RETURN DIRECTIVE IN LAW AND PRACTICE: CENTRAL THEMES AND ISSUES

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RETURN DIRECTIVE IN LAW AND PRACTICE: CENTRAL THEMES AND ISSUES

Maris Kask

Thesis submitted for the fulfilment of the Degree of Doctor of Philosophy

2016
ABSTRACT

Irregular migration management finds itself high on the political agenda of the European Union with the aim to establish a clear, fair and transparent common return policy respecting fundamental rights. Thus, in 2008, the EU adopted the Return Directive that became a subject of vast criticism by academics as well as practitioners due to its controversial nature. The main object of critique has been claims that the Return Directive does not provide sufficient fundamental rights protection for irregular third-country nationals during the return procedure and is thus not in compliance with general principles of EU law.

The thesis aims to study the fundamental rights protection in the Return Directive in the light of the Charter of Fundamental Rights and general principles of EU law. While the concerns over the Return Directive’s compliance with the fundamental rights principles continue even now, they have demonstrated a slight shift, which provides reason to question whether the Directive really is as insufficient as initially feared. The thesis sets to examine whether the alleged fundamental rights shortcomings in the Return Directive can be salvaged by the application of the Charter and general principle of EU law. In carrying out the research the thesis aims to study whether the Return Directive entails any shortcomings to provide sufficient fundamental rights safeguards during the return procedure and whether these shortcomings appeared because of the flawed work of legislators or were caused by the Member States whilst applying the Return Directive.

The thesis is composed of five parts, beginning with the Introduction and ending with the Conclusions. The form of methodology adopted throughout is therefore doctrinal.
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for my papa

for his encouragement to always pursue my studies and for his eternal faith in me
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CEPS</td>
<td>Centre for European Policy Studies</td>
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<tr>
<td>CHARTER</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<tr>
<td>COMMISSION</td>
<td>European Commission</td>
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<tr>
<td>COUNCIL</td>
<td>Council of Ministers</td>
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<tr>
<td>CRIDHO</td>
<td>Interdisciplinary Research Cell in Human Rights</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECJ/CJEU/Court</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECTHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ECRE</td>
<td>European Council on Refugees and Exiles</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EP</td>
<td>European Parliament</td>
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<tr>
<td>EU/Union</td>
<td>European Union</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICI</td>
<td>International Court of Justice</td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IOM</td>
<td>International Organisation for Migration</td>
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<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
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<tr>
<td>LIBE</td>
<td>Civil Liberties, Justice and Home Affairs Committee of European Parliament</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OJ</td>
<td>Official Journal</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>TCN</td>
<td>Third-Country National</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UN GA</td>
<td>United Nations General Assembly</td>
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INTRODUCTION

Immigration, including irregular immigration, finds itself high on the political agenda of the European Union (EU). This is partly due to the geographical location of a region which attempts to open up internal borders to the free movement of persons, partly because of the historical links with other parts of the world and partly because of the perceived economic opportunities, social, civil and political, enjoyed by Europeans. Being a desirable region of destination for new comers, the EU has witnessed an increased inflow of immigrants including both the ones that arrive using lawful channels and those whose arrival or residence might be unauthorised. Irregular migration is often believed to constitute challenges for States. Thus, for more than thirty years the EU has struggled to find the most appropriate way, collectively and for individual Member States, to manage the perceived threats raised by irregular immigration.

Irregular immigration is a complex and diverse concept that requires careful clarification. It is important to recognise that there are many ways that a migrant can become irregular, either by entry, overstay, being smuggled or trafficked to the country, or by deliberately abusing the asylum system. A migrant’s status can also change rapidly overnight. Irregular migrants are often portrayed as undesirable and as the vanguard of a much larger migrant army waiting in the wings to invade and plunder the social welfare systems of affluent European nations. This negative image, exaggerated frequently in the media and fuelled by political and electoral agendas, inexplicably turns a blind eye to the simple fact that irregular immigrants are human beings possessing fundamental and inalienable rights.

1 According to IOM in 2014 alone there were a considerable proportion of more than 220,000 irregular border crossings to the EU and almost 442,000 documented instances of irregular overstay across the EU Member States. For further see ‘Flash Update: Illegal and Forced Migration to the EU’ of 10 July 2015, available at http://www.iom.int/sites/default/files/infographic/Irregular-and-Forced-Migration-to-the-EU-July10.pdf (last accessed 30 September 2016)

2 B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds) (2004), Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Martinus Nijhoff, Leiden/Boston, preface at x

1. The research question and methodology

The thesis was originally inspired mainly by the subject matter, that of irregular migration as a fascinating phenomenon and the fact that regulating irregular migration is not a simple exercise. As a sensitive topic, it requires a special approach that the States in general are not interested in taking. Amongst the generic resistance to irregular entries, immigration to Europe is associated with a large number of fears, particularly in the present state of play: that countries are losing control over their borders, that social systems are overstretched by unauthorised use, that indigenous workers are being pushed out of the labour market and that criminality is growing⁴. As a result, controlling irregular migration is one of the priorities of the European Union’s migration policy⁵ with the aim to establish a clear, fair and transparent common policy respecting fundamental rights. A common return policy in compliance with the aforementioned standards forms an important part of that.

Therefore, in 2008, the EU adopted a directive that established common return procedure throughout the Union (Return Directive)⁶. This directive became a subject of vast criticism before it was adopted and has been continuously scrutinised by academics as well as practitioners due to its controversial nature. The main object of critique has been claims that the Return Directive does not provide sufficient fundamental rights protection for irregular third-country nationals during

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the return procedure and is thus not in compliance with general principles of EU law. The critique and the controversial reputation of the Return Directive are primary factors that is under discussion in this thesis.

Adoption and application of the Return Directive has taken place at an interesting and dynamic time in EU law. First, it coincided with the time period when the Lisbon Treaty came into effect and amended the Union’s constitutional framework. The Lisbon Treaty strengthened the importance of fundamental rights in its legal order by giving them the status of general principles of EU law and giving the Charter of Fundamental Rights of the European Union (the Charter) a legally binding status. Second, the constitutional changes brought along by the Lisbon Treaty also triggered the references to the Charter and general principles of EU law in the judgments of the Court of Justice of the European Union (ECJ), which influenced the application of common Union immigration measures, including the Return Directive by the Member States. Finally, the increase of irregular migration into the EU has tested both the Union’s and Member States’ capacity to execute the return of irregularly staying third-country nationals, making the application of the Return Directive particularly pertinent.

The thesis aims to study the fundamental rights protection in the Return Directive in the light of the Charter. It is interesting to note that while the concerns over the Return Directive’s compliance with the fundamental rights principles continue even now, after eight years since its adoption and six years after expiry of its transposition deadline, they have demonstrated a slight shift, which provides reason to question whether the Directive really is as insufficient as initially feared. Thus, the thesis sets a research question: can the alleged fundamental rights shortcomings in the Return Directive be salvaged by the application of the Charter and general principle of EU law?

In finding the answer to the research question the thesis aims to examine whether the Return Directive entails any shortcomings to provide sufficient fundamental rights safeguards during the return procedure and whether these shortcomings appeared because of the flawed work of legislators or were caused by the Member
States whilst applying the Return Directive. In order to do that it is important to analyse the Return Directive in the broader context of common return policy and immigration *acquis* as well as discuss the nexus between the Directive as the EU legislative measure and domestic laws.

The thesis aims to provide a contribution to the existing discussion on the Return Directive. Albeit the Directive has been a subject of inquiry in many academic as well as practical publications, there is currently no work that reflects on the Return Directive mainly in the post-transposition phase. This thesis intends to provide a legal discussion of the Return Directive and analyse its controversial nature in the post-Lisbon context and thus contribute to the more general public policy debate surrounding the Return Directive.

In carrying out the research the following sources have been used: the legislation, the Court’s judgments and the Advocate Generals’ Opinions, documents from the EU institutions and the academic doctrine. Accordingly, the methodology adopted is doctrinal and focusses primarily on the practical elements involved. The context in which this thesis has been written is principally from an EU law perspective.

2. The format of the thesis

The thesis begins by introducing the migration regulation in the EU. It aims to provide a contextual framework to help understand the background and the content of the Return Directive in the following chapters. Chapter 1 covers the general framework of EU migration policy, providing a brief overview of the existing political, legislative and institutional dimensions and demonstrating how the EU obtained the competence to regulate migration focussing on the changes brought by the Lisbon Treaty. The overview will end with the discussion of general principles of migration regulation in the Union that not only form a constitutional basis in shaping the immigration law but also play an important role in the implementation and application of the legal rules. The purpose of this chapter is to highlight the central themes that underpin the development of migration law and essentially also the Return Directive.
Chapter 2 provides a brief overview of the general concepts of irregular migration and analyses the EU policy on return of irregularly staying third-country nationals, focusing on the Return Directive in the wider context of common immigration acquis. The Return Directive can be depicted as one of the focal instruments of the existing immigration acquis, tackling irregular migration and guaranteeing the successful return of irregularly staying third-country nationals. The chapter demonstrates how the Union has developed common migration policy on irregular migration and provides a brief encounter of the most relevant fundamental rights principles that the common return policy is required to respect and safeguard. In order to understand the disputes around the Return Directive, it is necessary to see the Directive in the wider EU policy context with other key legislative instruments.

Chapter 3 examines the adoption and negotiation process of the Return Directive. This is important in order to discuss whether the issues that have occurred with the Return Directive were caused in the legislative or the application phase. This Chapter provides a brief overview of the political and procedural backgrounds that were in place when the Commission submitted the proposal and during the negotiations of the Return Directive. The political backdrop as well as the procedural rules played an important role in its content and thus help to expose some of the reasons behind the overall outcome. The second part of the Chapter follows with a discussion on the negotiations between the Commission, the Council and the Parliament, focussing mainly on the opposing views and complex relationship of the Council and the Parliament. Since it was the first time for Parliament to participate in the legislative procedures as a co-legislator, the process was not as smooth as was hoped and was only exacerbated by unrealistically high expectations placed on the Parliament and politically salient topic of the Directive. The negotiations section will focus on five main issues that were both, the most cumbersome to regulate and also proved to be the most problematic in the implementation phase of the Directive, which generated many legal challenges.

Chapter 4 focusses on the Return Directive in practice discussing the issues and difficulties that appeared in the implementation phase of the Directive. This Chapter demonstrates the pivotal role of the Court of Justice in providing
clarification in interpretation as well as application of the provisions of the Directive. Some of the issues occurred due to the ambiguities in the wording of the Directive provisions and required unified interpretation by the ECJ. However, some of the much more complex matters occurred in the interaction between the Directive and domestic laws. These matters required the Court of Justice to provide guidance regarding the application of the Directive. The main purpose of this Chapter is to examine the shortcomings and gaps in law that appeared in the implementation phase of the Return Directive and whether the interpretation of the Court of Justice provided any assistance to overcome these shortcomings.

Chapter 5 focuses on the Return Directive in the context of fundamental rights. This Chapter aims to examine whether the Return Directive provisions are capable of upholding fundamental rights safeguards. This Chapter will analyse whether any of the fundamental rights shortcomings were caused in the legislative or rather in the implementation phase of the Return Directive and whether the Court’s interpretation has eased some of these concerns, consequently improving the Directive’s compliance with fundamental rights. As the Court’s jurisprudence in matters of the Return Directive evolved alongside the increasing role of the general principles of EU law and the Charter of Fundamental Rights, the key question is whether the Return Directive can, or will be, salvaged by the general principles of EU law and the application of the Charter.

The thesis will end with some short conclusions that address the research question, as well as offer some general comments on the Return Directive in the context of the general principles of EU law.
CHAPTER I MIGRATION REGULATION FRAMEWORK IN THE EU

Introduction

Immigration management is a common EU policy area that has gained increasing importance with the political and economic changes that happened in the 1990s after the fall of communism in Eastern Europe. The pivotal event triggered an increase of migrant inflows in the EU Member States where the existing immigration rules and regulations seemed to be too inefficient to respond to the demographic changes. Limited knowledge of this new phenomenon and the rapid increase of people seeking access to the Member States, led to the recognition of the need for more centralised rules and regulations to deal accurately with the new situation\(^7\). Additionally, it was observed\(^8\) that the immigrants arriving from Eastern Europe were no longer escaping from gross human rights violations, but were simply looking to improve their quality of life.

Furthermore, it was not only these newcomers knocking at the doors of the EU but the increased intra-Union movement and the pursuit for further EU integration, which called for the establishment of common policy. With the creation of the Union citizenship notion, the EU foresaw the launch of an area without internal frontiers, where the citizens of the Union could move, study and work freely. That kind of freedom could only be guaranteed by strengthening the controls at the external borders of the Union and limiting the access to this free movement area for only the selected people, that of the Union citizens alone.

EU migration law has been a fast-moving field despite being in the Union competence for just little under two decades. Compared to other fields of EU law, immigration and asylum have a number of specific characteristics that influence the development of common policy and law significantly. For instance, it is an area of

\(^7\) For further see the discussion on the effects of global changes on migration regulation in I. Atak and F. Crepeau (2014), ‘National security, terrorism and the securitization of migration’ in V. Chetail and C. Baulo (eds), Research Handbook on International Law and Migration, Edward Elgar, UK USA, pp 94-95

\(^8\) S. S. Juss (2006), International Migration and Global Justice, Ashgate, p 7
shared competence\(^9\) where the Union can only act together with the Member States. Moreover, the Member States retain a large discretion over immigration control, conditions of admission to their national territories, and are fully responsible for the maintenance of law and order and the safeguarding of internal security\(^10\). Additionally, it is an area of ‘differentiation’ with UK, Ireland and Denmark not fully participating in the common immigration law and policies. But most importantly, it is an area that is still strongly influenced by ‘inter-governmentality’ and although the Lisbon Treaty brought important institutional changes, the basis of the common immigration and asylum law still lies in the political programmes that lead to institutional and legislative battles\(^11\).

The chapter aims to provide a necessary contextual framework that should help to understand the background and the content of the Return Directive in the following chapters. The two central themes in migration regulation that belongs under the title of Area of Freedom, Security and Justice (AFSJ)\(^12\) and concerns legal development in the field generically called Justice and Home Affairs (JHA) law, have witnessed the institutional debate over the competences on one hand and striking a fair balance between effectiveness and general principles of EU law. Both themes have been severely affected by the enforcement of the Lisbon Treaty.

The chapter begins with an examination of the general framework of EU migration policy giving a brief overview of the existing political, legislative and institutional dimensions of AFSJ. The chapter will then move on to demonstrate how the EU obtained the competence to regulate migration and with the aim to establish the competence changes brought by the Lisbon Treaty. The Chapter will end with an overview of the general principles of EU law that are the basis of common Union laws and also play an important role in the implementation and application of the legislative rules. The purpose of this chapter is to highlight the central themes that


\(^10\) Article 72 TFEU


\(^12\) See Title V of TFEU
underpin the development of common immigration *acquis*, including the Return Directive.

1. **Migration regulation in the EU: general framework**

1.1. **General framework: contextual layers**

EU migration regulation is directly linked with the process of EU integration and the continuous re-definition of the EU’s external borders and identity along with the enlargement processes\(^\text{13}\). Moreover, the establishment of the internal market area comprising a space without internal frontiers as set out in the Single European Act\(^\text{14}\) resulted in reconsideration and reconceptualization of the traditional visions and divisions between the national and supranational\(^\text{15}\). Some of the powers, such as controlling one’s borders that were exclusively linked to execution of State sovereignty entered now into the supranational realm of the EU and resulted in the pursuit for a common Union-wide immigration *acquis*. Hence, the EU immigration policy is a complex set of rules of national and EU legislation; as well as containing elements and principles from international law and bilateral treaties, it also operates in the framework of several human rights instruments.

In principle, the framework of the common EU migration regulation has three major contextual layers, political, legislative and institutional, that are all interdependent and play an important role. The political side can be summed up as the driving force that sets the central theme and political impetus for the common EU immigration *acquis*. It consists of the policy declarations adopted by the European Council. Within the principles set in policy declarations, a set of legally binding legislative instruments have been adopted that form the legislative context to the EU migration regulation and that is usually referred to as the common *acquis*. Those legislative instruments have been co-adopted by the Council of the European Union (the Council) and now also the European Parliament (Parliament) on the proposal of

\(^{13}\) A. Górny and P. Ruspini (eds) (2004), *Migration in the New Europe: East-West Revisited*, Palgrave, Basingstoke

\(^{14}\) Treaties establishing the European Communities, Single European Act, signed 17 February 1986, entered into force 1 July 1987, OJ L 169/1

the European Commission (Commission) that make for the main institutional players in the field. The Court of Justice of the European Union (ECJ) provides for the interpretation of the adopted legislative measures upon preliminary reference from national courts.

1.2. Political and legislative framework

For the purpose of this thesis it can be summarised that EU immigration policy consists mainly of three themes of rules. The first area concerns the free movement of EU citizens and their family members irrespective of their nationality. The second area is the agreements concluded between the EU and countries outside the Union on issues relating to migration to and from those countries. The third area is the set of rules and regulations on migration and asylum of nationals of non-EU Member States, i.e. third-country nationals. The common immigration and asylum policy covers the aspects from external and internal border management to the admission and stay of immigrants and to returning the irregular immigrants from the Union territory. All of the themes are intertwined and form the basis for common Union immigration policy.

The legislative framework of the common EU immigration system is based on the Treaties that can be seen as the constitutional texts of the Union and thus form a solid basis for the following policy declarations and legislative work. The Treaties provide the Union with the competence to create an Area of Freedom, Security and

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16 According to Article 77 of the Treaty on the Functioning of the European Union (TFEU), the Union is competent to adopt rules relating to the absence of internal border controls, the management of external borders and short stay visa policy.

17 Depending on the countries, these agreements may be partnership agreements, association agreements with candidate Member States, visa facilitation agreements and agreements on the application of the rules on free movement or parts of the Schengen acquis to nationals of EEA countries such as Iceland, Norway and Liechtenstein. For further see, K. Groenendijk (2014), ‘Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court’s Approach’ in European Journal of Migration and Law, Vol 16 No 3, pp 313-335, at p 315

18 Article 79 TFEU defines the areas of immigration policy in which the EU can act. The EU may adopt rules relating to the conditions of entry and residence, the definition of the rights of third country nationals residing legally, illegal immigration and unauthorised residence, and combating human trafficking.

Justice (AFSJ), which includes policing, judicial cooperation in criminal and civil matters, border controls, immigration, asylum and related fields.

The legislative framework of the AFSJ is based on the guidelines and impetus enshrined in the policy declarations setting the strategic agenda. The European Council adopts five-year political programmes that encompass wider objectives and priorities of developing the EU’s AFSJ, including immigration policy and law and the timetables for their accomplishment. The policy declarations thus set the general agenda and notion for controlling the peoples’ movement into and within the area of freedom, security and justice. Thus far there have been three five year policy programmes: Tampere Programme 1999-2004; the Hague Programme 2004-2009 and Stockholm Programme 2009-2014. After the Stockholm Programme the European Council has not adopted another policy declaration, however it has set some general political guidelines, foreseeing the next steps in justice and home affairs matters. Unsurprisingly, the policy programmes have been vulnerable and strongly responsive to several general political demands and upheavals in Europe shifting from ambitious human rights expectations, to security-based themes, to integrating rights with security.

Based on the priorities set in the policy programmes the Commission initiates and the Council and the Parliament co-adopt the legislative instruments. Since

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20 Originally established in the Treaty of Amsterdam, signed at Amsterdam 2 October 1997, OJ C 326/01
21 Article 68 TFEU
22 Presidency Conclusions of the Tampere European Council of 15-16 October 1999 (The Tampere Programme)
24 European Council, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, 17024/09, OJ C 115/4
25 European Council, Presidency Conclusions of 26-27 June 2014, Brussels 27 June 2014, EUCO 79/14; Presidency Conclusion of 25-26 June 2015, Brussels 26 June 2015, EUCO 22/15; Presidency Conclusion of 15 October 2015, Brussels 16 October 2015, EUCO 26/15; Presidency Conclusion of 17-18 December 2015, Brussels 18 December 2015, EUCO 28/15; Presidency Conclusion of 18-19 February 2016, Brussels 19 February 2016, EUCO 1/16; Presidency Conclusion of 17-18 March 2016, Brussels 18 March 2016, EUCO 12/1/16 REV 1. However, it should be noted here that the latest European Council declarations have been aimed at the current migration crises that is an ongoing issue at the time of writing.
26 The Tampere Programme 1999
27 The Hague Programme 2004
28 The Stockholm Programme 2009
regulation of immigration belongs in the field of shared competence\textsuperscript{29}, the Union must operate within the principles of subsidiarity and proportionality\textsuperscript{30} applying to the use of the competences. More precisely, these principles govern the choice of when (subsidiarity) and how (proportionality) the existing competence can be exploited by the European institutions\textsuperscript{31}. This leaves the Member States free to act to the extent that the EU has not acted, but it is open to the EU to harmonise the field as much as it wishes\textsuperscript{32}.

Under the principles established by the Court of Justice of the European Union (ECJ) the Union has its own legal order\textsuperscript{33}, which forms an integral part of the legal systems of the Member States, due to which the Union law is not only legally binding but also prevails over national laws\textsuperscript{34}. Accordingly, the Member States and national courts have the obligation to implement and apply the legislative rules adopted by the Council and the Parliament.

1.3. Institutional framework

The common immigration policy of the EU has three aims that are likely to have certain tensions between them\textsuperscript{35}, which then tend to prolong the legislative procedure. One of the aims of the AFSJ is to frame a common policy on asylum, immigration and external border control, which is fair towards third-country nationals, whereas the other is the efficient management of migration flows and combat against irregular immigration\textsuperscript{36}. The latter, which forms the basis for legislative framework of irregular immigration, is a complex matter and is strongly linked with other areas of immigration law, such as visas and border controls, asylum rules and application of criminal law. Irregular migration regulation is intertwined also with concerns about the fundamental rights of the persons

\textsuperscript{29} Article 4(2) TFEU
\textsuperscript{30} Article 69 TFEU. Also see Article 5 TEU, Article 2(2) TFEU and Article 1 of Protocol 2 to TFEU
\textsuperscript{32} Article 2(2) TFEU
\textsuperscript{33} ECJ C-26/62, \textit{Van Gend en Loos}, judgment of 5 February 1963, ECR 1963, 1
\textsuperscript{34} ECJ C-6/64, \textit{Costa v ENEL}, judgment of 15 July 1964, ECR 1964, 585
\textsuperscript{35} For further see the discussion in N. Walker (2004), ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’ in N. Walker (ed), \textit{Europe’s Are of Freedom, Security and Justice}, Academy of European Law, European University Institute, Oxford University Press, pp 10-28
\textsuperscript{36} Originally Article 61(b) TEC, now Articles 67(2) and 79(1) TFEU
affected by such regulations. Thus, development of common Union policy to combat irregular immigration has been complicated by the conceptual matters of trying to find the balance between protecting EU borders and safeguarding fundamental rights, as well as competence issues between the Member States and the Union, and lastly by institutional struggles within the EU itself. All these issues have played a significant role in the evolution of EU migration regulation and essentially also shaped the existing legislative framework of irregular migration.

