judicial proceedings.

1. At what moment does the execution of the precept to leave become compulsory once the alien has been refused from international protection and/ or issuance of a residence permit and he or she has contested that refusal in court?
2. Is the compulsory execution of the precept to leave suspended automatically for the duration of the judicial proceedings or does the court decide on the suspension pending on the case and/ or content of the complaint etc?
3. If the court of first instance has not satisfied the complaint and the alien files an appeal to the court of second instance, then is the compulsory execution of the precept to leave carried out or whether the MS waits for the final judicial decision to take effect before compulsory execution of the precept to leave?

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2. Responses

		Wider Dissemination	
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Belgium	Yes	<p>Possibilities of appeal (questions 1, 2 and 3) Appeal against detention and/or against the decision for removal can be registered with two different authorities: within the normal court system or the administrative court system.</p> <p>A Appeal against detention A migrant in a closed centre can appeal against his detention with the following jurisdictions: <i>“Raadkamer/Chambre de Conseil” (i.e. local district court level)</i> This Court will verify whether the detention or its extension is lawful. The migrant will be released if the Court decides that not all legal provisions have been complied with. If, however, the Public Prosecutor or the Minister appeals against the decision of the “Raadkamer/Chambre de Conseil”, the migrant remains in detention.</p> <p><i>“Kamer van Inbeschuldigingstelling/Chambre des Mises en Accusation” (Court of Appeal level)</i> This Court handles the appeal (lodged by the Public Prosecutor, the Minister or the migrant) against the decision of the <i>local district court level</i>. This Court has to decide within 15 working days. If the court does not decide within this delay the migrant shall be released.</p> <p>B. Appeal against removal decisions Not only detained migrants can lodge an appeal against a removal decision, but every migrant can appeal against all types of negative decisions about his immigration status.</p> <p>“Aliens Litigation Council” (ALC) An appeal to acquire annulment of the removal decision or to suspend the effectuation of it can be lodged with this body (an administrative Court). Without the approval of the migrant no single action for a forced (i.e. physical) removal can be carried out during the appeal delay determined by Law, neither during the actual appeal procedure. Not all appeals suspend the removal, however. This means that a migrant can effectively be removed even while the appeal procedure is pending. Only appeals against specific decisions, defined by Law, will suspend the effective removal (e.g. appeals in case of asylum requests, family reunification between non-EU citizens with limited leave to remain, students, EU Citizen, Ministerial Decree of Removal, ...)</p> <p><i>Appeal in case of extreme urgency:</i> Should a migrant be involved in a procedure for removal, whereby the effectuation is near and if he has not yet filed a request to suspend the execution, he may request the suspension of this decision in “extreme urgent necessity” within 5 calendar days following the</p>

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			<p>notification of the decision. The aforementioned ALC has to decide within 72 hours. In the meantime the foreigner cannot be removed.</p> <p><i>The Council of State (highest administrative Court)</i> Since 2006 this highest administrative Court only deals with (still) pending procedures of annulment or procedures to suspend the effectuation of the removal. It is mainly concerned with “cassation” procedures on decisions of the ALC.</p> <p><i>The Complaints Committee</i> Detainees can file a claim with the Complaints Committee by virtue of the Royal Decree regulating the operation of the detention centres. A claim should always relate to these regulations.</p>
	Estonia	Yes	<p>1. The refusal from international protection and the precept to leave the country are made in one decision. The execution of the precept is to be carried out without delay depending on the case with or without the decision of Administrative Court. The submission of appeal does not postpone the execution of the precept to leave if the Administrative Court has not suspended it.</p> <p>2. The Administrative Court must decide upon suspension of the execution of the precept to leave.</p> <p>3. In case of appeal on the decision of refusal from issuing the residence permit and on the precept to leave, the execution of the precept to leave is not to be carried out until the first instance court decision has been made.</p>
	Finland	Yes	<p>1. Negative decision on international protection and decision on removal are made in same decision. Where a person has applied for a residence permit on the grounds of needing international asylum or temporary asylum, (s)he may not be removed before the decision of the Finnish Immigration Service on such removal has been legally enforced.</p> <p>In the event that the applicant has appealed against the decision to the Administrative Court of Helsinki, the authorities are obliged to await the decision of the Administrative Court. An application for leave to appeal to the Supreme Court will not prevent the implementation of the decision, unless expressly ordered otherwise by the Supreme Court. There are two exceptions to this rule. An asylum applicant may be removed on the handing down of such a ruling, provided that:</p> <ul style="list-style-type: none"> • (s)he can be removed to a country which, in accordance with the applicable statute pertaining to the definition of a responsible state, will be responsible for the handling of the asylum application • the application in question concerns a renewed asylum application which does not contain any new grounds. <p>An asylum applicant may be removed within eight days of notification of the decision (which period must include five working days), in the event that:</p> <ul style="list-style-type: none"> • the applicant has arrived from a safe country of refuge • the applicant has arrived from a safe country of origin • the application is considered to be without any apparent grounds.

