

## **Summary: order of the Supreme Administrative Court of 20 December 2018, II OZ 1239/18**

International protection – provisional interim measure - suspension of enforcement of a decision - foreigner's right to stay on the territory of Poland until the end of proceedings before the first instance court - administrative court proceedings - Procedural Directive 2013/32/EU

The competent administrative authority refused to grant the refugee status to a foreigner. The decision was appealed against by the foreigner to the administrative court; the foreigner also filed a motion to suspend its execution. The first instance court refused by the order to suspend the execution of the decision.

SAC, while granting the interlocutory appeal against this refusal, reminded that art. 61 (3) of the Act on proceedings before administrative courts justifies suspending the execution of a decision when there is a risk of causing significant damage or causing effects that are difficult to reverse. A decision refusing to grant international protection under the provisions of the Polish Act on Foreigners has two consequences: the foreigner's obligation to leave the territory of Poland within 30 days of the date of service of the decision (Article 299(6)(1)(b)) and the order to initiate proceedings to oblige the foreigner to return if the [foreigner] fails to comply with the obligation to leave Poland (Article 302(1)(16)). SAC stated that the interpretation of the Polish provisions concerning the suspension of the execution of a decision refusing to grant international protection must take into account the provisions of the Procedural Directive 2013/32/EU, in particular Article 46 (5), which obliges Member States to ensure that applicants for international protection have the right to stay in the territory of the Member State until the proceedings before the first instance court are concluded. In SAC's opinion, there is no doubt that the term "the outcome of the remedy" used in Article 46 (5) of the Directive refers to proceedings before the court of first instance, as confirmed by the judgment of the CJEU in case C-180/17 X and Y. According to the CJEU (paragraph 29 of the said judgment), in order to ensure that an appeal against a decision rejecting an application for international protection is fully effective, it is necessary, in particular, to suspend all the effects of the return decision during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal in case regarding international protection.

SAC noticed a threat to the foreigner's right to stay in Poland until the proceedings before the court of first instance are concluded in a situation where, during the court proceedings concerning the refusal to grant international protection, a decision on the obligation to return is issued - a decision which is subject to mandatory execution. Although, so far, the Polish administrative courts have assumed that the foreigner may apply for interim measure only in the court proceedings concerning the obligation to return, granting protection only at this stage may prove insufficient to guarantee the foreigner the right of residence within the territory of Poland until the proceedings before the court of first instance are concluded. First of all, if the decision on the foreigner's obligation to return is not challenged before the court, it is possible to execute the decision despite the ongoing court proceedings to grant international protection. Secondly, the applicant is deprived of any protection from the time of the decision to return is issued until the time the complaint before the administrative court is lodged. The period protection does not start running until the complaint has been lodged and an motion for suspension of execution of the challenged decision has been made. Thirdly, if the court proceedings on the obligation to return end with the final dismissal of the complaint before the conclusion of the legal proceedings on the granting of international protection, the foreigner shall no longer benefit from the protection granted in the return proceedings. SAC explained that the Act on Foreigners restricts suspension of enforcement of a decision only to the stage of administrative proceedings for granting international protection, or to the date of the court's decision on the motion to suspend the execution of the challenged return decision. Also, the provisions of the Law on proceedings before administrative courts do not extend temporary protection (interim measure) to other administrative court proceedings concerning the foreigner. Since the Polish law on granting international protection does not directly provide for the right of residence of a foreigner applying for international protection in the proceedings before the first instance court, the implementation of the obligation under Article 46(5) of Directive 2013/32 must take place by way of a court's decision to suspend the execution of the decision on refusal to grant the international protection. This means that until a courts decision dismissing a complaint concerning granting international protection becomes final, proceedings regarding return decision can not be initiated and conducted.