1.4. Territorial scope

Area of Freedom, Security and Justice as established in Title V of the Lisbon Treaty is also subject to complicated territorial scope that distinguishes the matters of Justice and Home Affairs from most of the rest of EU law. Namely, the area comprises not only of immigration and asylum matters but also criminal law cooperation and policing provisions. The Schengen area has been developed separately and outside the realm of EU law and hence comprises a different territorial scope, yet overlaps and is intertwined with migration regulation in the Union. The Schengen Area comprises four countries outside the EU: Norway, Iceland, Switzerland and Liechtenstein. At the same time the UK and Ireland do not take part in the Schengen Area and maintain their border controls.

Moreover, the AFSJ provides for a certain flexibility approach with the opportunity to opt-in or opt-out from the measures. Currently, three Member States have negotiated particular approaches to the AFSJ project. With the adoption of the Lisbon Treaty the UK and Ireland obtained the possibility to opt-out of a measure amending an act to which they had already opted in, Denmark maintains its complete opt-out in the matters of Justice and Home Affairs, as provided in the

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37 For more detailed overview of Schengen acquis and how it pertains to immigration regulation see the discussion in Chapter II.
38 In addition, new Member States must first take necessary measures before they are allowed to abolish their border controls. For further see the discussion in P. Boeles, M. den Heijer, G Lodder and K. Wouters (2014), European Migration Law, 2nd edition, Intersentia, Cambridge-Antwerp-Portland, p 377
39 The Council can, under certain conditions, require them to stop participating in the existing measure if they fail to opt in to the amending measure. See Protocols 19 and 21 TEU and TFEU
40 Since the entry into force of the Treaty of Lisbon there have been several attempts to put the question of complete opt-out on referendum in Denmark but thus far all the attempts have failed due to the lack of support in the national Parliament. See S. Peers (2008), Changing the institutional
Lisbon Treaty and Protocols No 21\textsuperscript{41} and No 22\textsuperscript{42} respectively. If desired, the said Member States can later opt-in under the conditions set out in the Protocol. The consequence of any opt-out by a Member State is that the ECJ will not have to monitor action by that Member State in that field\textsuperscript{43}. In addition, the representatives of the UK, Ireland and Denmark, respectively do not participate in the Council as regards to the relevant measure. However, the members of the European Parliament nevertheless vote on the relevant measures during the legislative proceedings in the Parliament.\textsuperscript{44}

1.5. Personal scope

To determine the personal scope of EU immigration law it is necessary to establish as to whom exactly is covered by the legislation. In general, in national legislation the distinction is drawn between the concepts of ‘us’ and ‘them’. The term ‘us’ can refer to the citizens of a State and ‘them’ to an alien or an immigrant. In the EU, because of the multifaceted nature of EU immigration policy, the distinction is not so clear cut. The term ‘us’ as well as the ‘them’ is difficult to define as on one hand the notion of ‘citizenship’ can encompass more people than just the EU citizens; on the other hand, because in EU law there is no commonly accepted generic or general legal concept of ‘migrant’, the concept of ‘them’ has become a residual category comprising of everyone that is simply not covered by the protective realm of ‘citizenship’.

\textsuperscript{41} Treaty on the Functioning of the European Union, Protocol (No 21) On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ 2007/C 306/01

\textsuperscript{42} Treaty on the Functioning of the European Union, Protocol (No 22) On the Position of Denmark, OJ 2007/C 306/01


\textsuperscript{44} S. Peers (2011), \textit{EU Justice and Home Affairs Law}, 3rd edition, Oxford University Press, p 74
The Treaty of Maastricht stipulated the notion of the EU citizenship as ‘every person holding the nationality of a Member State. Citizenship of the Union supplements national citizenship without replacing it’\textsuperscript{45}. Thus, the EU draws the line between the EU citizens and everyone from outside of these areas. However, as the following chapters will show, ‘us’ can mean EU citizens and their family members in the meaning of the Citizens’ Rights Directive\textsuperscript{46}; it can encompass some of the EU citizens\textsuperscript{47} and EEA citizens\textsuperscript{48} within the realm of the Schengen Area; or it can simply refer to third-country nationals that have a legal basis for entering and residing in the EU\textsuperscript{49}.

Hence, a generic way to distinguish between ‘us’ and ‘them’ is by to determine those who have the ‘right of abode’\textsuperscript{50} in the EU: all citizens of the Member States, but including EEA citizens\textsuperscript{51}, and those who do not have this right. Those without the right of abode have in the past been largely the same as ‘Persons Subject to Immigration Control,’ meaning that they need permission to enter or to remain in the European Union. Commonly they are called ‘third-country nationals’. The formal definition of a third-country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty Establishing the European Community (now Article 20(1) of The Lisbon Treaty)\textsuperscript{52}.

\textsuperscript{45} Article 9, TEU
\textsuperscript{46} The Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/78
\textsuperscript{47} For the special cases regarding U.K, Ireland and Denmark regarding the matters of EU Justice and Home Affairs please see further in this and the following chapter.
\textsuperscript{48} Citizens of Norway, Iceland and Liechtenstein following the European Economic Area Agreement signed 2 May 1992, OJ 1994 L 1
\textsuperscript{49} For more detailed analysis on the concepts of ‘us’ and ‘others’ see D Acosta (2011), The Long-Term Residence Status as a Subsidiary Form of EU Citizenship An Analysis of Directive 2003/109, Brill, Leiden, Boston, pp 18-31
\textsuperscript{50} The ‘right of abode’ means an individual’s freedom from immigration control in a particular country. In this case it entails the freedom of immigration control for EU and EEC citizens in the Schengen Visa zone countries. A person who has the ‘right of abode’ in a country does not need permission from the government to enter the country and can live and work there without restrictions.
\textsuperscript{51} EEA citizens refers to the citizens of States that are not Member States of the EU but are part of the European Economic Area (EEA) and hence fully enjoy the right to free movement. These countries include Iceland, Liechtenstein and Norway. Switzerland is not part of the EEA but is treated as an EEA country for certain benefits, including free movement of people. See European Economic Area Agreement signed 2 May 1992, OJ 1994 L 1
In short, the personal scope of the EU immigration *acquis* can be determined as to the rules and regulations pertinent to third-country nationals without the right to abode in the EU.

2. Establishing EU institutional framework and competences

2.1. Competence and institutional dilemmas

Development of common EU immigration policy has been fundamentally accompanied by constant competence struggles. Furthermore, supranational migration regulation in the EU inevitably enters into the sovereign realm of the Member States and links to the matters of membership and identity. In the past twenty years the EU has seen four major revisions and one failed attempt to its constitutional foundation that forms the basis for EU competences. Thus, evolution of the Union competence and common EU immigration and asylum law, can be divided into three phases: the pre-Amsterdam phase, where there was little activity by the European Community on migration issues and the common matters were being regulated mostly on the intergovernmental level; the post-Amsterdam phase witnessed the most active period and several legislative and political developments, including the adoption of the so-called Return Directive in 2008; the third phase commenced after the entry into force of the Lisbon Treaty on 1 December 2009, which brought the matters of immigration and asylum law under the Union competence and faced the implementation issues of many measures that had been adopted previously.

The competence struggle has also been exacerbated by the conceptual clashes between the main EU institutions that are involved in the law making and implementation in the Union. All the main legislative players, the Parliament, Commission and the Council, have demonstrated different views towards immigration matters that often contradicted one another. The Commission has

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55 The failure of the Constitutional Treaty in 2004
traditionally been seen as a proactive actor proposing legislative measures that in general tend to favour immigration and hence received fuller support from the Parliament known for the promotion of human rights. The Council, being often influenced by the policy interests of the Country of Presidency and interests of single Member States, has demonstrated restrictive views towards immigration, thus opposing to the position of the Commission and the Parliament. The position of the Court of Justice has also shown some inconsistencies and peculiarities. The Court had a very restricted competence in immigration matters and thus its earlier jurisprudence has only had some effect on immigration matters. However, with the Lisbon Treaty the Court gained extensive competence and can now fully review the matters of JHA under preliminary reference from national courts at all levels.

Considering all the above, it is no surprise the development of AFSJ has taken place in such a cumulative manner. Immigration touches upon powers that are traditionally related to the sovereignty of Member States and it is understandable that for the Union to gain the competence, albeit shared with the Member States, it has not been an organic process, as will be seen in the following section.

2.2. Pre-Amsterdam framework

During its first years of existence after the adoption of the Rome Treaty, the European Community made only a marginal attempt to deal with immigration. Migratory movements from outside the European Community were strictly governed by Member States’ legislation and the EC had the competence to

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57 D. Acosta (2011), op cit., 49, p 11
58 G. Papagianni (2006), op cit., 56, p 252
59 D. Acosta (2011), op cit., 49, p 15
62 D. Acosta (2011), op cit., 49, p 47
regulate only the movements of specific categories of EC nationals, such as European workers and later their family members.

However, up until the Amsterdam Treaty, the EU immigration and asylum law has been predominantly regulated by ad hoc inter-governmental cooperation as the Member States were not willing to accept the Commission’s argument on adopting common policies and actions on the Community level. The intergovernmental approach resulted in occasional community based systems and agreements such as the Schengen Agreement in 1985 and the Dublin Convention in 1990, the latter only coming into force in 1997. However, the majority of the immigration and asylum law emerged from purely informal or quasi-binding sources of law, such as resolutions of immigration ministers and inter-governmental arrangements and agreements, as well as implementing measures.

Influenced by the political changes in Central and Eastern Europe and the shift it brought in the immigration flows to Western Europe, the Member States realised they could no longer avoid the discussion as to which authorities should be competent to take measures in the area of immigration, as there was clearly a need for joint action. Thus, the Treaty on European Union (TEU), which entered into force on 1 November 1993, introduced an entirely different structure and widened

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64 D. Acosta (2011), op cit., 49, p 48
65 Article 3(c) of the Treaty of Rome 1957 envisaged ‘the abolition of obstacles...to freedom of movement’.
66 Regulation EEC No 15/61, regulation EEC No 38/64 and Council Regulation EEC No 1612/68 on freedom of movement for workers within the Community
67 European Commission Decision of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ 1985 L 217/25.
68 T.E. Lagrand (2010), Immigration law and policy: the EU acquis and its impact on the Turkish legal order, Erasmus Universiteit Rotterdam, Rotterdam, p 22. The Commission Decision envisaged common positions to be reached by facilitating the exchange of information and views in these areas however was declared void by the ECJ on the grounds that the Commission lacked competence in matters relating to the cultural integration of third-country national workers. See Joined Cases C-281, 283, 284, 285 and 287/85 [1987], ECR 03203
70 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 December 2000, OJ C 254/1 (1997)
72 Also referred to as the Maastricht Treaty, signed on 7 February 1992. It heralded the creation of the European Union, extended the Community’s powers and changed its name from European Economic Community to European Community.
the competences of the Community by both, broadening the scope of already existing competences and bringing new areas within the sphere of Community competence and introducing the Council as the main institutional player in the field.

The Treaty of Maastricht was the first legislative instrument stipulating immigration as a matter of common policy interest for achieving the objectives of the Union, in particular the free movement of persons and established immigration as a common legislative, political and institutional concern. Because the Treaty did not solve the competence issues and left the matters concerning third-country nationals only marginal, the Maastricht period did not see many political or legal developments under the Justice and Home Affairs. Main advances regarding the regulation of illegal immigration were made rather via soft law instruments on the inter-governmental level and involved one key player, that of the Member States’ immigration ministers and later consequently, the Council. However, the Maastricht period witnessed illegal immigration management taking an important role in the Community policy albeit providing very limited development to establish the common rules and regulation combating illegal immigration per se. The only ‘hard law’ on illegal entry was the Schengen Convention that is not an actual return measure per se. Even though the framework of the Justice and Home Affairs was not yet complicated by multiple players or ambitious legislative agenda the unresolved competence matters hindered potential hard law developments in the field.

2.3. Post-Amsterdam framework: common immigration policy

It was not until 1997 that the Union’s competence to regulate immigration was stipulated, however, not ideally or entirely in the Treaty of Amsterdam, which launched a new goal to maintain and develop the Union as an Area of Freedom, Security and Justice. Thus, the first important change that the Amsterdam Treaty brought forth is the ending of the exclusive competence of the Member States to

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73 Article K.1, Title VI Provisions on Cooperation in the Fields of Justice and Home Affairs, Treaty of Maastricht 1992, OJEC C244/97
74 Article K.1 of TEU
75 The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999, OJ 1997 C 340.
76 Article 2, of the Treaty of Amsterdam
decide on the entry of third-country nationals. However, the competence issues were not yet entirely resolved.

The Union power to legislate in immigration matters comprised of measures concerning visa formats as well as common conditions and procedures issuing them and standard procedures on external and internal border checks and the free movement of third-country nationals for a period up to three months. However, the competence regarding the illegal migration and illegal residence was worded in an overly broad manner, stipulating the Council’s obligation to adopt measures on immigration policy within the following areas: “illegal immigration and illegal residence, including repatriation of illegal residents.”

The Treaty brought along a more complex institutional dimension, introducing the European Parliament, Commission and the Court as the new players, although in limited terms. During the five year transitional period the Council had to act unanimously after consulting the European Parliament. Moreover, the Court was given the competence to provide for preliminary rulings, obliging final courts to refer if it was necessary to give judgments, leaving the Commission, the Council and the Member States the power to send requests for interpretation. The requirement of unanimity significantly slowed down the legislative process and created unnecessary tensions between the EU institutions, since the initiative of the Commission was curtailed and the Parliament was forced into the subsidiary role of a mere consultant. All these procedural obstacles placed the competence in a ‘limbo’ between the ‘inter-governmentalism’ and the Community method.

Additionally, immigration and asylum matters were subject to a transitional period of five years in which the ‘Community method’ of a strong role of the Commission, Parliament, Court of Justice and qualified majority voting in the Council, was set aside. During this period, although the intergovernmental method was being

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77 D. Acosta (2011), op cit., 49, p 54
78 Article 73j of the Treaty of Amsterdam
79 Article 73k of the Treaty of Amsterdam
80 Article 73k of the Treaty of Amsterdam
81 Article 73p paragraph 3 of the Treaty of Amsterdam
82 For further and more detailed analysis on the competence matters see G. Papagianni (2006), op cit., 56, pp 42-48
abolished *de jure*, it still applied *de facto*. The issues of the decision making process were thus not solved until 2004, when the Council adopted a decision applying co-decision and qualified majority voting to all Title IV measures, with the exception of legal immigration, as of 1 January 2005. The aforementioned development not only increased the democratic legitimacy of the European Parliament, but abolishing unanimous voting and also sped up the legislative work process. However, leaving the decision-making procedures in the matters of legal migration subject to unanimity in the Council and mere consultation of the Parliament, resulted in quite modest legislative developments in this specific area and facilitated the Union interests in tackling the illegal immigration, as well as affecting strongly the nature of the pertinent legal instruments. Nevertheless, the Protocols stipulating the opt-outs of three Member States, the United Kingdom, Ireland and Denmark, as well as curtailment of the Union’s powers in immigration matters, remained in force.

2.4. Post-Lisbon framework

The Treaty of Lisbon entered into force on 1 December 2009 and introduced far-reaching consequences in the Area of Freedom, Security and Justice, putting an end to the so-called ‘pillar structure’ and bringing all the matters in the field of immigration and asylum together. Now all aspects of justice and home affairs are gathered under the Title V of the TFEU. This means that almost all justice and home affairs areas are subjected to the Union decision-making method. Thus, the Treaty of Lisbon significantly widened the competence of the EU institutions in the field of immigration and asylum and accordingly empowers it to legislate for ‘uniform

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84 Article 73q of the Treaty of Amsterdam
85 Article 73k of the Treaty of Amsterdam provided that “measures adopted by the Council pursuant to point 3 and 4 [of Article 63 TEC] shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements”.
86 The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (TFEU) was signed on 13 December 2007, OJ 2007/C 306/01
standards’, as opposed to the ‘minimum standards’ provided for in the Amsterdam Treaty\(^7\).

The Treaty of Lisbon confirmed the objective of a common policy in the area of immigration and introduced co-decision and qualified majority on legal migration and a new legal base for promoting integration measures\(^8\). At present the ordinary legislative procedure applies to both illegal and legal immigration policies. Only in the areas of identity cards, passports, residence permits and other documents necessary for the free movement of persons remain subject to the unanimity rule\(^9\). The role of the European Parliament has been extended and the Parliament is now fully involved in the decision-making process, being the co-decider with the Council\(^90\).

Moreover, The Court of Justice has eventually received full jurisdiction in respect to almost all matters of Justice and Home Affairs\(^91\), as the previous restrictions on its role in the field of immigration and asylum were abolished, which were laid down in the previous treaties. The TFEU provided the Court with the jurisdiction to rule on this area as it does for ordinary law\(^92\).

By bringing the area of freedom, security and justice under shared competence, the Lisbon Treaty extended the Union powers in the field of immigration and asylum. Sharing the competence to legislate in the area with Member States, the EU institutions are bound by the principles of subsidiarity and proportionality\(^93\). The EU is free to adopt legislative measures to regulate irregular immigration and adopt common standards to manage the return of irregularly staying third-country nationals\(^94\). The choice of the type of legislation is up to the EU institutions to

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\(^9\) Articles 20(2) and 77(3) TFEU

\(^90\) Articles 77(2), 78(2), 79(2) and 79(4), for ordinary legislative procedure see Article 294 TFEU

\(^91\) Articles 275 and 276 TFEU


\(^93\) Article 5(2) TFEU

\(^94\) Article 79(2)(c) TFEU
decide\textsuperscript{95}. It can be argued that due to their direct applicability, regulations\textsuperscript{96} would be a more appropriate method of establishing common Union-wide standards, however, in practice the EU institutions have largely adopted Directives concerning both legal and irregular immigration issues. It can be presumed that the Union intention is to leave some flexibility to Member States as regards to the application of EU law in this area\textsuperscript{97}.

Consequently, following the entry into force of the Treaty of Lisbon, immigration still remains a shared competence of the EU and its Member States\textsuperscript{98}. However, the wording of the new provisions\textsuperscript{99} implies that it is now easier for the Union institutions to take action in the area of immigration and asylum\textsuperscript{100} pursuant to the principles of subsidiarity and proportionality\textsuperscript{101}. The only aspect regarding common immigration policy in which the Union has not been conferred any powers to legislate concerns the Member States’ right to determine volumes of third-country nationals coming from third countries to seek work, including self-employed work\textsuperscript{102}. It remains yet to be determined to what extent Article 79(5) restricts the Union competence. The wording of the Article is ambiguous enough to leave room for interpretation by the Member States, as well as the Court of Justice\textsuperscript{103}.

Yet the period after the adoption of the Lisbon Treaty has witnessed continued institutional challenges regarding the competence over illegal migration issues. One of the changes brought along by the Lisbon Treaty was the increased roles of the

\textsuperscript{95} Article 296 TFEU
\textsuperscript{96} Article 288 TFEU
\textsuperscript{97} According to the Article 288 Treaty of Lisbon Regulations are binding in their entirety and directly applicable in all Member States whereas Directives bind the Member States as to the results to be achieved; they have to be transposed into the national legal framework and thus leave margin for manoeuvre as to the form and means of implementation; See also S. Peers, E. Guild, D. Acosta, K. Groenendijk and V. Moreno-Lax (eds) (2012), \textit{EU Immigration and Asylum Law}, 2nd rev ed., Volume 2, Martinus Nijhoff, Leiden, p 11
\textsuperscript{98} Article 4(2)(j) TFEU
\textsuperscript{99} Article 2(2) TFEU in shared competence the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
\textsuperscript{100} The Union competence to develop common policy on immigration and asylum is enshrined in the Articles 78 and 79 TFEU respectively.
\textsuperscript{101} Article 69 TFEU
\textsuperscript{102} Article 79(5) TFEU
Commission, the Parliament and the Court of Justice. The JHA matters taking a more focal point in the Commission were noticeable in the appointment of two Directorate-Generals to cover the JHA issues. This organisational development can be seen as mirroring national administrative structures (i.e. justice ministries and interior ministries) and it appears to have raised the profile of the Commission in JHA matters. Moreover, at the time of writing the Commission has demonstrated its initiative to address the current migrant crisis in the EU.

One of the major contributions brought by the Lisbon Treaty concerning migration was the extension of the jurisdiction of the Court of Justice over JHA matters, with the general assumption that the Treaty would lead to an enlarged number of JHA cases referred to the ECJ by national courts. This was taken into consideration with the rise of the EU Charter of Fundamental Rights that became legally binding with the enforcement of the Lisbon Treaty and belonged now under the jurisprudence of the ECJ. The effects of the latter could be witnessed in many important immigration and asylum cases that have resulted in the changes to the Dublin System, as well as demonstrating the Court’s stern approach towards the uniform interpretation of the legislation in light of human rights concerns.

purpose of all this was to increase the Court’s role as an actor and one of the key
players in JHA law. It can be assumed that the increased role of the Court was
hoped to bring a better and more human rights based balance in the field of JHA.
Even though in reality the amount of references under the JHA issues did not show
significant escalation\textsuperscript{108}, the disputes under the Return Directive did not take long to
reach the ECJ. In fact, the Court’s impact on the implementation and interpretation
of the Directive and in the entire common return policy in the EU has been
tremendous by curtailing Member States’ tendencies towards criminalisation and
detention, whilst expediting effective and efficient removal of illegally staying
immigrants\textsuperscript{109}.