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			<p>In any of the above cases, the Administrative Court of Helsinki may, on application, disallow or discontinue the implementation of a removal.</p> <p>2. The Administrative court decides upon the suspension.</p> <p>3. An application for leave to appeal to the Supreme Court will not prevent the implementation of the decision, unless expressly ordered otherwise by the Supreme Court.</p>
	Germany	Yes	<p>1. The compulsory execution of the precept to leave is to be carried out independently of judicial proceedings if the judicial proceedings do not have a suspensive effect (please see reply to question 2), unless the court decides upon a suspension of the execution of the precept to leave if an application to that effect has been submitted.</p> <p>2. Only in cases of simple refusal of an application filed for the recognition of refugee status and in the cases of the refugee status already granted being revoked or withdrawn, judicial proceedings will have a suspensive effect. For all other cases with a negative decision against an application for asylum (application for international protection), the suspensive effect of the judicial proceedings must be applied for at the court and adjudicated by the same court. In the case of a rejection for the residence title to be granted or extended, the suspensive effect of the right to appeal must be applied for at the court and adjudicated by the same court.</p> <p>3. If an appeal is lodged against the decision taken by the court of first instance, an application for the continuation of the suspensive effect must be filed with the competent court of second instance, as the compulsory execution of the precept to leave must be carried out after the conclusion of the judicial proceedings at the court of first instance if such a court adjudication has not been made.</p>
	Hungary	Yes	<p>1 – 2. According to the section 110 of Act CXL of 2004 on the General Rules of Administrative Proceedings and Service enforcement of the decision shall not be suspended upon lodging a request or petition for judicial review; however, the person entitled to invoke judicial proceedings may appeal in the request or petition that enforcement be suspended. The compulsory execution of the precept is not to leave suspended automatically for the proceedings.</p> <p>According to the Section 332 of the Act III. of 1952 on the Code of Civil Procedure if the statement of claim contains a request for suspension of the enforcement of the administrative decision to which it pertains, the court shall adopt a decision thereof within eight days of receipt of the relevant documents. Henceforward, the court may order the suspension of the enforcement of the administrative decision - before setting the date of the hearing - at any time upon request. In adopting a ruling for the suspension of enforcement the court shall take into consideration as to whether the original state can be restored following enforcement, or whether the damage caused by the lack of enforcement outweighs the loss the suspension of enforcement is likely to entail. The ruling ordering the suspension of enforcement may be contested separately. The court's ruling ordering the suspension of enforcement may be executed irrespective of any appeal.</p> <p>3. According to the Section 273 of the Act III. of 1952 on the Code of Civil Procedure a petition for review shall have no suspensory effect concerning the enforcement of the decision, however, the Legfelsőbb Bíróság has powers to suspend enforcement upon request, under special circumstances. In adopting a ruling for the suspension of enforcement the court shall - first and foremost - take into</p>