Most of the institutional challenges have been evident in the changes of the
legislative process and the complicated relationship between the Council and the
Parliament with a number of lingering disputes on JHA matters\textsuperscript{110}. Prior to the
Lisbon Treaty, the role of the European Parliament was rather limited in terms of
legislative powers. Under Article 63(3) TEU the legislative measures in the matters
of illegal immigration had to be adopted by the Council unanimously upon
consultation with the Parliament. Due to different views of the Parliament, its
stance being positive towards immigration and immigrant rights and more aligned
with the views of the Commission\textsuperscript{111}, the Council felt reluctant to engage the
Parliament in any substantive discussions, making the consultation process rather a
pro forma gesture. Upon the law making changes stipulated by the Council\textsuperscript{112} the
legislative measures were subject to QMV in the Council and co-decision
procedures by the Council and the Parliament. These rules were extended in the
Lisbon Treaty with the co-decision procedure becoming the ordinary legislative

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\begin{itemize}
\item \textsuperscript{108} For more detailed overview of the references under JHA cases see S. Peers (2014), op cit., 105, pp
\item \textsuperscript{25}-27
\item \textsuperscript{109} See the detailed discussion in Chapter IV
\item \textsuperscript{110} Case C-355/10 Parliament v Council [2012], judgment of 5 September 2012,
\textit{ECLI:EU:C:2012:516}
\item \textsuperscript{111} D. Acosta (2011), op cit., 49, p 12
\item \textsuperscript{112} Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part
\item Three of the Treaty establishing the European Community to be governed by the procedure laid down in
\item Article 251 of that Treaty (2004/927/EC), OJ L 396/45
\end{itemize}
procedure applying towards most of the immigration and all the illegal immigration matters. These changes have shifted the institutional balance in favour of the Parliament, which on one hand can be seen as reducing the democratic deficit, but on the other hand, run the risk of slowing down the legislative progress in JHA matters.

Indeed, the democratic legitimacy of the Union is founded on its Member States and people, and consequently a legislative act must always come from bodies that represent the States and the people, i.e. the Council and the Parliament. Hence the increased participation of the Parliament in the legislative procedures can be welcomed as a positive factor. However, in reality the fairy-tale co-operation method has not come without challenges. As was mentioned above, the Parliament has portrayed itself more as a migrant friendly institution opposing itself to the Council’s approach. The evidence of its migrant friendly attitude is demonstrated by the Parliament’s sensitivity to human rights. Considering the Parliament’s and the Council’s different views, it can be easy to presume that the incorporation of the Parliament in the co-decision procedure could have a slowing effect on the legislative progress. In reality, co-decision procedures with Parliament’s involvement in JHA matters has been largely exercised in first-reading deals based on so-called informal “trilogues”. For instance, the Return Directive was also agreed by the Parliament in the first reading and that was already before the entry into force of the Lisbon Treaty. The use of first-reading deals can raise valid questions whether the Parliament has decided to opt for an accommodating yet comfortable approach revoking sufficient transparency and migrant friendly approach. Despite the qualitative changes in the matters of irregular immigration that the Lisbon Treaty brought along, such as the co-decision and qualified majority voting system,

113 Article 294 TFEU
116 G. Papagianni (2006), op cit., 56, p 252
there have not been many common standards adopted in the respective field\textsuperscript{118}. Yet, it has been argued that unanimity may have been a significant obstacle that has slowed down the legislative process\textsuperscript{119}.

In practice, the potential competence dilemmas have been solved with an additional clause of ‘more favourable provisions’ in most of the immigration legislation, including the Return Directive. This means that any reference to ‘more favourable’ provisions has to be understood as referring to setting higher standards, i.e. more favourable provisions for the persons concerned. Namely, where the EU law in this area is adopted, it permits Member States to set higher standards provided they are compatible with the concerned EU legislation. The requirement of compatibility then must be interpreted as such that Member States have to be in compliance with any fully uniform provisions of the relevant legislation, i.e. any measures which clearly leave no room for national variations as regards the application of this principle\textsuperscript{120}. Additionally, any restraint on Member States powers to set higher standards should not and cannot breach the human rights obligations of the EU, as enshrined in the EU law. The latter is of particular importance in the implementation of the respective EU law in the matters of illegal immigration and more so the Return Directive.

3. General principles of EU migration law

3.1. Constitutional principles

One of the major changes brought by the Lisbon Treaty was the confirmation of general principles of Union law that are the anchor and the spine of the entire EU legal system. General principles of law manifest certain important propositions that form the basis for legal principles and from which concrete rules derive. For the

\textsuperscript{118} As per Council documents one Member State (UK) voted against the legislation establishing a Return Fund, while another Member State (Belgium) abstained as regards the Return Directive, and there was one abstention and one vote against the Directive on employment of irregular migrants (Sweden). For further see Council doc. 12561/07, 4 September 2007, summary of Council acts for December 2008, in Council doc. 7478/09, 11 March 2009, summary of Council acts for May 2009, in Council doc. 11670/09, 2 July 2009


\textsuperscript{120} S. Peers (2011), op cit., 44, p 509
purpose of this thesis, the general principles that will be discussed are the ones that primarily pertain to the relationship between the individual and the Union and national authorities.

3.1.1 The rule of law

The general principles of EU law, whilst being grounds of review and operating as rules of law, mainly serve the function of providing aid to interpretation\textsuperscript{121}. Accordingly, where the Union measure falls to be interpreted, preference must be given as far as possible to the interpretation which renders it compatible with the Treaty and the general principles of law\textsuperscript{122}. Hence, general principles as established pertain to be of pivotal significance in implementation and application of the common immigration law.

The starting point of the general principles is the rule of law that forms the constitutional basis of the EU\textsuperscript{123}. In addition, the EU is not only founded on the rule of law but that foundational value guides the international action of the Union.\textsuperscript{124} The rule of law is based on the central theme to bound government restrained by law from acting outside its powers.\textsuperscript{125} Therefore, it can be argued that in the matters of AFSJ, the rule of law is of crucial importance to control coercive power and ensure respect for human rights\textsuperscript{126}. Additionally, the principle obliges the ECJ to ensure the interpretation of Union law in accordance with the Treaties and the rule of law\textsuperscript{127}.

\textsuperscript{121} T. Tridimas (1998), \textit{The General Principles of EC Law}, Oxford, Oxford University Press, p 17
\textsuperscript{122} ECJ C-218/82, \textit{Commission v Council \[1983\]}, judgment of 13 December 1983, ECR 4063, paragraph 15
\textsuperscript{123} Article 2 TEU
\textsuperscript{124} Article 21 TEU
\textsuperscript{127} Article 19 TEU
3.1.2 Effectiveness and mutual recognition

The principle of effectiveness was first established and mentioned by the Court of Justice as part of the reasoning that furthered the development of EU law\(^\text{128}\). The ECJ adopted the approach that without the principle of effectiveness (‘effet utile’), the EU law would become void and meaningless. Thus the principle of effectiveness is often adopted by the Court to confirm and ensure the supremacy of EU law over domestic legislation.

The Effectiveness principle has attracted attention and it has become predominant in the Court of Justice in the immigration law cases. ECJ has applied the principle to define the competence and margin of appreciation of Member States\(^\text{129}\). As Chapter IV will demonstrate, principle of effectiveness has played a pivotal role in the Court’s reasoning and had severe impact in the aftermath of implementation of EU legislation. In general, the effectiveness has been employed to curb discretionary powers of Member States and to establish boundaries on national measures that are not in compliance or impede the achievement of the objectives of the EU legislation in question.

The principle of mutual recognition is inherent to the concept of internal market area and shared competence. The latter in general, results in the adoption of minimum harmonisation measures, of which the implementation requires mutual trust and recognition. However, the principle of mutual recognition is not an end in itself but a tool to achieve a specific objective, that of the effective and uniform application of EU legislation.

Like the principle of effectiveness, the principle of mutual recognition was established by the Court in its case law\(^\text{130}\). The principle requires and is largely based on mutual trust. For nationality laws, as EU citizenship has derivative status from Member State nationality, the principle obliges the EU States to recognise

\(^{128}\) ECJ C-26/62, Van Gend en Loos, judgment of 5 February 1963, ECR 1963, 1; ECJ C-6/64, Costa v ENEL, judgment of 15 July 1964, ECR 1964, 585

\(^{129}\) See for example ECJ cases C-61/11 PPU, El Dridi [2011], judgment of 01 April 2011, ECR I-03015 and C-38/14 Zaizoune [2015], judgment of 23 April 2015, not yet published

\(^{130}\) ECJ C-120/78 Rewe-Zentral AG (Cassis de Dijon) [1979], judgment of 20 February 1979, ECR 649
those who hold the nationality of the Member States as EU citizens and trust that other Member States act within legal boundaries and recognition\textsuperscript{131}. In immigration matters, the principle of mutual recognition and trust occupy an important place. The matters of JHA are filled with judicial decisions executed by Member States and can range from a short stay visa granting the right to enter and reside in the Schengen area\textsuperscript{132}, to processing or refusing to process asylum claims under Dublin regulations\textsuperscript{133}, from a return decision issued under Return Directive\textsuperscript{134} to visa or entry alert in SIS\textsuperscript{135} and VIS\textsuperscript{136} systems. Thus, mutual recognition of judicial decisions across the Member States presupposes a level of trust between the national legal systems and is the very core of the AFSJ, subject to rebuttal if necessary for the adequate protection of fundamental rights, as established by the Court\textsuperscript{137}.

\subsection*{3.1.3 Subsidiarity and proportionality}

The Lisbon Treaty is accompanied with Protocol 2\textsuperscript{138} that declares the principles of subsidiarity and proportionality as overall legislative principles. The principle of subsidiarity requires the Commission to consult widely before it legislates and to give reasons as to why an objective is better achieved at the EU level rather than national level\textsuperscript{139}. In practice this means that the Commission now has an obligation to send a draft proposal of legislation to the national parliaments as well as the EU institutions. In matters of immigration, the principle of subsidiarity serves the

\textsuperscript{131} C. Costello (2016), \textit{The Human Rights of Migrants and Refugees in European Law}, Oxford, Oxford University Press, pp 32-33
\textsuperscript{132} Article 5(1) Schengen Borders Code, OJ L 176
\textsuperscript{133} Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31
\textsuperscript{134} Article 6 Return Directive, OJ L 348/98
\textsuperscript{138} Treaty on the Functioning of the European Union, Protocol (No 2) On The Application Of The Principles Of Subsidiarity And Proportionality, OJ 2007/C 306/01
\textsuperscript{139} P. Craig (2010), \textit{The Lisbon Treaty, Law, Politics and Treaty Reform}, Oxford, Oxford University Press, pp 184-186
purpose of better quality legislation, as it needs to be proved to be better than any legislation enacted at the domestic level.

The principle of proportionality in EU law requires that action undertaken must be proportionate to its objectives. According to the standard formula applied by the Court of Justice to establish whether a Union law provision is consonant with the principle of proportionality, it is necessary to establish whether the means it employs to achieve the aim correspond to the importance of the aim and whether they are necessary for its achievement. In short, the test comprises of two limbs: suitability and necessity\textsuperscript{140}.

In Union legislative procedure, the principle of proportionality is an indicator that helps to estimate whether there was a need for EU action in a given area and whether the action taken was both suitable and necessary to achieve the set objective. In the matters of immigration law, proportionality serves another, and even more important, purpose. Namely, as established in the early case law, proportionality is applied by the Court to safeguard fundamental rights protection in the EU\textsuperscript{141}. The Court will enquire whether the Member State in case, whilst implementing or derogating from EU law, has not done so at a disproportionate expense of fundamental rights. The presumption is that interference with EU law rights should be kept to a minimum. Hence, the role and the scope of the principle of proportionality are extensive in EU immigration law. First, it operates as a boundary in the legislative procedure as the EU is compelled by the obligation to legislate to a necessary extent and in an appropriate manner. Second, it operates as a scale par, binding the Member States to find a balance when implementing or derogating from the rules adopted at the Union level. Even though derogation from EU norms as well as from fundamental rights is allowed, such qualifications must be as narrow as possible and suitable to achieve the objective. Furthermore, Member States are bound by the principle of proportionality when implementing EU law. Third, it operates as a test at the Court of Justice and at national courts when interpreting EU laws. Proper application of proportionality is of crucial importance.

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\textsuperscript{140} T. Tridimas (1998), op cit., 121, pp 89-91
\textsuperscript{141} ECJ C-11/70, \textit{Internationale Handelsgesellschaft} [1970], judgment of 17 December 1970, ECR 1125
}
in EU immigration policy. Since most legislative measures in the field tend to establish minimum standards and provide for a wide margin of discretion without specific guidelines, the principle of proportionality is often the main principle providing for legal certainty and effective safeguard of fundamental rights.

3.2. Fundamental rights

3.2.1 Sources of fundamental rights in EU law

The Justice and Home Affairs matters are closely linked to the issues of fundamental rights, which have been recognised as the general principles of EU law that the Union protects. The same approach has also been stated by the Court of Justice of European Union (ECJ) for almost fifty years. The scope of the general principles comprises acts of EU institutions, acts of Member States implementing EU measures and acts of Member States derogating from EU law.

The sources of the general principles of human rights comprise of rights and freedoms set out in international human rights treaties on which Member States

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142 Article 6(3), TEU provides that ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’


145 See for example ECJ Cases C-112/00 Eugen Schmidberger [2003], judgment of 12 June 2003, ECR I-5659 and C-36/02, Omega, [2004], judgment of 14 October 2004, ECR I-9609

have collaborated\textsuperscript{147}. The development of international norms generally predates the enactment of EU legislation in the field of migration and thus serves as a source of reference for EU law\textsuperscript{148}. The ECJ has for instance, confirmed the recognition of human rights enshrined in the Refugee Convention\textsuperscript{149} and ICCPR as general principles of EU law and position was also later established in the Charter of Fundamental Rights of the European Union. Additionally, international law norms on migration derive from the provisions of the European Convention on Human Rights (ECHR)\textsuperscript{150}, which plays a pivotal role as a source of fundamental rights standards in the EU.

The fundamental rights gained a new and wider scope after the adoption of the Lisbon Treaty. First, as stated above, the Lisbon Treaty recognised the fundamental rights as general principles of EU law. Second, the EU Charter of Fundamental Rights (the Charter) became a legally binding instrument incorporated into European constitutional law and set at the same level with the primary EU law, i.e. the Treaties\textsuperscript{151}. Third, the Treaties now not only provide for the possibility of EU accession to the European Convention on Human Rights (ECHR) but expressly require it\textsuperscript{152}. Furthermore, the ECJ has provided an important affirmation as to the importance and pivotal role of the fundamental rights in the EU by recognising them as a \textit{jus cogens} norms that take priority over the international obligations of the Union, even those stemming from the Security Council resolutions\textsuperscript{153}. Thus, the

\begin{quote}
\textsuperscript{147} Note that as for now no EU Member State is a signatory to the \textit{International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families}, yet it contains several interesting provisions on expulsions. For further see C. Phuong (2007), ‘Minimum Standards for Return Procedures and International Human Rights Law’ in \textit{European Journal of Migration and Law}, Vol 9 No 1, pp 101-125

\textsuperscript{148} L. Azoulai and K. De Vries (eds) (2014), op cit., 11, p 6


\textsuperscript{150} \textit{European Convention on Human Rights}, adopted 4 November 1950, entered into force 3 September 1953

\textsuperscript{151} Article 6(1) TEU stipulates: ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.’

\textsuperscript{152} Article 6(2) TEU stipulates: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

\textsuperscript{153} See ECJ case-law in joined cases T-315/01 and T-306/01 \textit{Kadi v Council and Commission (Kadi I)} [2005], judgment of 21 November 2005, ECR II-3649, reversed on appeal; joined cases C-402/05 P & C-415/05 P \textit{Kadi I} [2008], judgment of 3 September 2008, ECR I-6351; T-85/09 \textit{Kadi II} [2010], judgment of 30 September 2010, ECR II-05177, reversed on appeal; joined cases C-584/10 P.
\end{quote}
international obligations coupled with norms stipulated in the ECHR and the Charter as well as the case-law of the ECJ and the European Court of Human Rights (ECtHR) forms a solid basis of fundamental rights protection in the common immigration and asylum *acquis*.

**3.2.2 Implications of the Charter**

The Charter contains a catalogue of rights that, albeit being largely based on the ECHR, are in general more extensive\(^{154}\). The Charter entails detailed provisions regarding its interpretation enshrined in Article 52. Subparagraph 3 of the said article provides that in so far as the rights of the Charter correspond to the ones guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. Such a wording implies that the substance of rights must be also, by extension, consistent with the interpretation and jurisprudence of the ECtHR\(^{155}\). However, the contracting parties are permitted to more generous interpretation of the Charter rights by applying higher standards of human rights protection than the ECHR.

Possible further enhancements of the fundamental rights protection may be evolved after the EU’s accession to the ECHR. Although the ECJ rejected\(^{156}\) the accession under the terms stipulated in the Draft Accession Agreement\(^{157}\) the negotiation are still ongoing endorsed by the requirement stipulated in Article 6(2) TEU. The accession weighs more of a political value and thus is more likely to have an impact on the EU and its institutions rather than on fundamental rights

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\(^{157}\) Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16
protection at national levels. The main impact however is most likely going to have an effect on the increased competences of the ECJ on the one hand, whereas on the other hand, also subject the Court of Justice to the external scrutiny by the ECtHR.

The scope of application of the Charter is defined by the horizontal provision of Article 51 and by a number of Protocols to the Treaty of Lisbon. Article 51(1) establishes that the Charter applies primarily to the institutions, bodies, offices and agencies of the Union, in compliance with the principle of subsidiarity. The institutions are defined in Article 13(1) TEU as bodies, offices and agencies and are a comprehensive formulation. According to Article 51(1) Member States are bound by the Charter only when they implement EU law. However, relying on the application and interpretation adopted by the Court of Justice, fundamental rights obligations extend to the cases when domestic measures come within the scope of Union law, meaning that Member States are compelled by the Charter also when they derogate from the EU law.

The Charter codifying rights already established in the ECHR and acknowledged by the Court of Justice, nonetheless, has provided a fresh energy to human rights, not only in litigation but in legislative process as well. First, the Parliament is now compelled to fully respect both the Charter and the rights and principles enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union in all its activities. Second, the Commission, in drafting legislative proposals and in policy-making, has paid more attention and brought the fundamental rights protection to the central point in assessing the compatibility of its legislative proposals with the

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158 T. Lock (2012), ‘End of an Epic? The Draft Agreement on the EU’s Accession to the Convention’ in Yearbook of European Law, Vol 31, p 162

159 De Búrca consequently asks whether the ECJ will become a human rights adjudicator upon EU accession to the ECHR. See G. De Búrca (2013), ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ in Maastricht Journal of European and Comparative Law, Volume 20, Issue 2, pp 168-184

160 UK and Poland have negotiated a limited application of the Charter as per Protocol No 30 to The Treaty on the Functioning of the European Union, On the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 306/157. For further discussion on this matter see D. Anderson and C. Murphy (2012), op cit., 155, pp 166-169


requirements of fundamental rights. The Commission has additionally integrated fundamental rights into its practice of impact assessments, as well as moved to a more proactive approach to fundamental rights through the preparation of an annual report on the implementation of the Charter\textsuperscript{163}.

In litigation, the impact of the Charter on ECJ case law was immediate\textsuperscript{164}, with the ECJ engaging with the Charter on an increasingly systematic and comprehensive manner. Although the Charter had become legally binding since the coming into force of the Lisbon Treaty, the Court of Justice had been eager to make a reference to its provisions already earlier\textsuperscript{165}. However, post-Lisbon case law indicates that the Charter has moved from the original position of reference text and the starting point to a legally binding nature to the fullest extent for the ECJ’s interpretation and assessment of EU law. This, together with the increasing amount of case law, suggests that the Charter is, and will continue to be, the main test of adjudication.

Such an indication is significant considering that the adopted provisions in the matters of JHA and more precisely, immigration law, being in the area of shared competence, employ in general wide discretionary powers in compliance with the principles of subsidiarity and proportionality, and hence leaving the implementation and application of the EU rules highly dependent on Member States’ adherence to the general principles of EU law and in particular to fundamental rights obligations. Furthermore, as a result of the accession to the ECHR, the EU would be subject to external review of compliance by ECtHR in respect of rights guaranteed under Convention and by extension have an impact on the detail with which the Convention is explicitly applied by the ECJ in relation to relevant Charter rights\textsuperscript{166}.


\textsuperscript{166} Ibid, pp 81-82
These references on both legislative as well as in implementation and litigation level, suggest that the jurisprudence of the Court of Justice, the Charter itself and fundamental rights as the general principles of EU law, should avoid the risk of the Charter becoming just a "screen" providing for a generic point of reference or being invoked incoherently and thus "freezing" the evolution of fundamental rights as recognised in the legal order of the EU. Additionally, it will be interesting to see how the Charter might evolve common European immigration law on the interpretation of rights in the AFSJ context more generally.

Conclusions

The Chapter aimed to provide a general framework of EU migration policy and to demonstrate some of the most important rules and principles that play a pivotal role in the application of EU law. The Chapter indicated how the EU regulates migration and how it gained the competence enabling it to adopt legislative measures in the said area. In order to understand some of the issues that will unfold in the following pages, the development of the Union competence provides for some important background information. Furthermore, some of the constitutional principles of the EU law were being examined. These principles not only form the basis of the Union law and the common immigration acquis but additionally they provide for significant interpretative measures in the hands of the Court of Justice and are thus crucial to understand.

This chapter demonstrated the challenges that the EU has faced in the development of common migration policy. At first, the deficits establishing common policies were partly caused by the pillar system which presented a loose institutional structure resulting in rather unclear legislative outcomes. Additionally, limited jurisdiction of the Court of Justice of the European Union (ECJ) to review and interpret the legislation in AFSJ along with the non-applicability of the co-decision procedure caused the EU to fall behind to establish the “Europe of rights” and rather focus on striking a fair balance between rights and security. Even though the Lisbon Treaty

put an end to some of the deficits, political and legislative developments in the AFSJ have not been as smooth as expected.

It can be said that the political and executive architecture of the AFSJ has been a matter of substantial institutional restlessness, that have by now resulted in the EU constitutional dimension in the area brought by the Lisbon Treaty, which is setting the road for political developments. However, institutional and substantive dilemmas concerning the area of freedom, security and justice are likely to continue as the legislative and political initiatives, will for the foreseeable future, be one of the primary hot topics in the EU’s agenda.

Centre for European Policy Studies, Brussels, pp 14-15. For further discussion on policy declarations see Chapter II of the dissertation.

CHAPTER II EU RETURN POLICY IN THE CONTEXT

Introduction

The European integration process as demonstrated in the previous chapter has developed by the progressive extension of Union competence, which finally led to the inclusion of immigration amongst the common Union policies. Due to the increased importance of the migration phenomenon, Member States realised that they needed to work together to establish a common political strategy and common legislative framework. Regulation of irregular migration forms an important part of the common immigration *acquis* and manifests itself in the need to prevent irregular migration, to detect irregular migrants and to remove any irregular migrants once they are detected\(^{169}\).

However, such policy is not easy to establish and execute, as it encompasses a myriad of aspects from voluntary migration to the need of international protection; from external border management to procedural rights; and from electronic security alerts to detention and expulsion procedures. Furthermore, all these aspects are closely linked to fundamental rights protection of the persons affected by these measures.

Return policy forms an integral part of the common European immigration policy managing irregular migration. The need to establish a common system on returning third-country nationals in irregular situations is not only of political origin but stems from a variety of practical situations. For instance, some migrants enter the territory without authorisation; some enter the territory legally but overstay the period of their legal stay; or the regulations for examining a request for asylum or residence permit become redundant, if following a negative decision the effective termination of residence is not accomplished and third-country nationals remain in the country irregularly. If persons who (no longer) have authorisation to stay on the territory of a Member State are detected it would be extremely naive to rely solely on an illusion of effective and efficient concept of voluntary return based upon

\(^{169}\) S. Peers (2011), op cit., 44, p 500
incentives of the said immigrants\(^ {170} \). Hence, the primary response of a Member State is to expel irregularly staying immigrants from its territory.

The purpose of this chapter is to provide a brief overview of the general concepts of irregular migration and to analyse the EU policy on return of irregularly staying third-country nationals, focusing on the Return Directive in the wider context of common immigration *acquis*. The EU has been conferred the competence to tackle the challenges posed by the irregular immigration. In order to achieve this, the EU has developed return policy with appropriate legislative measures with the aim to establish common Union-wide standards and principles to return individuals without an authorization to enter or reside in the Member States. The Return Directive can be depicted as one of the focal instruments of the existing immigration *acquis* aimed at fighting irregular migration and to guarantee successful return of irregularly staying third-country nationals. The chapter begins by discussing the general concepts of irregular migration in order to demonstrate how the Union has developed common migration policy on irregular migration. The chapter will then move on to provide an overview of the existing common return policy and to examine the legislative instruments that together with the Return Directive form the legislative framework of expulsion procedures. In order to understand the disputes around the Return Directive, it is necessary to see the Directive in the wider EU policy context with other key legislative instruments. The chapter will end with a brief encounter of the most relevant fundamental rights principles that the common return policy is required to respect and safeguard.

1. **Irregular migration management**

1.1. **Competence and scope**

Since the avoidance of irregular migration has been at the heart of the EU migration policy\(^ {171} \) the EU has been gradually harmonizing national law as regards to control


of irregular migration and continually increasing the degree of control of irregular entry. This has resulted in the adoption of various legislative measures that aim to set the common EU wide standards to regulate and facilitate the return of irregular immigrants. Those measures simultaneously form the third category of legislative rules tackling the irregular migration. The most recent and also the most comprehensive accomplishment in the development of common European return policy is the adoption of the Return Directive as a result of the lengthy negotiation period.

The EU’s competence to regulate the area of irregular immigration stems from Article 79 of the Lisbon Treaty that compels the Union to develop a common immigration policy that ensures the prevention of and combats irregular immigration. The legislative measures will be co-adopted by the Council and the Parliament on the Commission’s initiative and stem from the policy objectives set by the European Council. Since the regulation of irregular immigration belongs in the field of shared competence, the Union must operate within the principles of subsidiarity and proportionality.

Largely, the measures that deal with irregular immigration to Europe can be divided into the ones aimed at preventing the irregular entry, treatment of irregular migrants and expulsion of irregular migrants. The first set of measures concern in general policies and legislation about carrier sanctions, passenger data and criminalising human trafficking and smuggling and are thus aimed at the facilitators of irregular migrants. Under EU law, the measures that have been taken to prevent unauthorised access to EU territory are for example The Carriers Sanctions Directive that provides for sanctions against those who transport undocumented migrants into the EU and The Facilitation Directive that defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches. The second set of rules is rather aimed at the irregular migrants.

172 Article 4(2) TFEU
173 Article 69 TFEU. Also see Article 5 TEU, Article 2(2) TFEU and Article 1 of Protocol 2 to TFEU
themselves and includes measures dealing with the victims of trafficking and smuggling in persons, as well as sanctions against employers of irregular migrants. These include for instance the Trafficking Directive\textsuperscript{176} requiring the Member States to adopt criminal sanctions to combat trafficking in human beings providing for an overall Union-wide concept of trafficking. The last set of policies is consequently addressed towards dealing directly with the consequences of irregular migration, which are the various expulsion rules and regulations. This thesis focuses on the last set of policies with a particular interest on the importance and impact of the Return Directive which is the first ever Union legislation that provides for common standards on returning illegally staying third-country nationals.

1.2. Territorial scope

Territorial scope of irregular migration rules is not the clearest to define. In principle, the rules adopted under Article 79 TFEU build upon the Schengen \textit{acquis} as the Schengen Borders Code\textsuperscript{177} are the very basis that defines unlawful stay in the EU as well as establishing Union-wide information systems to enter and store data on persons not/no longer allowed to enter the EU Member States. The Schengen Area is formed of all EU Member States, except Ireland the UK, Norway, Iceland, Switzerland and Lichtenstein. The Area comprises of the EU rules on the abolition of internal border controls, including powers to exercise those controls that were initially set out in the Schengen Convention\textsuperscript{178} and represents a territory where the free movement of persons is guaranteed. The signatory States to the agreement have abolished all internal borders in lieu of a single external border. In the Schengen Area common rules and procedures are applied with regard to visas for short stays, asylum requests and border controls\textsuperscript{179}. The Schengen Convention was


\textsuperscript{177} Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ L 101/1

\textsuperscript{178} The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common border, OJ L 239

\textsuperscript{179} The Schengen area and cooperation, EUR-Lex website, available at \url{http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133020} (last accessed 30 September 2016)
incorporated into the European Union (EU) legal framework by the Treaty of Amsterdam of 1997 with a legal base in the Article 62(1) TEU (now Article 77(2)(e) TFEU).

The general EU external border management as well as rules regulating exchange of operational information on irregular migration management and executing return procedures, including finances and joint operations, are also based on the Schengen system. However, all countries cooperating in Schengen acquis are not parties to the Schengen area. This is either because they do not wish to eliminate border controls or because they do not yet fulfil the required conditions for the application of the Schengen acquis. Hence, legislative measures regulating return of illegally staying third-country nationals, albeit based on the Schengen acquis, do not apply in all Schengen countries or in all EU Member States.

Furthermore, the UK, Ireland and Denmark, due to their opt-outs, do not participate in all the irregular immigration measures. Pursuant to Protocol 21 to the TFEU the UK, and separately Ireland, may choose, within three months of a proposal in JHA matters under Title V of TFEU being presented to the Council, whether it wishes to participate in the adoption and application of any such proposed measure.

Whilst Denmark takes full part of the Schengen Area, the UK and Ireland can request to take part in some or all provisions of the Schengen acquis as provides by Article 4 to Protocol (No 19) to the TEU and TFEU, on the Schengen acquis integrated into the Framework of the European Union. Pursuant to their association with the Schengen acquis, Norway, Iceland, Switzerland and Liechtenstein are not covered by the measures outside the scope of that acquis but are not full parties to the measures that build on the Schengen acquis, notably the

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180 The UK and Ireland do not take part in the Schengen Area and maintain their border controls. The Schengen Area comprises four countries outside the EU: Norway, Iceland, Switzerland and Liechtenstein. In addition, new Member States must first take necessary measures before they are allowed to abolish their border controls. For further see the discussion in P. Boeles, M. den Heijer, G Lodder and K. Wouters (2014), op cit., 38, p 377

181 Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen acquis which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC, OJ L 345/1; Council Decision 2002/192/EC of 28 February 2002 concerning Ireland’s request to take part in some of the provisions of the Schengen acquis, OJ L 064/1
criteria that defines lawful stay in the EU. As a result, some of the legislative measures on irregular migration may apply in all the Member States and in the EEA and Schengen countries.

1.3. Personal scope and migration terminology

In the previous chapter the personal scope of EU migration policy was defined as a set of rules and regulations pertinent to third-country nationals without the right to abode in the EU. The EU Treaties have established a policy frame that treats migration status as a binary, legal or illegal and distinguishes between ‘us’ and ‘them’ based on the right to enter and reside in the EU territory. However, the distinction between ‘us’ and ‘them’ along the lines of legality of one’s residence makes sense if migration laws are seen as making borders meaningful for people determining who can enter and who must be turned away.

Deriving from the discussion in the previous chapter and the focus of the current one, attention must be paid to the derogatory term ‘illegal’ to affix with a type of border crossing or residence. There are several conceptual problems inherent to the framing of this category of migration. Many descriptive labels about irregular migration have been proposed and discussed over the years. They include “illegal” migration, “irregular migration”, “undocumented” migration and “unauthorized” migration, each of which has its proponents and detractors in migration literature. Some convergence seems to be emerging on the use of irregular migration as the most appropriate word to refer to migrants whose status does not conform, for one reason or another, to the norms of the country in which they reside. The term “irregular” may refer variously to conditions of entry, stay and

182 S. Peers (2011), op cit., 44, p 512
employment, including possession of appropriate documentation. Most commonly, irregularity is determined by reference to the norms of the country of destination or transit, although recent research has shown that irregularity is a multifaceted concept that is often not reflected in policy responses\textsuperscript{186}.

The term ‘illegal migrant’ carries in itself a negative notion and is considered fraught\textsuperscript{187} as it might ascribe to the person involved a social status that entails suspicion and condones the person rather than the committed act as ‘illegal’. It is generally argued that since unauthorized migrants have not committed any criminal offences besides breaches of migration law, which is in any event often punishable by administrative sanctions, rather than criminal penalties\textsuperscript{188}. The term ‘illegal migration’ has been largely condemned because defining people as ‘illegal’ denies their humanity and the term connotes with criminality\textsuperscript{189}.

This thesis uses the term ‘irregular migrant’ for pejorative connotations and instead of the term ‘undocumented migrant’ as the latter refers to those third-country nationals who are without the necessary documents, which has specific consequences for individuals, especially in terms of potential expulsion. However, the term ‘illegal’ will be used to be in conformity with the Return Directive terminology and only when referring to the unlawful status of one’s residence.

There is no universal definition for an irregular migrant. From the perspective of a receiving State ‘irregularity’ as a status, would apply for anyone who is currently in contravention of the law, including the people entering the country in breach of the law and the ones overstaying their permission to remain. Since this thesis discusses the EU migration regulation, the ‘State’ in this case would mean the European Union. Hence, ‘irregular migrant’ in this case should not be understood as a widespread connotation of an ‘illegal person’ but referring to a third-country national without a legal basis to enter or reside in the EU. Because the asylum seekers are not to be punished for irregular entry, until their asylum applications

\textsuperscript{186} G. Battistella, (2008), op cit., 185, pp 201-232
\textsuperscript{187} See E. Guild (2004), op cit., 184, p 3
\textsuperscript{188} S. Peers (2011), op cit., 44, p 500
are pending they have the right to remain in the territory of an EU Member State and are not covered under the definition of ‘illegal immigrant’. However, should their application be rejected, the scope of the term may shift to include them as well190.

2. Common Return Policy

The Union policy on returning irregularly staying immigrants is an important aspect towards establishing a common immigration acquis and comprises of a set of rules addressed towards dealing directly with the consequences of irregular migration. It regulates one of the most sensitive aspects of irregular migration management and is complicated by the opposing rights: that of a State’s sovereign right to protect one’s borders and the individual’s right to be protected from arbitrary expulsion.

The power to expel aliens is being recognised as the necessary component of a State’s sovereign right to admit and exclude aliens191 and it is fundamental for the self-preservation of a State. Thus, the common policy of return in the EU context as part of the AFSJ192 must entail measures for both concepts, voluntary and forced return. Although return policy in principle also covers the return of persons legally residing in the EU but willing to return to their country of origin, as a set of

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190 For further on the scope of the term in regards the scope of application of the Return Directive see the analysis in Chapter IV

A clear and transparent return policy requires several legislative measures to set common standards to prevent and tackle irregular migration. To achieve that the EU has over the years adopted a number of measures concerning the prevention of irregular migration, the treatment of irregular migrants on the territory and the expulsion of irregular migrants from the territory.

Moreover, it helps to address the situations when third-country nationals enter EU territory legally but then overstay\textsuperscript{202}.

2.1. General background

Establishing the common return policy has passed the complex competence phases from intergovernmental co-operation into the field of shared competence\textsuperscript{203}. The EU has made efforts to devise a common legal and operational framework relating to measures preceding and implementing voluntary and forced removal since the early 2000s\textsuperscript{204}. According to the Commission a common EU return and readmission policy should be based on three elements: common principles, for example the priority of voluntary return over forced return; common standards; and common measures\textsuperscript{205}.

In 2004 The Hague Programme called for an integrated approach towards return and repatriation procedures. For the European Council, the implementation of effective return policy would mean closer cooperation and more integrated approach to common standards and procedures\textsuperscript{206}. Since then the EU has taken many legislative and policy steps to establish a common return policy that would include all the required elements seeking to harmonise and support national efforts to better manage returns and to facilitate reintegration. Moreover, the efficient return policy requires effective cooperation with non-EU countries on the basis of readmission agreements. Both, readmission and return policies need to be in line with fundamental rights standards enshrined in the EU Charter of Fundamental Rights and the ECHR to guarantee humane and effective return procedures based

\textsuperscript{202} Article 4 of the Employers Sanctions Directive requires the Member States to require employers to require prospective third-country national employees to present their residence permits or other authorization and to keep them for the durations of employment.

\textsuperscript{203} See the competence struggles discussed in Chapter I.

\textsuperscript{204} European Commission, Communication on a common policy on illegal migration, Brussels 15 November 2001, COM(2001) 672 final


\textsuperscript{206} See the Hague Programme point 1.6.4 on Return and Readmission Policy
on the principle of giving preference to voluntary return. The latter principle is essential to a comprehensive and sustainable migration policy.  

Thus, a transparent and clear return policy in the EU context must comply with a variety of legal and political principles: it must ensure successful expulsion of illegally staying third-country nationals, operate within the readmission agreements with non-EU countries and make certain that admission policy is not undermined as well as to enforce the rule of law and fair treatment of third-country nationals and safeguard protection of fundamental rights, which are not only constituent elements of an area of freedom, security and justice but also form the main principles of the European Union.

Consequently, in order to actually implement an effective EU-wide return policy the European Commission has over the years set up various funding options for the Member States. In 2002-2006 the funding programme called ‘ARGO’ provided for spending for administrative cooperation on irregular migration. Subsequently the Commission established a European Return Fund (ERF) that was formalised by the Council in 2007 to support the Member States in management of return ‘in conformity with the Charter of Fundamental Rights and based on the preference for voluntary return’. All the Member States except for Denmark participate in the Fund. Specifically, the ERF seeks to improve return management, as well as to

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208 Article 67 TFEU
209 See Preamble of TFEU that states ‘Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’; The Preamble of the Charter of Fundamental Rights of the European Union that states: ‘[---]the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.’; Article 6(3), TEU provides that ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.’
encourage the development of cooperation between EU countries and with countries of return.

In 2014 the ERF was substituted with the Asylum, Migration and Integration Fund (AMIF) to promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration212. The AMIF is amongst others aimed at combating irregular migration by enhancing fair and effective return strategies with an emphasis on sustainability and effectiveness of the return process.

2.2. Expulsion from the EU

Prior to analysing the Return Directive itself, a brief overview of the legislative context of expulsion from the EU should be provided, as the Directive is part of this general framework. The previous pages in the chapter defined the territorial as well as personal scope of common Union return policy. This section will aim to establish the parameters in which the Return Directive, as the main legislative instrument operates. Common rules that regulate expulsion from the territory of the EU are manifested in different legislative devices starting with external border management and defining irregular stay that form the legal basis to initiate expulsion procedures. An efficient expulsion procedure needs to comply with a variety of legislative measures and follow the established common standards. Pursuant to the effective expulsion procedure, the individual concerned may be subject to a readmission agreement or, depending on the specific circumstances and reasons for expulsion, be subject to security alerts recorded in electronic databases. In short, expelling an irregularly staying third-country national may be a difficult procedure for a Member State to carry out. The application of the Return Directive is impacted by a myriad of legislative instruments and aspects of EU law. The following section will aim to provide a brief overview of the broader expulsion context in the EU.

2.2.1 External border management

The common return policy in the EU, being part of the area of freedom, security and justice, is closely linked with the EU border management regulations. The abolition of internal border controls on persons is at the very heart of the European integration project. Establishing the AFSJ meant creating the area without internal frontiers that may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out\textsuperscript{213}. The necessary corollary of the abolition of internal border checks on persons resulted in the shifting of controls to the external borders of the Member States that made the EU to become involved in the issues of identity, control and security.

The competence to take measures with regard to the external border, both as regards its control\textsuperscript{214} and management\textsuperscript{215}, has also provided the legal basis for the further development of the Schengen \textit{acquis} in a third area: several Regulations have addressed the operational coordination and the exchange of information in the field of external border management and control\textsuperscript{216}. Border controls are, amongst other purposes, aimed at preventing or detecting irregular entry and residence to the territory of the EU. It follows that the definition of irregular migration is largely influenced by the rules relating to external borders. In border controls and in irregular immigration management in general, several EU-wide electronic systems and databases are of significant importance. In particular, the Schengen Information System (SIS)\textsuperscript{217} that lists all persons who should be denied a


\textsuperscript{214}Article 77(2) (b) TFEU

\textsuperscript{215}Article 77(2) (d) TFEU


visa or entry into the Member States’ territories together with Eurodac system\textsuperscript{218}, plays a pivotal role in issuing EU-wide entry-bans under the Return Directive.

Finally, common European borders control and the increasing integration of national systems required a more unified and structured approach to migration management. Several activities and powers in tackling irregular immigration and border controls in the EU are now delegated to EU border agencies. It serves little purpose here to list and analyse all the intended and established European agencies in the area of justice and home affairs but one of the most pertinent in terms of effective return policy shall be focussed on.

An efficient common external borders control set the need for a stronger institutional structure\textsuperscript{219} that led to the creation of Frontex, the European Agency for the Management of the Operative Cooperation at the External Borders of the Member States of European Union\textsuperscript{220}. Frontex has powers relating to expulsion of illegally staying third-country nationals, the network of immigration liaison officers established pursuant to EU powers over irregular immigration assist border control in practice. Additionally, Frontex is involved with transfer of passenger data from carriers facilitating both, external border control and control of irregular migration in general\textsuperscript{221}.

All these measures and how they operate within the general legislative framework that would guarantee successful removal of illegally staying third-country national will be dealt with in turn.

\textit{2.2.2 Defining irregular stay}

At the heart of the return policy is the definition of what actually constitutes an irregular stay. The common rules on returning irregular third-country nationals are

\textsuperscript{218}Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316/1
\textsuperscript{219}S. Peers (2011), op cit., 44, pp 216-217; See also Frontex webpage available at \url{http://frontex.europa.eu/} (last accessed 30 September 2016)
\textsuperscript{221}S. Peers (2011), op cit., 44, p 137
based on the Schengen system and more specifically on the Schengen Convention\textsuperscript{222}. Although the SBC contains mainly technical rules regarding the border management and control, it is relevant for the purpose of this study, as it entails provisions relating to the allowing or refusal of entry of third-country nationals and hence determines the parameters of legal and irregular stay.

The Schengen Convention was replaced in 2006 with the Council Regulation establishing the Schengen Borders Code (SBC), which stipulates the rules governing the border control of persons crossing external borders and provides for the absence of border checks on persons crossing internal borders between the Member States.

Articles 4 and 5 of the SBC, set out the rules concerning crossing external borders and the conditions for entry at the external borders. Both paragraphs apply without prejudice for EU citizens and other persons enjoying the EU right to free movement and refugees and persons requesting international protection, in particular as regards \textit{non-refoulement}\textsuperscript{223}. For the first category of persons, the requirements are laid down in the Citizens’ Directive\textsuperscript{224}. The rights and requirements for the persons requesting a refugee status or international protection are stipulated in the Qualification Directive\textsuperscript{225}.

The Return Directive, that is the focal legislative instrument that establishes common standards for expelling illegally staying immigrants, stipulates that the Directive ‘applies to third-country nationals staying illegally on the territory of a

\begin{itemize}
\item\textsuperscript{222} The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common border, OJ L 239
\item\textsuperscript{223} Paragraph 3 of the Schengen Borders Code
\item\textsuperscript{224} Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the union and their family members to move and reside freely within the territory of the member states, OJ L 158/77. According to Articles 4-6 of the CRD the Union citizens have the right to enter the territory of a Member State for a period up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. The same applies to family members of EU citizens, but if they are third-country nationals, they may be subject to a visa requirement according to the Council Regulation (EC) No 549/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81.
\item\textsuperscript{225} Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9
\end{itemize}
Member State’. This is also mentioned in Recital 5 of the preamble of the Directive\textsuperscript{226}. The term ‘illegal stay’ is defined in Article 3 paragraph 2 with a reference to the Schengen Borders Code. Namely, ‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’.

A third-country national who fails to meet one or more of the entry conditions\textsuperscript{227} enshrined in Article 5 of the SBC must be refused entry to the territories of the Member States\textsuperscript{228}. However, the subsection four of the Article 5 provides humanitarian grounds, grounds of national interests and international obligations as possible derogations from the general requirements, hence leaving a leeway for national discretion by allowing entry on the grounds of purely national considerations\textsuperscript{229}.

Nevertheless, for the purposes of the current thesis it is not only essential to determine the parameters of irregular entry and stay but a presumption of irregular stay must also be addressed. According to Article 10(1) of the SBC travel documents of third-country nationals must be stamped when third-country nationals cross the border, both on entry and exit, regardless of whether they are subject to visa obligation or not\textsuperscript{230}. If a travel document is not stamped on entry, Member States

\textsuperscript{226} Recital 5 of the Preamble of the Directive stipulates ‘This Directive should establish a horizontal set of rules, applicable to all third-country national who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.’