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			consideration as to whether the original state can be restored following enforcement, or whether the damage caused by the lack of enforcement outweighs the loss the suspension of enforcement is likely to entail. At the party's request the Legfelsőbb Bíróság shall appraise the real estate supervisory authority concerning the submission of the petition for review, provided that this is permitted by law.
	Latvia	Yes	<p>1. If the asylum seeker appeals the refusal in the court, he is still in the asylum procedure and he/she is not obliged to leave the Country. The decision on the expulsion of the alien shall be made only after a final court decision on rejection of asylum application. If a decision on refuse issuing other type of residence permit has made, alien is obligated to leave the country within time given in the same decision on refuse issuing other type of residence permit and appeal in court doesn't give rights to stay in the country and to breach the obligation to return. However, it should be mentioned that there are few exemptions set in Immigration Law when alien has rights to stay in the country during the proceedings, for example, if the issuing of temporary residence permit second time (after one year stay in Latvia) or the issuing of permanent residence permit due to marriage has been denied etc.</p> <p>2. As it is mentioned in the 1st response, the rights to reside in the country automatically results from the provisions of the Law and the court doesn't take a separate decision on the delay of duty to return.</p> <p>3. If an alien has the rights to stay in the country during proceedings in accordance with provisions of the Law, then it is related to all instances and he/she has rights to stay in the country while the final judicial decision has been made.</p>
	Lithuania	Yes	<p>1. In such cases, the alien has 14 days to apply to court. If he doesn't apply to the court, the return decision must be implemented. If he applies to the court:</p> <ol style="list-style-type: none"> a. when the alien has been refused from international protection or when his residence permit has been revoked – the return decision is suspended automatically; b. when the alien has been refused from the issue of a residence permit – the return decision is suspended if the court passes a ruling to suspend the implementation of the return decision. <p>2. When the implementation of the decision is suspended automatically, it is suspended for the duration of the judicial proceedings. If the decision is suspended by a ruling of the court, the court decides on the duration of such suspending on a case by case basis.</p> <p>3. MS waits for the final judicial decision to come into force. So in case the alien applies to the court of appeal, the return decision continues to be suspended.</p>
	Luxembourg	Yes	<p>1. In Luxembourg art. 19 (3) of the Law of 5 May 2006 on the right to asylum and complementary forms of protection (modified by the Law of 29 August 2008 on the free movement of persons and immigration) indicates that once the application for international protection is refused by the Minister and the precept to leave can be executed, the applicant has the right to file a legal recourse to the administrative tribunal (court of first instance). Nevertheless, according to art. 19 (3) the applicant must file the recourse against the decision and against the precept to leave simultaneously. The deadline is one month after the decision has been notified to the applicant. If the recourse against the precept of leave is filed separately from the recourse against the decision, the recourse must be declared inadmissible and the precept</p>

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			<p>of leave can be executed immediately.</p> <p>Once the recourse is filed it has a suspending effect over both decisions (art. 19 (3)). Even if the recourse is refused by the administrative tribunal, if the applicant files an appeal (art. 19 (4)) to the Administrative court, the execution of the precept of leave will be suspended.</p> <p>Once, the Administrative court refuses the appeal, art. 22 (1) indicates that the applicant can be expelled immediately from the territory (articles 124 (2), (3), (4), 125, 129, 130 and 131 of the Law of 29 August 2008 applies) if necessary. Nevertheless, if the compulsory execution of the precept of leave cannot be executed for circumstances or reasons that are not imputable to the applicant, the Ministry can give him a tolerance status to stay in the country until the situation disappears.</p> <p>In the case that the residences permit is refused, art 124 (1) of the law of 29 August 2008 foresees that the Ministry gives a prudential time to the applicant to leave the country. If he/she does not leave within the given period, he/she can be compelled to leave.</p> <p>2. As mentioned above, the compulsory execution of the precept to leave is suspended with the filing of the recourse to the Administrative tribunal (first instance court) and it will be suspended during the judicial proceedings (art. 19 (3)). The only case where that does not apply is in the case that the recourse filed against the compulsory execution was filed separately from the principal recourse. In this case, the compulsory execution can be executed because the recourse will be declared inadmissible.</p> <p>3. If the alien files an appeal against the first instance court judgment to the court of second instance (Administrative court), the compulsory execution of the precept to leave will be suspended during the duration of the proceedings (art. 19 (4)).</p>
	<p>Netherlands</p>	<p>Yes</p>	<p>When an asylum application is rejected, the asylumseeker has the obligation to leave the Netherlands before the end of the "departure period". In most cases this period is four weeks. When the asylumseeker makes an appeal (first instance) against the rejection of the application, in general the effect of the negative decision is suspended until the court's decision on the appeal.</p> <p>There are, however, four exceptions to this general rule. The effect of a negative decision on an asylum application is not suspended:</p> <ul style="list-style-type: none"> - when the asylum application is rejected within the general asylum procedure (the procedure of –maximum- eight days); - when the asylum application is rejected because it is an subsequent application without new elements or findings; - when the asylum application is rejected because another Member State is responsible for handling the application (Dublin Regulation); - when the applicant is detained (on the basis of article 6 of 59 of the Aliens Act 2000). <p>When the asylum seeker makes an appeal to the court of second instance, this appeal has no suspensive effect.</p> <p>In all cases where the appeals procedure has no expensive effect, the applicant is entitled to file for a provisional ruling by the court, in order to avoid removal during the appeal-procedure. As a general rule, the applicant may await the court's decision on the provisional rule in the Netherlands. This general rule also knows (five) exceptions. The court's decision may not be awaited in the Netherlands:</p> <ul style="list-style-type: none"> - when the provisional ruling is a subsequent provisional ruling; - when the asylum application is rejected because it is an subsequent application without new elements or findings; - when the public order or national security is at stake;