\textsuperscript{227} Article 5(1) Schengen Borders Code states: ‘For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following: (a) they are in possession of a valid travel document or documents authorising them to cross the border; (b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement\textsuperscript{17}, except where they hold a valid residence permit; (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully; (d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry; (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national data bases for the purposes of refusing entry on the same grounds.

\textsuperscript{228} Article 13(1) Schengen Borders Code

\textsuperscript{229} P. Boeles, M. den Heijer, G Lodder and K. Wouters (2014), op cit., 38, p 379

\textsuperscript{230} The detailed arrangements for stamping are set out in Annex IV of the Schengen Borders Code. Article 10(2) and (3) provide for exemptions from the rule.
may presume that the person concerned does not fulfil the conditions for the duration of stay in the Member State concerned. If the third-country national cannot rebut the presumption they may be expelled. However, it has not yet been clarified how this provision intertwines with the provisions of the Return Directive.

In conclusion, the Schengen Borders Code does not provide a definition for irregular stay per se. However, it can be argued that by listing the essential grounds for what constitutes a lawful entry and stay of a third-country national, the parameters of irregular stay are inferred and also applying the a contrario interpretation, irregular entry and stay shall result if at least one of these set conditions is not fulfilled.

2.2.3 Return procedure

After a Member State has detected a person to have entered or resided in the EU unlawfully, the State in question starts the return procedure. The Return Directive does not use the word ‘expulsion’ but instead introduces the concepts of ‘return’ and ‘removal’. According to Article 3(3) ‘return’ means the process of going back, whether in voluntary compliance with an obligation to return or enforced, to one’s country of origin, to a country of transit in accordance with EU or bilateral readmission agreements, or to another third country to which the third-country national concerned voluntarily decides to return, and in which he or she shall be accepted. The term ‘return’ hence implies that the person goes to a third country and accordingly, that he or she leaves the territory of the EU.

In order to execute a successful removal of an irregular third-country national, a return decision must be issued. This may be either an administrative or judicial decision stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return. Prior to the Return Directive, the

231 Article 11(1) Schengen Borders Code
232 Article 11(3) Schengen Borders Code
233 For further on this point see the discussion in Chapter IV
234 Article 5 Schengen Borders Code
235 Article 3(4) Return Directive
Council adopted a Directive on the mutual recognition of expulsion orders\textsuperscript{236} to address the issue of persons subject to expulsion that travel between Member States. With the adoption and transposition of the Return Directive the Member States have an obligation to apply and enforce an expulsion order issued in another Member State to remove an irregular third-country national\textsuperscript{237}. The obligation serves the establishment of common return procedures in the EU.

After issuing a return decision the ‘removal’ procedure, which is the enforcement of the obligation to return, namely the physical transportation out of the country\textsuperscript{238}, of the third-country national in irregular status shall be carried out pursuant to the rules in Return Directive and the Directive on the issue of assistance in expulsion by air\textsuperscript{239}. The latter serves to provide assistance in cases of transit for the purposes of removal by air which sets measures to facilitate the transit of persons subject to removal in an airport of a Member State other than the Member State, which has adopted and implemented the removal decision.

Issuing a return decision and carrying out removal of illegally staying third-country nationals is an area of return policy that is largely based on mutual recognition and mutual trust, the principles examined in the previous Chapter. Pursuant to this, the Member States are allowed to adopt decisions for joint removals. The Council has adopted a Decision on joint expulsion flights\textsuperscript{240} to encourage the Member States to


\textsuperscript{238} Article 3(5) Return Directive

\textsuperscript{239} Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321/26; thus far the Council has made significant attempts to adopt a similar legislative measure to regulate expulsion via land or sea, see Draft Council Conclusions on assistance in cases of short-term transit by land or sea through the territory of another Member State in the course of effecting a removal order adopted by a Member State against a third-country national in the framework of the operational cooperation among Member States, Brussels, 12 December 2003, 15998/1/03 REV 1, available at http://www.statewatch.org/semdoc/assets/files/council/15998-1-03.pdf (last accessed 30 September 2016)

\textsuperscript{240} Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261/28
organise joint expulsion flights in practice with the active participation of Frontex in the return procedures\textsuperscript{241}.

The role of the Frontex needs closer examination here. Frontex is supposed to contribute to the efficient and flexible implementation of EU legislation and policies, whilst encouraging the harmonisation of regulatory practices in the Member States\textsuperscript{242}. The Frontex Regulation creates a set of mechanisms for cooperation between Member States and for assistance to Member States with regard to technical and operational issues concerning the management of the EU external borders\textsuperscript{243}. These mechanisms aim at preventing as well as managing arrivals of irregular migrants at the external borders, in particular by sea, regardless of their status.

As per one of the migration management priorities in the EU, that of prevention and fighting against irregular immigration, Frontex is involved in providing Member States with support in organising joint return operations. Additionally, according to border surveillance activities enshrined in Article 12 of the SBC, Frontex assists and coordinates the EU Member States in external border surveillance, including in cases that involve search and rescue situations, participating in setting up and executing joint operations at the southern maritime borders of the EU, with a view to curbing irregular immigration by sea to Member States. While search and rescue activities are regulated by international law, in particular by the law of the Sea Convention (UNCLOS), the Convention on the Safety of Life at Sea (SOLAS) and the Convention on Search and Rescue (SAR), not all EU Member States have ratified the SAR and SOLAS 2004 amendments that define which State is responsible for finding


\textsuperscript{242} M. Groenleer, M. Kaeding and E. Versluis (2010), ‘Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation’ in Journal of European Public Policy, Vol 7, No 8, 2010, p 1213

\textsuperscript{243} Article 2 Frontex Regulation
a "place of safety" for migrants in distress. Thus, the (legal) environment in which Frontex operates is sometimes contested.

In response and also to develop common EU return policy that would be in full compliance with the principles of fundamental rights as recognised by Articles 2 and 6 of the Treaty on European Union (TEU) and by the Charter of Fundamental Rights of the European Union, the EU has recently adopted a new piece of legislation, the Frontex Sea Borders Regulation to ensure common action in this area. Additionally, a European Border Surveillance System (Eurosur) was established to detect and prevent cross-border crime, to detect and prevent irregular border crossings and to contribute to saving the lives of migrants at sea. The Eurosur Regulation requires both, Member States and Frontex to fully comply with fundamental rights, in particular the prohibition of refoulement and the protection of personal data.

245 The national authorities and Frontex have often been blamed for ‘push-backs’: the forced return of migrants’ vessels to unsafe countries, which were condemned by the European Court of Human Rights in its 2012 judgment in Hirsi v Italy. The frequent occurrence of boat tragedies, such as the Lampedusa shipwreck of 3 October 2013 and other control practices such as the pushing back of irregular migrants, have raised widespread concerns about the relationship between maritime border controls and human rights. For further see S. Peers (2014), ‘New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?’, Statewatch Analysis, available at http://www.statewatch.org/analyses/no-237-maritime-surveillance.pdf (last accessed 30 September 2016); Frontex’ Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders, Warsaw 9 July 2015, available at http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Sea_Surveillance/Sea_Surveillance_report_2014.pdf (last accessed 30 September 2016); P. Boeles, M. den Heijer, G Lodder and K. Wouters (2014), op cit., 38, p 409  
246 Recital 11 of the Preamble of Regulation No 1052/2013  
247 For further discussion on the Frontex Sea Borders Regulation see M. den Heijer paper ‘How the Frontex Sea Borders Regulation avoids the hot potatoes’ at European Union Studies Association 2015 Conference, available at https://eustudies.org/conference/papers/11?_token=x9S1h86NaLCbw78SEFP83cglhOgfG6DxlIdupm a&criteria=author&keywords=heijer&submit= (last accessed 30 September 2016)  
248 Recital 11 of the Preamble of Regulation No 1052/2013
2.2.4 Readmission agreements

Pursuant to the wording in the Return Directive, the third-country national subject to removal should either go back to his or her country of origin, a third country or to a country of transit in accordance with EU or bilateral readmission agreements. The shifting geographic boundaries of irregular migration have also set the issue of readmission of third country nationals by origin but also transit countries at the top of political agenda\textsuperscript{250}. International law clearly requires States to admit or re-admit their own nationals when those individuals want to return\textsuperscript{251}. However, the cases in which the national does not want to return or in which the State does not want to admit or re-admit the person or the person in question has no nationality, the rules are not as clear. These situations often impede the removal of irregular migrants and undermine the execution of an effective and efficient return process. For these and other reasons, States negotiate readmission agreements that have been identified as an integral and pivotal component in the fight against irregular immigration\textsuperscript{252}.

Many EU Member States have entered into bilateral agreements with particular source countries. The EU however has preferred EU Readmission Agreements (EURAs)\textsuperscript{253} in which the EU negotiates agreements between the EU itself and specific source countries. EURAs are also amongst the major themes of Schengen acquis and one of the oldest instruments used by EU Member States to carry out migration controls\textsuperscript{254}. They aim at improving cooperation between administrations and can only be used after a return decision has been made in accordance with the procedural guarantees set by the Return Directive and the relevant EU asylum

\textsuperscript{251} Article 13(2) Universal Declaration of Human Rights; Article 12(4) International Covenant on Civil and Political Rights
\textsuperscript{253} European Commission, Communication on Evaluation of EU Readmission Agreements, Brussels 23 February 2011, COM(2011) 76 final
rules. The agreements impose an obligation on contracting parties to readmit, upon application and without any further formality, their nationals if they do not or no longer fulfil the conditions for entry to, presence or residence in the territory of the requesting State. It can be said, thus, that readmission agreements are a key element in return policy and an important component to ensure effective and efficient removal of third country nationals in irregular situations. Moreover, they can also help to undermine the activities of internationally operating smuggling networks which are behind a significant part of the irregular immigration in Europe. Even though the EU readmission agreements have been under a stream of criticism on an academic level mainly for their poor fundamental rights standards their amount and importance seems to be increasing in development of common return policy. To date, seventeen readmission agreements are in force while several others are under negotiation.

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256 T. Balzacq and S. Carrera (2005), Migration, Borders and Asylum. Trends and Vulnerabilities in EU Policy, CEPS Brussels, pp 30-31
2.2.5 Security alerts

As a consequence of removal, a third-country national subject to return, may also face more extensive and long standing consequences in the form of a security alert, visa alert or an entry ban. This area is like the previous ones, based on the Schengen system but complicated by the adoption of the Return Directive.

To secure an effective surveillance of the external borders and the regions neighbouring these borders the EU has developed a range of technical instruments for the purposes of migration control. The basic rules for entry and stay are laid down in the Schengen Borders Code as seen above. This is supported by three major electronic databases that record and store the data of migratory movement on the external borders. The Schengen Information System (now SIS II) contains data in the form of security alerts on persons to be refused entry to the Schengen Area. An instrument primarily developed to support the implementation of the Dublin system is the Eurodac, containing fingerprints and other data about asylum applicants in the EU. The Visa Information System (VIS) contains personal and biometric data relating to all third-country nationals who ask for a visa to enter the EU.

SIS alert

SIS was established with the Schengen Implementing Convention to provide a unified system of ‘alerts’ issued in order to identify persons who are not entitled to

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261 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31
262 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1
264 The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/1
enter and move freely in the Schengen area, as well as persons sought in relation to
criminal activities, missing persons and stolen documents and property. With the
SIS II the use of biometric data such as fingerprints and photographs has been
introduced to the database. Article 5 of the Schengen Borders Code contains legal
enforcement of an alert stipulating that an entry shall be refused to persons for
whom an alert has been issued in the SIS for the purposes of refusing entry\(^{265}\).
Member State must issue a SIS alert if a national alert is based on a threat to public
policy, public security or national security. For the purpose of the SIS II Regulation
this may be for criminal convictions or if there are serious grounds to believe
serious criminal offences committed by the said person\(^{266}\). An alert may be entered
when the national alert is based on the fact that the third-country national has been
subject to a measure involving expulsion, refusal of entry or removal which has not
been rescinded or suspended including a prohibition on entry or residence, based
on a failure to comply with national regulations on the entry or residence of third-
country nationals\(^{267}\). It is the responsibility of the Member State to determine the
necessity to warrant entry of the alert in the SIS II\(^{268}\). There is no clear maximum
duration of validity of an alert but in principle it should not last longer than three
years unless the Member State entering the alert shall review and extend it\(^{269}\).

The effect of a SIS alert is that a person is excluded from entering all Schengen
States. As it emerges from the set conditions to warrant entry of the alert, Member
States must enter alerts in the SIS II on the basis of criminal convictions, serious
suspicions. Whereas by the rules in SIS II the Member States may register alerts
about those third-country nationals who have merely breached immigration law\(^{270}\).
Arguably, they may enter alerts on the rather broadly formulated grounds of failure

\(^{265}\) Articles 20-26 Regulation (EC) No 1987/2006 SIS II lay down the conditions for entering alert
\(^{266}\) Article 24(2) Regulation (EC) No 1987/2006 SIS II
\(^{267}\) Article 24(3) Regulation (EC) No 1987/2006 SIS II
\(^{268}\) Article 24(1) Regulation (EC) No 1987/2006 SIS II
\(^{269}\) Article 29 Regulation (EC) No 1987/2006 SIS II
\(^{270}\) The decision to issue an alert is subject to the principle of proportionality. See for more on this, E.
Brouwer (2008), *Digital Borders and Real rights: Effective Remedies for Third-Country Nationals In
the Schengen Information System*, Martinus Nijhoff Publishers, Leiden and Boston; *The Other Side of
the Moon: The Schengen Information System and Human Rights – A Task for National Courts*, CEPS
to comply with national immigration rules, which may lead to certain inconsistencies in the EU-wide system\textsuperscript{271}. 

**VIS alert**

As a Schengen instrument, VIS applies to all Schengen States\textsuperscript{272}. The aim of the Visa Code is to establish the conditions and procedures for issuing visas for short stays in the European Union countries and the associated States. As per Regulation VIS enables border guards to verify that a person presenting a visa is its rightful holder and to identify persons found on the Schengen territory with no or fraudulent documents. It is also aimed at fighting and preventing fraudulent behaviours, such as "visa shopping", i.e. the practice of making further visa applications to other EU States when a first application has been rejected and assisting in preventing, detecting and investigating terrorist offences and other serious criminal offences. Additionally, VIS provides assistance to asylum procedures by making it easier to determine which EU State is responsible for examining an asylum application and to examine such applications\textsuperscript{273}.

The creation of VIS has been accompanied by a modification of the standard uniform visa to enter the Schengen Area, in order to guarantee a clear connection between a person’s identity and the self-adhesive visa\textsuperscript{274}. This system enables the tracing of each person who requests a visa and as a control mechanism permits, for example, a clear distinction in practice between irregular entrants and irregular residents\textsuperscript{275}. In principle, such a distinction is relevant for the early detection of

\textsuperscript{271} P. Boeles, M. den Heijer, G Lodder and K. Wouters (2014), op cit., 38, p 403  
\textsuperscript{272} According to Paragraph 31 of the Preamble of the Visa Code Denmark has decided to implement Regulation No 810/2009  
\textsuperscript{274} Article 2(3) Visa Code  
\textsuperscript{275} According to the terminology provided by the Commission illegal entrant is any person who does not fulfil the conditions for entry in the territory of the Member States of the European Union and any person who does not, or no longer, fulfil the conditions for presence in, or residence on the territory of the Member State of the European Union constitutes an illegal resident. See European Commission, Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, Brussels, 14 October 2002, COM(2002) 564 final, Annex p 26
irregular entrants and prevention of irregular entry leading to “the stable form of residence they hope to achieve”\(^{276}\).

**EURODAC**

Systematic data gathering and data exchange of information concerning third-country nationals happens through the SIS II, the Visa Information System (VIS) and Eurodac. Since the VIS concerns mainly exchange of data between Member States on short-stay visas and visa applications, it will not be considered here. However, a brief overview of the Eurodac is necessary to be provided.

In the data system of Eurodac, fingerprints of asylum seekers and irregular immigrants are being stored for the purpose of checking whether the migrant has previously lodged an asylum application in another Member State. In addition to all persons applying for asylum\(^ {277}\), the Eurodac Regulation obliges Member States to also take fingerprints from all third-country nationals that cross their borders irregularly\(^ {278}\). Member States are not obliged but may collect fingerprint data from third-country nationals who are found irregularly staying on their territories\(^ {279}\).

**Entry ban**

As stated above, security alerts became particularly important following the implementation of the Return Directive. According to Article 11 of the Return Directive Member States may issue an entry ban with a return decision\(^ {280}\). However, Member States are obliged to issue an entry ban if the third-country national is forcibly returned or if they have not respected the order to leave the territory\(^ {281}\). The entry ban may not, in principle, last longer than five years except if the third-country national represents a serious threat to public policy, public security or to national security\(^ {282}\). The effect of the entry-ban is exclusion from entry to the Member States.

\(^{276}\) European Commission, COM(2001) 672 final, p 6
\(^{277}\) Article 9 Regulation No 603/2013
\(^{278}\) Article 14 Regulation No 603/2013
\(^{279}\) Article 17 Regulation No 603/2013
\(^{280}\) Article 11(1) Return Directive
\(^{281}\) Article 11(1) Return Directive
\(^{282}\) Article 11(2) Return Directive
Unfortunately, it remains unclear as to how an entry ban issued under the Return Directive exactly relates to an SIS alert. As the Return Directive does not regulate how the effect of exclusion pursuant to an entry ban is to be realised, an entry ban will only be effective in practice if it is accompanied by a SIS alert. Furthermore, Recital 18 of the Return Directive says that Member States should have rapid access to information on entry bans issued by other Member States in accordance with the SIS II Regulation. This suggests that the SIS alert is meant to play a supportive role to the entry ban.

Even though the Eurodac system is mainly linked to asylum policy and the completion of the CEAS, it plays an important role in the implementation of the Return Directive with a broad reference to the purpose of removal with the application of the Return Directive to irregular third-country nationals that refuse to be fingerprinted in Eurodac. It is clear that both measures, Eurodac and Return Directive are of significant importance to develop a coherent, credible and effective policy with regard to the return of illegally staying third-country nationals, which in turn is an essential part of a comprehensive EU migration policy.

The same can be said regarding the interplay between VIS and the Return Directive. The VIS nexus to establishing common return policy is of a preventative nature and serves as a necessary contribution to completion of migration policy network. In conclusion, the implementation of all the electronic systems is interrelated and essential for the completion of common immigration acquis.

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3. Fundamental rights in common return policy

It can be said that in the act of expulsion, the whole complex of migration regulation culminates. In a way it is a decisive stage of the discussion of whether a person is allowed residence or not and consequently may be a subject to expulsion. Forced removal is an intrusive measure that may not be carried out arbitrarily or regardless of the personal situation of the expellee.

Despite the fact that the EU has taken significant steps in establishing a coherent common immigration *acquis*, the regulation of migration does not belong under one legislative system but the regulations can be found in other branches of law as well. One of those branches is human rights law. Due to its international nature, migration raises the issue of the transnational protection of human rights of migrants. Thus, common EU return policy and irregular immigration management cannot be addressed without a discussion of required standards and principles that are mainly influenced and derived from several human rights instruments.

Migration has become an intrinsic feature of globalisation and as seen above, has highly influenced the EU as well.

In light of all this, the interaction of EU immigration law and the return policy with the system of the protection of fundamental rights is a critical issue in the practical application of the relevant EU legislation. The obligation of compliance with fundamental rights in the matters of immigration and asylum, including expulsion of third-country nationals, is of paramount importance. Although the European Convention on Human Rights belongs inherently in a different constitutional system, it can be still considered as one, if not the most important source of human rights and definitely the most significant set of standards to be adhered to in the following legislative as well as soft-law instruments. Now, after the adoption of the Lisbon Treaty\(^{287}\), the ECHR’s position in the EU legislative framework has strengthened even more, as it must be respected as part of the general principles of EU law\(^{288}\) and presumably not in the too distant future, as treaty obligations that

\(^{287}\) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (TFEU) was signed on 13 December 2007, OJ 2007/C 306/01

\(^{288}\) Article 6(3) TEU
are binding not only to the Member States but also on the EU itself\textsuperscript{289}. Thus it can be argued that the ECHR, together with international human rights instruments do not only serve as a mere source of inspiration in the Union immigration and asylum law, but the commitments they entail have to be respected throughout the legislative framework from adoption to implementation and interpretation\textsuperscript{290}.

When discussing expulsion and return of irregularly staying third-country nationals in the human rights context, the right not to be expelled must be analysed in depth. In the legislative and constitutional framework of the European Union, the Charter of Fundamental Rights of the European Union\textsuperscript{291} (Charter) is the most significant source of the human rights protection. The Charter was adopted in 2000 and ever since the entry into force of the Treaty of Lisbon has been a legally binding instrument for EU institutions and bodies, due to the principle of subsidiarity, as well as for Member States\textsuperscript{292}. Finally, the role of the case-law of the ECJ and the European Court of Human Rights (ECHR) should not be underestimated. Even though the ECJ can only act within the limits of the EU law it can still indirectly enforce the respect for fundamental rights and impose obligations on the Member States and confine the discretionary powers left to them\textsuperscript{293}. The ECJ has repeatedly referred to the judgments of the ECHR in its decisions, not only as a source of inspiration but as a source of interpretation of fundamental rights. Although for the time being both courts retain parallel powers to one another, the role of the ECJ will most likely even increase as in the post-Lisbon legal order, the EU Charter of Fundamental Rights is legally binding and the EU is looking at the realistic prospect

\textsuperscript{289} Article 6(2) TEU
\textsuperscript{290} On the relationship between international law and the EU law, see H. Battjes (2006), \textit{European Asylum Law and International Law}, Martinus Nijhoff, Leiden
\textsuperscript{291} The Charter was initially proclaimed and adopted at the Nice European Council on 7 December 2000. At that time, it did not have any binding legal effect. On 1 December 2009, with the entry into force of the Treaty of Lisbon the Charter became legally binding on the EU institutions and on national governments, just like the EU Treaties themselves.
\textsuperscript{292} Member States are bound by the Charter only when they implement EU law, see Article 51(1) EU Charter of Fundamental Rights; and when they derogate from the EU law on the grounds such as public policy, any derogations must not violate the EU concept of fundamental rights, see ECJ C-260/89 \textit{ERT} [1991], judgment of 18 June 1991, ECR I-2951
\textsuperscript{293} Illustrations for this can be found in the case-law regarding the Return Directive that will be analysed in the following chapter. For instance see ECJ C-61/11 PPU, \textit{El Dridi} [2011], I-03015, ECJ C-329/11, \textit{Achughhabian} [2011], ECR 2011 I-12695 and ECJ C-430/11 \textit{Md Sagor} [2011], not yet published
of accession to the ECHR\textsuperscript{294}. Moreover, the ECJ has held that EU law itself requires Member States to respect fundamental human rights, thus effectively incorporating into EU law not only the rights embodied in the ECHR, but also those laid out in the more universal conventions\textsuperscript{295}. These changes will provide for increased judicial scrutiny at the European level\textsuperscript{296}.

Prior to the adoption of the Charter of Fundamental Rights of the EU the ECHR had confirmed that a number of rights set out in the ECHR that are relevant in the matters of expulsion form part of the general principles of EU law. For example, the ECJ has accepted that EU law recognises a right to human dignity as part of the general principles. Furthermore, having stated that the fundamental rights principles in the EU take the rights enshrined in the ECHR and the case-law of the ECtHR as a source of inspiration, the considerations under the ECHR in aspects of return and expulsion are very important.

Articles 2 and 3 of ECHR prevent persons from being expelled to a country where they would face the death penalty, or a sufficient risk of torture, or other inhuman or degrading treatment or punishment. According to well established case law of the European Court of Human Rights, “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion”\textsuperscript{297}.

The question remains however, whether the principle of non-refoulement stretches beyond Article 3 of ECHR. The jurisprudence of the European Court of Human Rights indicates that the removal of a person from a State party to ECHR may give rise to a

\textsuperscript{294} Articles 6(1) and 6(2) TEU
\textsuperscript{295} ECJ Case C-540/03 European Parliament v Council of the European Union [2006], judgment of 27 June 2006, ECR I-05769, paragraphs 35-39
\textsuperscript{296} L. Azoulai and K. De Vries (eds) (2014), op cit., 11, p 8
\textsuperscript{297} ECtHR 15 November 1996, Rep. 1996-V Chahal v. UK, paragraph 80; ECtHR, Soering v. the United Kingdom, judgment of 7 July 1989, Series A No 161, p 35, paragraph 88
protection issue under Articles 2, or 3, and exceptionally under Articles 5 or 6.

Article 8 of ECHR protects against expulsion where family or private life is established in a State and can apply to migrants in irregular situations as well. In earlier cases of ECtHR, article 8 was successfully invoked only where the removal decision would impact on the enjoyment of family life of those already established within the territory of a State party to the Convention. Now, it has been argued that in case the State’s interest in expulsion is purely economic and the migrant has established a strong family life with his or her small children, the irregular migration status must be disregarded. The Court has also declared that a decision to remove a person to a situation in which he would face treatment that does not reach the severity of article 3, “may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity”.

As for procedural matters, Article 1 of Protocol no.7 to the ECHR lays down some safeguards relating to the expulsion of aliens: an alien lawfully resident can be expelled from the territory of a State party only in pursuance of a decision reached in accordance with law and has the right to submit reasons against his expulsion, to have his case reviewed and to be legally represented. Such procedural safeguards can be restricted when the expulsion is necessary in the interests of public order or is grounded on reasons of national security. However, it is noteworthy here that four of the EU Member States have not ratified Protocol 7 to the ECHR.

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298 Article 2(1), ECHR: ‘[E]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’.
299 Article 5(1), ECHR: ‘[E]veryone has the right to liberty and security of person. [---]’.
300 Article 6(1), ECHR: ‘[I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [---]’.
302 ECtHR 19 February 1998, 154/1996/773/974 Dalia v France; ECtHR 31 January 2006, 50435/99 Da Silva and Hoogkamer v Netherlands
303 ECtHR 6 February 2001, 44599/98 Bensaid v The United Kingdom
304 Belgium, Germany, the Netherlands and the UK
Conclusions

The Chapter set out to demonstrate the Return Directive in the context of common EU return policy. In order to achieve this, the management of irregular migration at the Union level was examined first. It is evident that irregular migration management has become of paramount importance in the EU. Despite the fact that the EU and its Member States have acted to prevent irregular migration, the phenomenon still continues and hence establishing a common return policy has been a necessary step in developing common immigration acquis.

Effective and efficient EU return policy is essentially aimed to securing successful removal of irregularly staying third-country nationals with a fair balance of safeguarding fundamental rights of the returnees. The EU’s dedication to safeguarding fair human rights standards is noticeable in the development of the common return policy. This is echoed also in the Return Directive that contains several references to the protection of fundamental rights in the preamble\(^\text{305}\) as well as in the main body\(^\text{306}\) of the Directive, encouraging the Member States to follow the rules of good administration when carrying out return procedures. Additionally, the Return Directive notes of several procedural safeguards, such as a right to appeal\(^\text{307}\) or to obtain review of the return decision, access to legal and linguistic assistance\(^\text{308}\) and specified procedural safeguards for detention\(^\text{309}\) for the purpose or removal that need to be provided by the Member State.

The Chapter demonstrated that the Return Directive is the focal instrument of common return policy. It is the very measure that establishes the common procedures for returning irregularly staying third-country nationals and binds together all of the other relevant legislative measures in the common immigration acquis. However, despite several fundamental rights references and other procedural safeguards, the Directive does not carry a positive reputation. Furthermore, it was not always a priority for the Union or the Member States to

\(^{305}\) Recitals 8, 9, 10 of the Preamble
\(^{306}\) Articles 6(4) and 5 of Return Directive
\(^{307}\) Article 13 Return Directive
\(^{308}\) Article 13 Return Directive
\(^{309}\) Article 15 Return Directive
adopt the Return Directive that would provide common rules and regulations for returning irregularly staying third-country nationals. The lack of motivation on behalf of the Member States to adopt a measure of establishing common standards of return procedure may have been one of the reasons why the negotiations process over the Return Directive was not a smooth journey and why its application later in the practice revealed several shortcomings in the Directive’s provisions. It is interesting to see how the EU institutions overcame Member States’ objections to adopt common measures and the next chapter will aim to discuss this, whilst covering the drafting and negotiations process of the Return Directive.
CHAPTER III: ADOPTION OF THE RETURN DIRECTIVE

Introduction

The Directive 2008/115/EC concerning common standards and procedures for returning illegally staying third-country nationals (Return Directive), was co-adopted on 16 December 2008, by the European Parliament and the Council. Being a measure on irregular immigration, the Directive was based on Article 63(3) of the EC Treaty, which has been renumbered as Article 79(2)(b) of the TFEU. The Directive applies in 28 Member States, minus the United Kingdom and Ireland. The Directive forms an integral part and is the core measure of the common Union return policy, and is thus an important step in the development of the common immigration acquis. The previous two chapters revealed the topicality of irregular migration regulation in the EU and demonstrated the need to adopt common return procedures to provide coherent and successful expulsion of third-country nationals without lawful grounds of entry or residence in the Union.

Yet, despite the topicality of irregular migration or perhaps because of it, the adoption of the Return Directive was not as efficient or smooth as one might have expected. The original draft proposal contained several provisions that were necessary, yet controversial to secure efficient expulsion of irregularly staying third-country nationals from the territory of the EU. Therefore, already in the negotiation phase, the Return Directive received extensive criticism due to its controversial content and was scrutinised for providing insufficient protection of fundamental human rights during the return procedure. Some of the concerns over the Return Directive’s compliance with the fundamental rights principles pertain even now, after eight years since its adoption and six years after the expiry of its transposition deadline.

310 Explanation: The Return Directive is a hybrid instrument and on the one hand is part of the Schengen acquis. It applies thus to Switzerland, Norway, Iceland and Liechtenstein. The UK and Ireland are not bound by that part of the Schengen acquis in accordance with Protocol 19. On the other hand, the Return Directive is a development of the acquis covered by Title V of Part Three of the Treaty, into which the UK and Ireland could opt into in accordance with Protocol 21. However, these Member States have not exercised such an opt-in. See European Commission, Communication on EU Return Policy, COM(2014) 199 final, Brussels 28.03.2014, p 3
One part of the research question this thesis aims to answer was whether the alleged fundamental rights shortcomings in the Return Directive were caused in the legislative or rather in the application phase of the Directive. In order to answer that question, it is essential to first analyse whether the Return Directive entailed gaps in the law that would create legal uncertainty in its interpretation and application. These gaps in the law are not only legislative flaws and not in compliance with fundamental rights principles but may even lead to real risks of human rights violations. Thus, it is necessary to explore the process of drafting and adoption of the Return Directive, since it may provide an understanding of its deficiencies in the general context.

It is vital to see why the Directive was adopted to begin with before moving on to the adoption process and negotiation phase. Some of the issues already discussed will arise again throughout the following pages. For example, the dichotomy between the Council and the Parliament, on the one hand, and the Parliament’s role in the co-decision process on the other. It is important to note the fact that the Directive was the first important legislative instrument in the field of immigration adopted under co-decision of the European Parliament and the Council. The adoption under the co-decision process was expected to balance the conservative aims of the Council and therefore provide a softer migrant friendly approach in the combat against irregular immigration, particularly because the European Parliament is known for promoting more liberal views in immigration management. The reality, however, turned out to be a bit different from the one expected, with the Parliament taking a rather passive position and agreeing to adopt the Directive already in the first reading, without much assertiveness on its views. This constituted yet another reason for criticism from international organisations, human rights NGOs and even some individual governments.

The purpose of the Chapter is to examine how the Directive was negotiated and adopted and how the negotiations of the Directive, and in particular the participation of the Parliament, influenced the final content of the Directive. This is important to be able to discuss whether the issues that have occurred with the

311 G. Papagianni (2006), op cit., 56, p 252
Return Directive were caused rather in the legislative or application phase. Therefore, the Chapter is divided into two sections. The first section provides a brief overview of the political and procedural backgrounds that were in place when the Commission submitted the proposal and during the negotiations of the Return Directive. The political backdrop as well as the procedural rules played an important role in its content and thus help to unveil some of the reasons behind the overall outcome. The second part of the Chapter follows with a discussion on the negotiations between the Commission, the Council and the Parliament focusing mainly on the opposing views and complex relationship of the Council and the Parliament. Since it was the first time for the Parliament to participate in the legislative procedures as a co-legislator, the process was not as smooth as was originally hoped and only exacerbated by unrealistically high expectations placed on the Parliament and politically salient topic of the Directive. The negotiations section will focus on five main issues that were the most cumbersome to regulate and that later on also proved out to be the most problematic in the implementation phase of the Directive, giving substance for many court cases that will be covered in the next chapter.

1. Political impetus to adopt a measure on common return standards

1.1. Political background

Prior to the Commission’s proposal that eventually led to the adoption of the Directive, there was a number of legislative instruments in force dealing with irregular immigration in the EU. Since 2000, a myriad of soft-law and hard law instruments had been adopted relating to the expulsion of third-country nationals in an irregular situation, including cooperation in respect of transit for the purposes of removal by air and the organisation of joint flights. Nevertheless, none of the previous measures provided any regulations that would have wider implications on irregular immigration but were rather aimed at remedying specific arrangements and mutual cooperation in returning irregularly staying third-country nationals. These instruments were briefly mentioned already in the previous chapter to demonstrate the respective developments of the common Union return policy.
Additionally, there were some intergovernmental, including Council of Europe’s, non-legally binding declarations on expulsions recommending examples of good State practice with regard to expulsions that are necessary to mention. Even though these intergovernmental declarations are not EU instruments, they are still pertinent to the Return Directive because they provide necessary standards for the process of return deriving from international human rights treaties. Their adoption period also coincided with the drafting of the Return Directive and hence they are interesting to mention for the discussion on the negotiations of the Directive. Moreover, the Council of Europe declarations operate within the realm of the European Convention on Human Rights. Considering the pending EU’s accession to the ECHR and the interplay of the ECJ and the ECtHR on interpretation of human rights standards regarding expulsions, the Council of Europe’s declarations are relevant to discuss here.

Hence, before analysing the negotiations of the Return Directive a brief overview of the common return policy background should be provided. One of the influential documents that should be noted here is the Guidelines on Forced Return from 2005. These guidelines aim at providing guidance to national governments on this issue and are applicable to all persons subject to expulsion measures, regardless of their administrative status. The guidelines are relevant to the Return Directive as they lay down practical principles aimed at the effective protection of aliens upon their entry and forced return, irrespective of their legal status. The guidelines are quite detailed and deal with voluntary return, the removal order, detention pending removal, readmission and forced removals. In terms of substantive protection against expulsions, the guidelines recommend that no removal order should be issued in the following situations: (a) a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment; (b) a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a

313 Ibid
substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or other situations that would under international law or national legislation, justify the granting of international protection\textsuperscript{314}. Moreover, the Council of Europe’s guidelines provided not only a substantial background for return procedures but also turned out to be a relevant backdrop for finding an agreement during the negotiations.

Furthermore, a coalition of non-governmental organisations adopted common principles on removal of irregular migrants and rejected asylum seekers in 2005\textsuperscript{315}. There are nine principles that are worth recalling in full: voluntary return should always be the priority, vulnerable persons should be protected against removal, persons subject to a removal order should have access to effective remedies, detention pending removal should be the last resort, family unity should be respected, independent monitoring and control bodies should be created, use of force should comply with Council of Europe recommendations, re-entry ban should be prohibited and a legal status should be granted to persons who cannot be removed\textsuperscript{316}.

As for the situation preceding the Return Directive in the EU law, it would be wrong to claim that the Return Directive was the first ever legislative instrument in the EU \textit{acquis} on irregular migration aiming to provide common rules and regulations concerning return of irregularly staying third-country nationals. The adoption of all the soft-law and hard-law measures are based on the policy declarations of the European Council that form the foundation of priorities and principles of the common immigration \textit{acquis}, as well as set the guidelines for the necessary legislative developments in the Union. These policy declarations, namely the Tampere\textsuperscript{317} and the Hague Programme\textsuperscript{318}, established the fight against irregular

\textsuperscript{314} See Twenty Guidelines on Forced Return, op cit., 312, p 2
\textsuperscript{316} Ibid
\textsuperscript{317} Presidency Conclusions of the Tampere European Council of 15-16 October 1999, p 23 stated „The European Council is determined to tackle at its source illegal immigration [---]”; “[---] it is necessary to prevent, control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders [---]”
immigration as one of the priorities of common Union migration policy. Accordingly, the European Council called for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity\textsuperscript{319}. The Hague Programme\textsuperscript{320} further stated the right to expel the migrants who do not or no longer have the right to stay legally in the EU, as one of the aims of common immigration acquis. Migrants who do not have the right to stay legally in the EU either must return on a voluntary or, if necessary, compulsory basis\textsuperscript{321}.

Consequently, the Commission, based on the policy declarations, confirmed already early on the common return policy as an integral and crucial part of the fight against illegal immigration\textsuperscript{322} and highlighted the need for approximation of return standards and improved cooperation on return among Member States\textsuperscript{323}. Hence, the Commission initiated a public debate on the subject matter among relevant stakeholders\textsuperscript{324}, which then formed a basis for the draft policy programme\textsuperscript{325} that was adopted by the Council in 2002\textsuperscript{326} and became one of the first steps on the road to the common Union return legislation, paving the way for the adoption of the Return Directive. The Return Action Programme discussed expulsion and repatriation policies and measures in the field of return of irregular residents. The programme covered both forced and voluntary return of irregularly staying third-country nationals and naturally included the policy reminder of the continued

\textsuperscript{318} Presidency Conclusion adopted by the Brussels European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 14292/04, Brussels, 08.12.2004, OJ C 2005 53/01, 03.03.2005, paragraph 1.7.1 stated: “[---] it is necessary to prevent, control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders [---]”

\textsuperscript{319} The Hague Programme, paragraph 1.6.4. Additional comment: Interestingly enough, in respect of terminology both the Tampere Conclusions and the Hague Programme did not entail the term ‘expulsion’, but have consistently referred to the ‘return’ of illegally staying migrants.

\textsuperscript{320} The Hague Programme: strengthening freedom, security and justice in the European Union 2005/CS3/01 adopted by the European Council 4-5 November 2004

\textsuperscript{321} The Hague Programme, p 1.6.4


\textsuperscript{323} European Commission, COM(2002) 175 final


\textsuperscript{325} European Commission, COM(2002) 175 final

respect of the human rights standards and international obligations in conducting the return and removal procedures\textsuperscript{327}. The Return Action Programme, being endorsed by the Hague Programme, called amongst other things for improved operational cooperation among Member States and the establishment of common standards with the aim of facilitating operational return. The Programme called for the submission of an appropriate Commission proposal in 2005.

1.2. Decision making rules

As was indicated above and also mentioned in the previous chapters, the initial legislative instruments of the common EU immigration \textit{acquis} had all been adopted by the Council following the legislative rules that required consultation with the European Parliament and unanimity in the voting in the Council\textsuperscript{328}. These rules were often referred to as one of the reasons why the legislative process in the field of immigration and asylum was relatively slow and often reflected one-sided views on migration regulation\textsuperscript{329}. Furthermore, such a system enabled to block the adoption of any piece of legislation by the veto of just one Member State and hence often brought about the Commission’s proposals to be significantly watered down in order to find an agreement and have any kind of legislative progress. At the same time, the Council was under no obligation to take the European Parliament’s views seriously into consideration and the consultation remained often just a window dressing rather than a substantial phase in the legislative process. Lastly, it was also believed that the supreme position of the Council in immigration matters resulted in a relatively low level of protection and allowed for considerable discretion for the Member States, as well as numerous exceptions and derogations to the standards set in the relevant directives\textsuperscript{330}.

\textsuperscript{327} EU Return Action Programme 2002, p 21
\textsuperscript{328} Article 73k of the Treaty of Amsterdam
In 2004 the justice and home affair matters were shifted under the co-decision procedures. Before moving onto the adoption process of the Return Directive, a few words need to be said about the co-decision procedure in general. Co-decision is the procedure that has been applied in the field of immigration since the beginning of 2005. Technically, according to the article 251 TFEU, a legislative act can go through two readings before being adopted by the Council. In both phases, Parliament has the right and the opportunity to make opinions and amendments. In reality, to speed up the decision making procedures and especially in politically salient or urgent matters, the Council tries to reach an ‘early agreement’ with the Parliament. This method is favoured by the Amsterdam Treaty, which made it possible to adopt a legislative act already in the first reading. Although it may seem as a perfectly legitimate legislative proceeding, the efficiency is often achieved at the expense of accountability and the content of the adopted legislative instrument. This was especially the case with the Return Directive. Furthermore, the voting system in the Council also underwent some changes. The unanimity was no longer required to adopt a legislative act, hence abolishing the possibility of obstructing the process by any of the Member States via posing a veto. Instead, a qualified majority voting system was introduced to reduce democratic legitimacy and bring in a better balance between the Member States and between the Council and the Parliament.

2. Negotiating the Return Directive: impact of the co-decision

The Return Directive was proposed in 2005 as part of the Hague Programme and thus was to be adopted under the co-decision procedure and qualified majority voting in the Council and majority voting in the Parliament. Although not passed

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331 Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, 2004/927/EC, OJ L 396/45

332 For more detailed analysis of the co-decision procedure see for instance P. Craig and G. de Búrca (2011), EU Law. Text, Cases and Materials, Oxford University Press, Oxford, fifth ed


334 A. Türk (2012), op cit., 114, p 64

under the Treaty of Lisbon, it was the first legislative instrument of the common immigration *acquis* that was adopted using the new legislative procedure in the Council and involved the European Parliament as the co-decider\(^{336}\).

As the European Parliament was generally more supportive of stronger human rights standards in the immigration instruments, it raised expectations that its greater involvement in the legislative procedure would accordingly have an effect on the Return Directive. Moreover, when the Commission proposal on the Directive was presented, the expectation was that because of the European Parliament acting as a co-legislator, the entire negotiations process would become more transparent allowing for a better-informed debate and consequently guarantee higher human rights safeguards\(^{337}\). It can be argued that the expectations laid on the new procedures, particularly on the new and increased role of the Parliament as the co-legislator, were perhaps unrealistically high and thus extremely easy to disappoint.

It is clear from the reality that these expectations did not materialise in the anticipated way. The negotiations on the proposal put forward by the European Commission proved particularly lengthy and difficult, both at the Council level and at the European Parliament\(^{338}\). The negotiating process lasted for three years under the presidency of six different Member States that sometimes had very different approaches to the Commission’s proposal and had their own legislative agenda priorities. It is only natural that the EU presidencies have their own political priorities that they push for in their agendas, hence steering the course of the legislative progress and negotiations in the Council accordingly. This can either speed up the discussions or slow down the negotiations or legislative progress in general, depending on the political agenda of the Member State holding the EU Presidency. This was also the case in the negotiations over the Return Directive, which coupled with the topic being a politically tricky issue, only exacerbated the cumbersome process even more.


\(^{337}\) K. Pollet (2011), op cit., 330, p 26

Namely, the Directive was drafted over the period from the end of 2006 until the second half of 2008, during three different Presidency periods, Finnish, German and Portuguese, all of which adopted very different approaches towards the Directive’s content. The Finnish Presidency, although taking a strong stand in avoiding too liberal an approach, aimed largely for a compromise in the rules. The German Presidency demonstrated the least success in the Directive drafting, as well as opting for the most conservative approach aiming to leave most of the matters for the discretion of the Member States. Clearly, Germany was not interested in achieving the harmonisation at this stage. With the Portuguese Presidency the draft experienced progress again, resulting eventually in the adoption of the Directive with the final text representing the compromise between a Parliament suggesting a more liberal approach and the sovereign interests of the Member States.