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			<p>- when a delay of the departure of the alien would cause a serious risk that the effectuation of the return would become impossible;</p> <p>- in the case of abuse of law.</p>
	Portugal	Yes	<p>1. Granting international protection, residence status and the removal from the country are completely separate processes:</p> <ol style="list-style-type: none"> The appeal from a refusal from international protection has suspensive effect till the final judicial decision. Voluntarily abandon notifications (for overstayers) could not be compulsory executed. Judicial reviews of a removal decision or refusals of residence status have a devolutive effect. <p>2. The execution of a removal order is not suspended by the judicial appeal (except if the court decides it in the framework of a special procedure for this proposes).</p>
	Slovak Republic	Yes	<p>1. The legal system of the Slovak Republic recognizes two types of expulsion:</p> <ul style="list-style-type: none"> Administrative expulsion as a decision of a police unit on termination of an alien's stay with determination of a time limit for his/her departure and a time period of a ban on his/her entry (Article 56 – 60 of the Act No. 48/2002 Coll. on the Stay of Aliens as amended). The police unit postpones enforcement of the decision on administrative expulsion if: <ol style="list-style-type: none"> the renewal of temporary residence permit or issuing subsequent permit is being decided on; if the police unit refuses the application or suspends the procedure, the decision on administrative expulsion shall be enforced, there are impediments to the expulsion; the decision on administrative expulsion is enforced after such impediments cease to exist, the police unit prolonged the period for exit under Article 57(3). <ul style="list-style-type: none"> Judicial expulsion as a court's decision (Article 65 of the Criminal Code of the Slovak Republic). <p>In both cases appeals can be examined in two stages of the administrative or judicial proceeding. As for the administrative expulsion, in most cases a police unit postpones the execution of the precept to leave. However, in special cases it can dismiss the postponement of the execution of the precept to leave (an alien cannot appeal against such a decision).</p> <p>2. A police unit must decide upon suspension of the execution of the precept to leave.</p> <p>3. In such a case the Slovak Republic waits for the final judicial decision to take effect before compulsory execution of the precept to leave. However, there are some exemptions (see 1).</p>
	Slovenia	Yes	<p>1. Obligation to leave the country – return decision shall be taken only after decision of not granting international protection is final. This means that applicant has the right to appeal. Return decision cannot be executed within the period in which appeal is applicable and in cases of appeal not until decision regarding appeal is made.</p> <p>2. Compulsory execution is suspended automatically until there is the right to appeal.</p>

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			3. Complaint to the court of second instance does not suspend execution of return decision.
	Sweden	Yes	<p>1. A decision of refusal of international protection in first instance, thus meaning that the applicant has to leave Sweden, is not possible to execute until the decision of refusal has entered into force (thus become legally binding). If there has been an appeal it means that the enforcement of the precept to leave have to wait until the appealed refusal has been legally binding.</p> <p>2. Yes, you cannot return a person refused international protection unless the refusal decision entered into force.</p> <p>3. See 1. and 2.</p>