One of the aspects that caused disappointment and made the Return Directive subject to criticism was the complete lack of transparency during the process of negotiations that involved almost no public discussion with the main stakeholders. The most active phase of negotiations took place mostly in the form of informal ‘trilogue’ meetings between the rapporteur of the LIBE Committee in the European Parliament, the Commission and the Presidency of the Council. During this period hardly any information with few occasional exceptions about the discussions between the three institutions was made public. Even though the informal ‘trilogue’ meetings accelerated the negotiation process, they should be largely used for purely technical matters, yet have been increasingly used to also

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339 See European Council documents 14814/05, 6008/06, 10002/06, 11051/06, 11456/06 (inter-institutional files); Documents 13451/06 (Presidency compromise suggestions on Articles 1–10, 6.10.06), and 15165/1/06 REV 1 (Presidency compromise suggestions on Articles 11–22, 15.11.06)
341 D. Acosta (2009), op cit., 115
342 See the Portuguese Presidency document
343 Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on practical arrangements for the co-decision procedure (Article 251 of the EC Treaty), OJ C 145
344 For further on the accelerated negotiations phase see F. Lutz (2010), op cit., 324, pp 23-24
345 K. Pollet (2011), op cit., 330, p 27
346 According to the European Parliament ‘trilogues consist of political negotiations, although they may be preceded by preparatory technical meetings (attended by the three institutions’ experts). They may address issues of planning and timetable or go into detail on specific issues of substance, often on the basis of compromise texts.’ See European Parliament, Co-decision and Conciliation: A guide to...
deal with politically sensitive issues. Thus, the fact that the EU institutions opted for such a method in a politically controversial issue can be seen as a sign to reduce the overly emotional discussions and to keep the circle of the negotiators small. In a way, it is evident that the main parties to the negotiations chose efficiency over transparency and accountability, thus sacrificing democratic legitimacy in the EU’s legislative procedure. The fact that the whole period of debate was accompanied by fierce criticism from several human rights organisations\textsuperscript{347}, as well as from the governments of several Latin-American countries\textsuperscript{348}, did not make the negotiations politically or institutionally easier. Therefore, it can be argued that the severe critique may have been one of the reasons why the negotiations were mostly held in a number of informal ‘trilogue’ meetings.

Another aspect that caused disappointment in the negotiations was the adoption of the Return Directive at the first reading at Parliament. Consequently, the Directive has also been referred to as a first reading deal\textsuperscript{349}. Many believe that the first reading agreement was reached in order to avoid the need for a second reading and reconciliation\textsuperscript{350}. Moreover, it is the simplicity that may seem appealing to lawmakers as a first reading agreement only requires a simple majority in plenary while an absolute majority is needed in second reading\textsuperscript{351}. Thus, for the sake of legislative efficiency the institutions are often encouraged to reach an agreement at an early stage of the procedure\textsuperscript{352}.

It seems from the adoption process that the Parliament simply did not try hard enough to push through their positions concerning this Directive. However, the


\textsuperscript{347} UNHCR, Amnesty International, ECRE


\textsuperscript{349} H. Toner (2014), ‘The Lisbon Treaty and the Future of European Immigration and Asylum Law’ in L. Azoulay and K. De Vries (eds), op cit., 11, p 19

\textsuperscript{350} K. Hailbronner (2010), op cit., no 71, p 1505

\textsuperscript{351} Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on practical arrangements for the co-decision procedure (Article 251 of the EC Treaty), OJ C 145

Parliament may have faced the unfamiliar difficulties during the proceedings because this was the first immigration instrument that was adopted under a co-decision procedure and as a politically utmost salient matter and it was often subject to conservative views of the Council and resistance from the Member States to harmonisation. Moreover, the Council’s views are largely influenced by the country of Presidency and the Parliament may have feared the negotiations becoming even more complex further along, depending on the leading country\textsuperscript{353}. In fact, the next country to take the Presidency of the Council would have been France, whose conservative views on immigration are well known amongst the members of European Parliament. Thus, it can be speculated that the quick approval of the Directive by the Parliament, derived also from political incentives. Namely, the Parliament may have been concerned that the French Presidency could have strongly influenced the situation, the co-adoption process may have aggravated matters politically and the composition of the Directive had reflected even more conservative views and exacerbated the quality of the legal instrument.

Yet, it cannot be said that the Return Directive is an isolated case, but rather part of a larger amount of cases that have also taken a similar approach\textsuperscript{354}. In terms of the Return Directive, it can also be argued that perhaps the Parliament came up against the harsh reality of what it means to have not just the power to protest but the obligation to reach solutions that can attract sufficient consensus to survive the legislative process, in the context of migration law issues. Playing the role of ‘rights champion’ perhaps becomes increasingly problematic, as the role of relatively powerless ‘outside’ critic gives way to real power, which has to be shared with others despite some deep disagreements\textsuperscript{355}.

Despite the somewhat high expectations laid on the new legislative procedure, the impact of the shifted rules on the negotiations and the final outcome of the Return


Directive cannot be underestimated. Under the previous consultation procedure it would have been relatively easy for any of the Member States to halt the negotiations by veto or to agree on an entirely watered down text with very limited added value, which, considering the politically sensitive nature of the Directive, would have been more than likely to happen. Bearing in mind that the negotiation period lasted for just over three years and did not follow a smooth pattern, it is safe to say that despite some limitations, the new legislative procedure had a largely positive impact on the Return Directive.

As for the role of the Parliament, as was stated above, its participation in the negotiation process was subject to unrealistically high expectations. It was anticipated that as an unconditional advocate for high human rights standards the Parliament would have pushed its views more and the result would have been a more liberal approach towards migration and expulsion of irregularly staying third-country nationals. In reality, the Parliament adopted a much more pragmatic approach, which under normal circumstances a legislator should not be unnecessarily judged. Despite all the disenchantments it would be wrong to say that Parliament’s involvement did not influence the final outcome of the Directive in any way or only in a negative manner. In fact, some of the clauses that ended up in the final text of the Directive are a result of long-lasting negotiations and often a compromise of the Parliament’s and the Council’s views, as will be demonstrated in the following section.

3. Substance of the Return Directive: reasons to negotiate

The negotiations over the Return Directive proved to be cumbersome, partly because of the new and yet unusual co-decision procedure and partly because of the institutional contestation that often poses challenges to legislative development in the EU. It is fair to say that in addition to the institutional and procedural dilemmas the negotiations procedure was exacerbated by the content and the topic of the Directive that was highly sensitive and politically salient. In fact, it was probably because of the latter that the negotiations experienced such a long and rocky road without really reaching an expected successful ending. The application of
the Directive will be analysed in more detailed in the next Chapter but in order to understand the challenges of the implementation, it is necessary to examine how the negotiations over the content of the Directive reached the final compromise. It is particularly important as the same issues that were controversial during the negotiations proved out to be the most contentious during the implementation of the Directive.

Namely, five issues can be pinpointed here: the scope of the Directive, voluntary departure, entry bans, legal remedies and detention. In respect of all of these issues, the Council Working Party discussions following on from the Commission’s proposal ‘tended towards a dilution of relevant provisions with an increase of the prerogatives that Member States could keep’, yet the European Parliament consistently proposed its extension and greater protection. All of these issues were subject to intense discussion mainly on the ‘trilogue’ meetings stage that took place in 2007 and 2008, whereas prior the negotiations remained merely marginal and were often superficial, if not halted all together at the Council depending on which Member State held the Presidency. As was said, the compromises that now form the final content of the Directive were reached at the technical level during the ‘trilogues’. Two issues, the maximum length of detention and the availability of free legal aid, could not be agreed upon technical level and had to be discussed in substance at the political level.

Even though it has been argued that most of the controversial issues were resolved in favour of the Council’s position, with the notable exception of detention and unaccompanied minors, it is not necessarily the case. In fact, the Council of Europe’s guidelines on forced return as well as the Commission’s original draft of the Directive were both playing the often thankless and unnoticeable role of the

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356 In some literature unaccompanied minors has also been listed amongst the most contested issues, for example see D. Acosta (2009), op cit., 115, pp 19-39; H. Toner (2014), ‘The Lisbon Treaty and the Future of European Immigration and Asylum Law’ in L. Azoulay and K. De Vries (eds), op cit., 11, and F. Lutz (2010), op cit., 324, p 27
357 D. Acosta (2009), op cit., 115, pp 19-39
358 F. Lutz (2010), op cit., 324, p 27
'golden bridge'\textsuperscript{360}, in the rivalry relationship between the Council and the Parliament. Even though the final outcome is not the ideal Directive it would be perhaps prejudiced to claim that the views represented in it belong solely to the Council.

3.1. The scope of the Directive

Despite the Council calling for a measure that would regulate or harmonise the reasons leading to the ending of legal stay and subsequent expulsion\textsuperscript{361}, the Commission’s proposal focused solely on rules to be followed once illegality of stay had been established. The reasons behind this were pragmatic rather than political, as the Commission did not see the need to provide yet another piece of legislation that would deal with these issues, nor predicted difficulties trying to find ‘one size fits all’ harmonisation\textsuperscript{362}.

According to the Commission’s proposal the Directive was applicable to any illegally staying third-country national regardless of the reason of the illegality of the stay. Illegality of the stay was defined as anyone who does not fulfil or no longer fulfils the conditions set out in Article 5 of the Schengen Convention. Member States could decide not to apply the Directive to third-country nationals who were refused entry in a transit zone of a Member State. In case they decided not to apply it to this category of third-country nationals, Member States still had to ensure a certain level of protection for these people\textsuperscript{363}. Thus, the question in the negotiations was never as to who were covered by the Directive but rather who were not.

During the ‘trilogues’ the Parliament sought to apply the Directive to any third-country national, except those refused entry at the border or the transit zone, whereas including the requirement that these people would still have the

\textsuperscript{360} F. Lutz (2010), op cit., 324, pp 28-29
\textsuperscript{362} For more detailed information see F. Lutz (2010), op cit., 324, pp 13-15
appropriate treatment and level of protection guaranteed by the Member State.\textsuperscript{364} Whereas the Council was not supporting the protection imperative, it was additionally requesting another exclusion, that of the cases of return as criminal law sanctions, arguing that the matters of criminal law should not be harmonised on the Union level.\textsuperscript{365}

As a result of the negotiations, the compromise was reached that the Member States were left a large margin of discretion not to apply the Directive to third-country nationals refused entry, or who are apprehended or intercepted with the illegal crossing at a Member State’s external border, or who are subject to return as a criminal law sanction.\textsuperscript{366} Hence, the scope of the Directive was agreed upon with a clear inclination towards the position of the Council. This may have been also an act of pragmatism in order to save the Directive as a whole, especially in the light of the fact that the protection clause was inserted in a separate provision.\textsuperscript{367}

However, the relatively broad wording of the scope and the large margin of discretion left for the Member States when implementing the Directive can be seen as signs of concern and question whether the harmonisation of the rules really was the main priority as stipulated by the Commission. Then again, the legislative pragmatism may have just silenced the initial enthusiasm and ideas in order to give way to compromises.


\textsuperscript{365} Council of the European Union, Outcome of proceedings of 7 December 2007, Brussels, No 15566/07, pp 15-16. Available at 

\textsuperscript{366} Article 2(2) of the Return Directive states: Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State; (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

\textsuperscript{367} Article 4(4) of the Return Directive states the Member States’ discretion to apply more favourable provisions with regard to the persons excluded from the scope of the Directive.
3.2. Voluntary departure

The promotion of the principle of voluntary departure was strongly supported by the Commission as one of the key added values of the Directive. This was also in compliance with the generally promoted principles of common return policy in the EU, as well as the Council of Europe’s guidelines of forced return and general safeguards of fundamental rights. The Commission proposed the voluntary return of up to four weeks of the third-country national subject to return decision unless there were reasons to believe that the person concerned could abscond during that period\(^{368}\). Hence the heated discussion was mainly over the length of the period of voluntary departure and over the reasons to deny such a period.

The European Parliament requested to provide for a period of ‘at least’ four weeks\(^{369}\), whereas the Council was siding with the Commission’s proposal and accepted a period of ‘up to 30 days’\(^{370}\). Even though the period of departure was being contested more strongly during certain Presidencies\(^{371}\), the agreed version was a period between seven and thirty days\(^{372}\), the Council’s insistence on the matter, with the wide margin of discretion for Member States to extend the period if necessary. Though not an ideal solution, especially as the Parliament was in favour of a rights-based approach obliging the Member States to prolong the period in specific circumstances, it can still be seen one of the positive indications of the co-legislation. Without the involvement of the Parliament, the existence of any safeguard of voluntary departure period would have been questionable if not entirely unlikely in the Directive.

As for the derogations from the voluntary departure, the Commission’s proposal to link the decision of a Member State to deny the period of voluntary departure, to the risk of absconding of the given person, was in general what also ended up in the

\(^{368}\) European Commission, COM(2005) 391 final, Article 6(2)
\(^{369}\) LIBE report, 20 September 2007, A6-0339/2007 final, amendment 26
\(^{371}\) For instance, the German Proposal restated the Finnish position that the voluntary departure period should be left to the discretion of the Member States’ authorities. See D. Acosta (2009), op cit., 115, p 29
\(^{372}\) Article 7(1) Return Directive
final version of the Directive, albeit in a more detailed format. The Council yet again had taken a much more controlling view, suggesting that any illegal entrant could have been quasi-automatically detained and deprived of the possibility to obtain a period of voluntary departure. Even though the final outcome was not quite as grim as the Council proposed, it still came short from the original idea of ‘promoting voluntary return’ and resulted in yet another ‘may clause’ with a wide margin of discretion for Member States to refrain from granting a period of voluntary departure, if certain circumstances occur.

It is evident that such a provision in the Directive was another illustration damaging the Parliament’s reputation as the co-legislator and indicated who actually seemed to have the upper hand in the legislative process. In addition, it is concerning to note another ‘may clause’ in the Directive opening the doors for Member States to foresee in their national implementing legislation suitable grounds to determine or to deny the period of voluntary departure. Such a regulation can be questioned to provide common standards of return, which is contrary to the purpose of the Directive.

3.3. Entry bans

The provisions concerning the conditions of the entry ban were again, one of the most highly contested and critical ones during the course of the tense negotiations between the Parliament and the Council. The trilogies were also exacerbated by the fact that the current national practices varied significantly. Article 3(8) of the Return Directive defines the ‘entry ban’ as accompanying a return decision that prohibit the individual in question to enter and stay on the territory of any Member State for a specified period of time.

The purpose of the entry ban was to set further incentives for voluntary departure and to strengthen the "Europeanisation" of the effects of national return measures. It was also intended to have preventative effects and to foster the credibility of a

374 Article 7(4) Return Directive
375 K. Hailbronner (2010), op cit., no 71, p 1532
truly European return policy. The underlying message of the provision was to send out a signal of ‘Fortress Europe’ to bar from re-entering the whole EU for a certain period of time, all those who disregard the EU immigration rules. Thus, the Commission proposal provided for the issuing of ‘re-entry bans’, preventing re-entry into the territory of all the Member States. The re-entry ban was a mandatory component to a removal order but a discretionary one to a return decision. The re-entry ban should not exceed five years.

The European Parliament advocated for optional re-entry bans and any bans longer than five years could only be imposed on those third-country nationals that represented a proven threat to public order or security. The Parliament also added some cases in which a re-entry ban might be withdrawn. In contrast, the Council suggested the compulsory re-entry ban but agreed with the maximum length of five years. However, in order to impose a longer ban it was only necessary to show that the third-country national represented a threat, as opposed to a serious or proven one, as in the Commission’s and Parliament’s proposals respectively. Suspension and withdrawal of the re-entry ban would have been at the discretion of Member States.

The compromise text went back to where it started providing for an obligation on Member States to make a return decision accompanied by a re-entry ban if no period of voluntary departure had been granted, or if the requirement to return had not been complied with. In other situations, Member States were not obliged to impose a re-entry ban but they had the possibility to do so. Where a third-country national complies with the return decision, Member States have to consider withdrawing or suspending the ban, whereas they may do so in other situations or if the threat has diminished.

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376 K. Hailbronner (2010), op cit., no 71, p 1532
378 COM(2005) 391 final, Article 9(2)
379 LIBE report A6-0339/2007 final, amendment 38
380 LIBE report A6-0339/2007 final, amendment 39
381 LIBE report A6-0339/2007 final, amendment 40
circumstances. Regarding the length of the entry ban the Parliament’s view prevailed, albeit with the added clause that the ban in principle does not exceed five years unless the person concerned poses a serious threat to public policy or security. Thus, the Parliament won the ‘serious’ clause but lost the ‘proven’ requirement.

Implications of the vagueness of the added clause remain yet to be seen. It leaves an uncertainty as to whether the Member States would in reality impose life-long entry bans, or will the existence of recital 6 in the preamble calling the Member States to carry out a case-by-case evaluation of all relevant circumstances prior adopting an entry ban subject to the principle of proportionality, provide for a sufficient safeguard. Nevertheless, the provisions of entry-bans, even though being a little more inclined towards the Parliament’s views were still seen as yet another shortcoming in the negotiations.

3.4. Legal remedies

The Commission proposal regarding judicial remedies was inspired by the EU Charter granting the right to an effective judicial remedy before a court or a tribunal with suspensive effect against a return decision or a removal order. Legal aid had to be made available to those who lacked sufficient resources.\footnote{European Commission, COM(2005) 391 final, Article 12} Even though during the negotiations the parties ended up lowering the requirements on both accounts, that of the reviewing body of appeal and availability of free legal aid, the discussion here will be focussed on the latter, as it ended up being the final significant hurdle on the way to adoption of the Directive. Naturally, safeguarding free legal aid was a matter that did not appease most Member States.

During the negotiations the Parliament sided with the Commission’s view with an added possibility to appeal also against an entry-ban or detention\footnote{LIBE report A6-0339/2007 final, amendment 51} and linked the conditions of guaranteeing free legal aid to Community law\footnote{LIBE report A6-0339/2007 final, amendment 52}. In contrast, on the resistance of the Member States, the Council suggested the free legal aid to be
optional and the conditions linked to national laws\textsuperscript{386}. In sum, the parties were once again arguing over “shall” versus “may” clause. Hence, the reached compromise was based on the CoE guidelines text providing a golden bridge between the contrasting views leaving the free legal aid mandatory for the Member States to provide but linking the conditions to national legislation\textsuperscript{387}.

Despite finding a compromise the negotiations over the nature of the clause lasted up until the very last minute, as the sudden and intense pressure from some of the Member States requested the provision of free legal aid to be optional. However, the Parliament would not accede and put into question the quasi-agreed ‘first reading deal’\textsuperscript{388} to which the Council gave in, on a condition that the provision would have a supplementary one year delay for transposition and the Commission’s commitment to assist finding financial assistance for Member States to implement Article 13(4).

It was refreshing to see the Parliament finally taking a stronger stance and lobbying for its views but it may have been also just an illustration of pure legislative pragmatism. After three years of having the draft Directive on the table it is quite possible that both parties were simply tired and wanted to reach an agreement. After all, the one thing the Council and the Parliament seemed to have agreed upon was the pursuit to have a Directive providing common standards of return. The judicial remedies provision is also another example of how the content of the Directive benefitted from co-decision procedure. In retrospective, it can be presumed that under the previous consultation method the said article would have become a ‘may’ clause or the negotiations halted in the Council under the pressure of Member States.

3.5. Detention

The provisions regulating the matters of detention of illegally staying third-country nationals subjected to departure are rather long in the Return Directive. Clearly this


\textsuperscript{387} Article 13(3) and (4) Return Directive

\textsuperscript{388} F. Lutz (2010), op cit., 324, p 24
was also one of the aspects that raised much contestation between EU institutions as well as Member States and was one of the most controversially discussed provisions during the whole negotiation process, in both political and technical terms. This, together with Article 7 that regulates voluntary departure, has been the Achilles heel of the entire Directive and thus subject to severe critique, as it often fails to meet the human rights standards. Since the length and the reasons to detain are the ones that proved to be the most problematic in the implementation phase and subject to case-law, the following section will focus on them.

With reference to detention the Commission envisaged it would be compulsory for the Member State to keep a third-country national under temporary custody if there was a risk of absconding and other less coercive measures were not sufficient. These measures had to be applied taking into account the principle of proportionality. The proposal foresaw a maximum limit of six months with the imperative to be reviewed by a judicial authority at least once a month.

During the lengthy discussions the Parliament proposed their version of detention possibilities or to be more precise, detention improbabilities. Namely, their version contains the safeguard that people cannot be presumed to be at risk of absconding, and therefore detained, just because they are irregular entrants. The Council felt differently, requesting detention being made mandatory with the possibility for indefinite prolongation if the third-country national concerned does not depart voluntarily. The final text represents, yet again, another compromise between the two ends.

Regarding the conditions and length of detention, the Parliament suggested it to be optional and not longer than three months with the possibility for the Member States to shorten or extend that period up to 18 months in cases in which the operation would be likely to last longer, due to a lack of cooperation on the part of

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390 European Commission, COM(2005) 391 final, Article 14
392 LIBE report A6-0339/2007 final, amendment 55
the third-country national, or due to delays in obtaining the necessary documentation from third-countries, or in the case of a threat to public order.\textsuperscript{393} The custody was linked to the purpose of removal and had to cease in the event of removal becoming impossible.\textsuperscript{394}

The Council’s position was much tougher suggesting the detention to be compulsory where it was necessary to prepare the return and/or carry out the removal process, unless other sufficient but less coercive measures could be applied\textsuperscript{395}. Hence, third-country nationals could be detained even if there was no risk of absconding. The Council proposed six months as a general length of detention with the possibility to prolong it indefinitely if there is a lack of cooperation by the individual or difficulties with documentation or pending appeal procedures. In short, the views of the Parliament and the Council set completely different dimensions exacerbating the chance of a good compromise.

Many organisations opposed the Article 15 of detention of migrants for a maximum of 18 months pending their removal, arguing that this is an excessive period to enforce a removal order\textsuperscript{396}. In the end, the parties agreed that detention was going to be optional, however for different reasons. For the Parliament it was representing more comfortable and acceptable rights-based approach in compliance with ECHR and the Charter. Whereas the Council was happily agreeing to the ‘may’ clause for the purpose of a wider margin of discretion for Member States and presumably easier transposition phase\textsuperscript{397}. The detention was fixed to the conditions of ‘purpose of removal’ and ‘the risk of absconding’ or ‘the lack of cooperation on behalf of the third-country national’\textsuperscript{398}. With regards to the length, both parties had to take a concession: the Parliament accepted the general six

\textsuperscript{393} LIBE report A6-0339/2007 final, amendment 60
\textsuperscript{394} LIBE report A6-0339/2007 final, amendment 59
\textsuperscript{396} “Against the outrageous Directive!”, full text of speech given by Yasha Maccanico (Statewatch) at the hearing with NGOs organised by the GUE group, European Parliament, Strasbourg on 12 December 2007
\textsuperscript{397} For further see the discussion in F. Lutz (2010), op cit., 324, pp 65-69
\textsuperscript{398} Article 15(1) Return Directive
months detention period and the Council agreed to the extension limit of 12 months (rather than indefinite as in the previous version) and dropping the ‘threat to public order’ as one of the potential grounds for extension making the maximum length of detention 18 months.

The detention clauses are a pure compromise case in which the Parliament and the Council met in the middle, albeit with strongly divergent views on the subject matter. However, the role of the Commission should not be underestimated as it steadfastly sustained successful removal as the main purpose of detention of illegally staying third-country nationals and that it was not a provision that should be used to protect the society from persons potentially constituting a threat to public policy or security. Moreover, despite the final provision being far from the rights-based approach originally envisaged by the Parliament it is still far improved from the regulation suggested by the Council and demonstrates the significance of role of the Parliament in the legislative procedure.

Conclusions

The Chapter set out to explore whether and to what extent the Parliament’s involvement in the legislative procedure as the co-legislator influenced the content of the Return Directive. The general expectation seemed to have been based on the European Parliament’s presented role as the advocate of transparency and fundamental rights. The expectations of having more transparent debates and an overall more migrant friendly Return Directive did not materialise in reality, resulting in more criticism towards the Directive. However, the Chapter established that these expectations, albeit somewhat justified, were perhaps unrealistically high and thus extremely easy to disappoint. It is important to remember that in a co-decision procedure legislative pragmatism holds an even stronger place, especially in politically salient and sensitive matters. At the risk of reaching a stalemate and failing to adopt a legislative measure, pragmatism is often exercised in compromises and concessions and comes at the expense of specific substantive provisions.

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399 Article 15(5) Return Directive
400 Article 15(6) Return Directive
The Parliament has been condemned for adopting the Directive as soon as the first reading, whilst being aware of its shortcomings and ambiguities\textsuperscript{401}. It has been stated that the Parliament, instead of settling for the best, just settled for what was there, thus sacrificing the quality of the Directive. Nevertheless, because of the Parliament’s involvement, the final text provides at least some of the conditions that do not have too harsh an effect on the rights of the migrants. Although the whole document was severely debated and subject to contradicting interests and opposing ideas, some of its aspects were particularly difficult to reach a compromise on. In general, the modifications to the Commission proposal suggested in the LIBE report enhanced fundamental rights safeguards. For example, by prohibiting the detention of unaccompanied children, allowing a minimum of four weeks for third-country nationals to independently prepare their departure, making the application of entry bans optional and establishing a number of mechanisms for the active monitoring of return. Nevertheless, some amendments included in the report worsened the Commission’s original draft, such as the ones allowing administrative authorities to issue detention orders and providing that detention could be extended for up to one and a half years\textsuperscript{402}.

For the Return Directive the negotiations unfortunately reminded a complex and antagonistic custody hearing, where the Council and the Parliament took the role of two divorceses, while the Commission placed itself as a mediator. Albeit, having a common purpose that of the adoption of the Directive, the Parliament and the Council seemed to be more interested in contesting each other rather than prioritising to achieve what is best for their common offspring, i.e. the quality of the Return Directive. Yet, it would be unfair to claim that the shortcomings in the Return Directive were solely the responsibility of the Parliament or its lack of assertiveness during the negotiations. The severe divergence of views between the two main negotiators was evident in all the identified issues and even though the

\textsuperscript{401} The Parliament endorsed the final compromise text at its plenary meeting on 18 June 2006 with a large majority of 367 votes to 206 and 109 abstentions. For more details see Council document 10737/08. The Council approved this text on 9 December 2008 with qualified majority. For more details about the voting results in the Council see Council document 17081/08.

end result did not always reflect the Parliament’s rights-based approach, it would be incorrect to say that they were entirely inclined towards the Council’s conservative position. It would be unrealistic to expect that the institution that is new to its co-legislator role would be able to bring a radical change in the course of the common immigration *acquis* already in the first negotiations. In particular, if the opponent is much more experienced and used to being in a dominant position.

Furthermore, it can be speculated that reaching an agreement in the first reading may have partly been caused by the urgency of the subject matter and the need to combat irregular immigration in the Union. The latter was also repeatedly mentioned by all the presidential conclusions, the Tampere Conclusion⁴⁰³, the Hague Programme⁴⁰⁴ and the Stockholm Programme⁴⁰⁵. Another reason may have been a simple pragmatism considering the voting and adoption procedures and the pressure from national governments on their members of the European Parliament. In fact, it was rather evident especially in the final stages of the negotiations that the Council and the Parliament both strongly pursued for the adoption the Directive. In short, any Directive seemed to be better than no Directive. It is true, that such an attitude is what may have cost the quality of the provisions at times, but at the same time is an indication of a legislative and political pragmatism.

One of the purposes of this Chapter was to examine the influence of the negotiations on the content of the Return Directive in order to understand whether the shortcomings in fundamental rights safeguards the Directive has been criticized for, occurred in the legislative phase due to the gaps in law. The research demonstrated that in addition to several institutional issues that had a negative impact on the negotiations, the final text of the Directive, albeit a few references to human rights entailed several clauses that can be considered detrimental to

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⁴⁰³ “The European Council is determined to tackle at its source illegal immigration [---]”, Presidency Conclusions of the Tampere European Council of 15-16 October 1999, paragraph 23
⁴⁰⁴ The Hague Programme, p 1.6.4: “The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner…”
⁴⁰⁵ See especially paragraph 6.1.6 in The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, 17024/09
fundamental rights safeguards⁴⁰⁶. The examples being here the short period provided for voluntary departure and contrastingly lengthy period to extend pre-removal detention, as well as the possibility to issue entry bans for five years to the individual subject to return procedure.

However, the concerning impact of the co-decision and heated negotiations between the contesting institutions on the final text of the Return Directive can be seen in the vast amount of provisions that leave a wide margin of discretion for Member States, the so-called ‘may’ clauses. This unfortunately speaks volumes of the shortcomings in the work of both legislators that were unable to reach an agreement on common views. The vagueness of the scope and preconditions of detention for instance is a disconcerting sign for successful transposition. The amount of clauses leaving a wide margin of appreciation for Member States can be considered as one of the shortcomings of the Return Directive that occurred in the legislative phase. Even though the Directive’s provisions were largely in compliance with human rights principles depicted in the Council of Europe’s guidelines of forced return, leaving the application of several crucial provisions at the discretion of Member States can be seen as failing to provide sufficient fundamental rights safeguards by the legislator.

Furthermore, the purpose of the Directive was to establish common standards on return of illegally staying third-country nationals. With the myriad of procedures left for the Member States to implement and tackle according to their national legislation is not an indication of a regulation of common but minimum standards and raises questions as to the true purpose of the Directive. Keeping in mind that the deadline for the transposition of the Directive was in 2010, except for article on free legal aid, the first case was referred for a preliminary ruling to the Court of Justice of European Union (ECJ) under the Return Directive⁴⁰⁷ even before the transposition deadline had passed. This was already an indication about the potential implementation and interpretation issues that may have been expected

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⁴⁰⁶ Return Directive’s compliance with fundamental rights safeguards will be analysed in more detailed in the final chapter of this thesis.
⁴⁰⁷ ECJ C-357/09 PPU Kadzoev [2009], judgment of 30 November 2009, ECR I-11189. The application was submitted to the ECJ 7 September 2009 by the Administrativen Sad Sofia-grad, Bulgaria.
after the expiry of the transposition deadline and the further case-studies that will be discussed in the following Chapter only confirm it.
CHAPTER IV RETURN DIRECTIVE IN PRACTICE: APPLICATION BY MEMBER STATES AND INTERPRETATION OF THE COURT

Introduction

The previous Chapter focussed on the adoption of the Return Directive, examining the co-decision procedure and the cooperation of the Council and the Parliament. It appeared from the analysis that the negotiations over the Directive did not run smoothly and the entire process contained several stumbling blocks due to the political salience of the subject matter, as well as the contradicting views of the two legislators. Moreover, it was disconcerting to see that the final outcome of the Return Directive entailed a myriad of facultative clauses leaving a wide margin of discretion for Member States. Even though this can be seen as a compromise to reconcile different views of the legislating institutions and a logical outcome considering that migration law belongs in the area of shared competence, it still created a fertile ground for potential struggles in the implementation phase.

In fact, the deadline for transposition of the Return Directive expired on 24 December 2010. By now, all the Member States have fully transposed the provisions of the Directive into their national legislation, however only six 408 Member States managed to comply with the deadline, whereas twenty 409 received a letter of formal notice from the Commission. However, during the implementation, several issues occurred that required the contribution of the Court of Justice of the EU. Even more so, preliminary problems and issues appeared already before the transposition deadline had passed. The implementation of the Directive has not been a smooth journey and the Court of Justice has played quite a

409 Austria, Belgium, Bulgaria, Cyprus, Denmark, Germany, France, Finland, Greece, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Poland, Romania, Slovenia and Sweden according to National Implementing Measures (NIM) communicated by the Member States concerning Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348
significant role not only in the interpretation but also in providing new margins for the scope of the provisions of the Directive, as well as helped to clarify its position in the myriad of positive measures that form the EU immigration and asylum law.

This Chapter aims to discuss the issues and difficulties that appeared in the implementation phase of the Return Directive, demonstrating the pivotal role of the Court of Justice, providing clarification in interpretation, as well as application of the referred Directive provisions. The Chapter will demonstrate how some of the issues occurred due to the ambiguities in the wording of the Directive provisions and required unified interpretation by the ECJ. However, some of the much more complex matters occurred in the interaction between the Directive and domestic laws. These matters required the Court of Justice to provide guidance regarding the application of the Directive.

The main purpose of this Chapter is to examine the shortcomings and gaps in law that appeared in the implementation phase of the Return Directive and whether the interpretation of the Court of Justice provided any assistance to overcome these shortcomings. The questions referred to the Court of Justice by the domestic courts vary from criminalising irregular stay to issuing entry bans and from interpreting the scope of the Return Directive to applying the rules on pre-removal detention. However, all the questions have one aspect in common, namely they all involve the responsibility to strike a fair balance between the protection of rights and humanity of irregular third-country nationals subject to return decision whilst securing their effective removal. It will be interesting to examine whether and how the ECJ has found the balance between achieving the main objective of the Return Directive and ensuring that return procedures would be executed in a humane manner in compliance with fundamental rights. For this, the Chapter is divided into two parts, the first one addresses the issues that concerned the interpretation of the Return Directive and the second part examines the issues that occurred in interaction between the Return Directive and domestic measures. The latter will be an interesting way to demonstrate the impact of the Return Directive on domestic measures and practices. Each section will first provide the provision of the Directive and its implementation in the Member States, followed by the interpretation and
clarifications provided by the Court of Justice. The Chapter will aim to demonstrate how the case law has developed and shifted over the years and how it has impacted the implementation and application of the Directive. The questions that pertain are whether the Return Directive has posed any limits to national legislation and whether the Court has actually improved the protection of fundamental rights in returning irregularly staying third-country nationals.

1. Interpretation of the Return Directive

1.1. The scope

1.1.1 The question of asylum seekers

One of the most contested aspects of the Return Directive was its scope as the wordings in the final text remained rather vague and unspecified. Article 2 paragraph 1 of the Directive establishes the general rule that ‘this Directive applies to third-country nationals staying illegally on the territory of a Member State’. This is also mentioned in Recital 5 of the preamble of the Directive.\(^{410}\) The terms ‘third-country national’\(^{411}\) and ‘illegal stay’\(^{412}\) are defined in Article 3 paragraphs 1 and 2. The reasons for illegal stay do not play a role and thus the Directive does not specify or address the preceding stage, i.e. when and how a third-country national’s residence may become illegal.

The wording of paragraph 1 of Article 2 is broad enough and does not specify the situation of the persons whose application for residence permit is still pending and has not yet been decided upon. Whether they should be covered with the Directive depends on the specific circumstances of the individual case and the national laws

\(^{410}\) Recital 5 of the Preamble of the Directive stipulates ‘This Directive should establish a horizontal set of rules, applicable to all third-country national who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.’

\(^{411}\) ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code

\(^{412}\) ‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’
applicable in each Member State. However, if a Member State’s national law deems the applicant’s stay unlawful during the application procedure, the Directive applies but the authorities of the Member State consider refraining from issuing a return decision until the pending procedure is finished.

However, Article 2(2) of the Return Directive provides for the possible exclusion of two important categories of illegally staying third-country nationals from the Directive’s scope of application: certain border cases and criminal law cases. Article 2(2) is a facultative provision, which is why Member States simply have the opportunity to exclude from the scope of the Directive. The only mandatory exclusion from the Directive provided for in Article 2(3) concerns persons enjoying the EU rights to free movement. The definition of such persons is provided accordingly in Article 2(5) of Schengen Borders Code and extends to EU citizens as well as their family members and nationals of EEA and Switzerland.

Regarding the implementation of the Article 2(2), the first exclusion seems to be clearer than the second one. Acosta argues that the provision should be interpreted within the meaning of European law as opposed to more narrow and differing meanings under national laws as argued by Baldaccini. Peers concludes that optional exclusion of irregular border crossing should only apply where a person was stopped at or near the border hence enabling to exclude certain categories of third-country nationals but within the context of European law. Such an interpretation would guarantee the application of certain legal safeguards provided

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413 For example in Estonia and in Germany the stay of an applicant for a residence permit is deemed lawful until a decision has been taken provided that the person has been legally present when submitting the application (e.g. holding a valid visa or a temporary residence permit). See Article 81 of the Residence Act in Germany; Article 43 of the Aliens Act and Article 2 of the Obligation to Leave and Prohibition on Entry Act in Estonia.

414 Article 6(5), Return Directive

415 ‘third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State’

416 ‘third-country nationals who: are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures’


418 A. Baldaccini, (2009) op cit., 348, pp 1-17

419 S. Peers (2011), op cit., 44, pp 564-565
for in this Directive and ‘ensure a minimum of legal certainty’\textsuperscript{420} as per Article 4(4)\textsuperscript{421} of the Directive.

The second exclusion has been subject to more debates as it was not contained in the initial proposal of the Commission but added later by the Council during the negotiations to make sure the Directive would not harmonize issues of criminal law. The wording of the Directive provides opportunities for various interpretations as it does not specify what is meant by ‘criminal law sanction’ or a ‘as a consequence of a criminal law sanction’. The issues in implementation may occur also as some Member States consider irregular entry or stay a criminal offence often punishable with a fine\textsuperscript{422}. Moreover, it will be seen also in the relevant case law that it is always not so easy to draw a clear distinction between immigration law and criminal law especially in matters of return. Hence, the fact that such an important and volatile provision has been left with a wide margin of discretion for Member States to implement is not an indication of a solid legislative work but can rather be seen as an example of establishing ‘minimum’ standards of return procedure. If a person falls out of the scope of the Directive, Member States are not bound by the fundamental rights protections under the Directive, thus lowering the general level of legal safeguards applicable in Member States. Consequently, this leads to questioning the importance of fundamental rights referred to in the Preamble of the Directive. It additionally raises questions about the Return Directive as a harmonizing measure. If the purpose of the Directive was to harmonize the standards of returning illegally staying third-country nationals and providing a common scope as to who are covered by the standards, it can be argued that the provision establishing the scope of the Directive should have been stipulated as a mandatory and not a facultative clause. The lack of common standards leaves the interpretation of the provisions first up for the Member States and potentially for

\begin{footnotesize}
\textsuperscript{420} K. Hailbronner (2010), op cit., 71, p 1509
\textsuperscript{421} ‘with regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall: (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and (b) respect the principle of non-refoulement.’
\textsuperscript{422} For instance in Italy a person entering or staying in Italy without permission is considered a crime punishable by a fine of 5,000-10,000 Euros. See the discussion in D. Acosta (2011), op cit., 417, p 11
\end{footnotesize}
the Court of Justice to provide. Such an approach undermines the Directive’s influence as a harmonizing measure.

However, one of the main ambiguities that occurred in the implementation of the Return Directive regarding its scope was the question of the individuals subject to a return procedure under the Directive but having applied for asylum and whose application is still pending. The Directive itself does not specify how its provisions relate to asylum seekers leaving the matter up for teleological interpretation except for recital 9 in the Preamble of the Directive. According to this a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force\textsuperscript{423}. The Directive fails to specify how to proceed in a situation where a person subject to a return decision and/or removal order submits an asylum application during the return procedure. The broad interpretation would allow concluding that in any case of the asylum application Directive 2005/85/EC applies thus at least suspending if not ending entirely the application of the Return Directive in the given situation. However, due to the ambiguous wording in Article 2 providing the scope of the Return Directive in conjunction with the relatively broad Recital 9 in the preamble of the Directive, the issues concerning the application of the Return Directive appeared and were respectively referred to the Court of Justice for a preliminary ruling prior the expiration of the transposition deadline.

1.1.2 Interpretation of the CJEU

There were two cases in which the Court clarified the scope of the Return Directive. The first case regarding the interplay of the Return Directive and the Directive 2005/85/EC that reached the ECJ was the Kadzoev case, where the Court had to determine how the two regimes, that of asylum and immigration, intersect and apply. Although the question referred to the Court was relative to the maximum duration of detention for the purpose of removal, in particular, the way of calculating the relevant time-limits in light of the specific circumstances of the case,

the judgment considered also the scope of the Directive in addition to pre-removal detention clauses. The second case of Mehmet Arslan\textsuperscript{424} dealt already directly with the relation between return related detention under Return Directive and Asylum related detention under Directive 2003/9/EC in a situation where a third-country national subject to a return decision is detained under the Return Directive and submits an application for asylum with the objective of postponing removal.

Both cases concerned the interplay between immigration and asylum law measures and posed a question not only about the scope of the Return Directive but the scope of application of immigration law. Broadly speaking, Kadzoev is an example how one case can repeatedly move from the scope of immigration law to asylum law and back, suggesting the interplay between the two is much more complex than it may seem at the outset. Furthermore, such a complexity indicates the potential issues that Member States can encounter suggesting that the implementation of the Return Directive is a cumbersome and a detailed procedure. Mr Kadzoev was arrested by Bulgarian law enforcement officials when trying to illegally cross Bulgaria’s border with Turkey in October 2006. His removal, however, proved to be more complex\textsuperscript{425} than initially expected, exacerbated by the fact that during his detention Mr Kadzoev\textsuperscript{426} applied for asylum on several occasions \textsuperscript{427} but all three applications were dismissed.

\textsuperscript{424} ECJ, C-534/11, Arslan [2013], judgment of 30 May 2013, not yet published

\textsuperscript{425} At the time of his arrest, Mr Kadzoev did not have identity documents on him but said he was born in Grozny, Chechnya. Mr Kadzoev, because he had neither valid identity documents nor sufficient funds enabling him to travel abroad, was detained. Much confusion was generated by the fact that the detainee claimed his name to be either Kad佐ev or Huchbarov on different occasions. Bulgarian authorities contacted the Russian authorities in order to obtain valid identification and travel documents for the detainee. Unfortunately, the Russian authorities did not recognise the Chechen identity card the detainee held and refused to issue him valid Russian identity documents, as he was born of a Chechen father and a Georgian mother, despite the fact that his birth took place and was registered in Moscow. Additionally, the Russian authorities claimed that since the Chechen identity card came from persons and authority unknown to the Russian Federation, it could not be regarded as a document proving the person’s Russian nationality.

\textsuperscript{426} Explanation: Since the temporary identity card that was his only document noted his name to be Said Samilovich Kad佐ev, he will be referred hereinafter as Mr Kad佐ev.

\textsuperscript{427} Mr Kad佐ev himself alleged that he was previously detained and tortured by Russian police. It is worth noting that a number of human rights organisations found it credible that Mr Kad佐ev had been subjected to torture and inhuman and degrading treatment in Chechnya. See para 23 of Kad佐ev judgment. The situation of Mr Kad佐ev was raised in several international fora, most notably in the UN Human Rights Council (see United Nations General Assembly, Human Rights Council, Addendum to the report of the Special Rapporteur on torture, and other cruel, inhuman or degrading
The question therefore remained whether the Return Directive continues to apply to a detained irregular third-country national if the individual concerned applies for asylum during the return procedure. Namely, whether the Member State in question maintains the right to detain the individual during the process of the asylum application or does the asylum application, until the decision is pending, preclude the Member State from detaining the individual, thus precluding the Return Directive from applying.

The Court, although not answering the aforementioned question directly, still cleared the scope of the Directive by narrowing the scope of Article 15. More specifically, the Court ruled that the period spent in detention during an examination of an asylum application, may not be regarded as detention for the purpose of removal in the meaning of Article 15 of the Directive. The justification was that detention for the purpose of removal, on one hand, and detention of an asylum seeker on the other, fall under different legal regimes. Namely, the first can be applied to third-country nationals staying illegally in Member States. The definition of ‘illegal stay’ is defined in article 3 of the Directive and it does not cover asylum seekers as their detention is being regulated with Directives 2005/85 and 2003/9/EC accordingly.

In the case of Mehmet Arslan the Court established that Article 2(1) of the Return Directive read in conjunction with recital 9 of the Preamble, does not apply to a third-country national who has applied for international protection during the making of the application, until the result of that application. Therefore, the Return Directive does not apply at least until the first decision on the application. The Court thus remained consistent with its previous literal interpretation of the Directive and its previous judgment in the case of Kadzoev. However, for the first time the Court referred to recital 2 of the Preamble and to the obligation to safeguard fundamental rights of the immigrants that are being returned to their

\[\text{treatment or punishment, Manfred Nowak: Summary of information, including individual cases, transmitted to governments and replies received, A/HRC/10/44/Add.4, 17.02.2009, p 43}\]

Paragraph 48 of Kadzoev judgment

Paragraph 49 of Arslan judgment

Paragraph 45 of Kadzoev judgment
home countries, or third States\textsuperscript{431}. This is important, as it is the first explicit acknowledgment of fundamental rights in the context of irregular immigration. Albeit, the judgment did not entail a reference to the Charter, an explicit recognition of fundamental rights safeguards and the narrow interpretation of Article 2(1) in conjunction with a strong emphasis of general implementation principles established in the Preamble of the Return Directive, suggest the Court’s willingness to apply the Directive in compliance with the human rights principles. The Charter being the main source of human rights principles in the EU implies that the Court is adamant about enforcing the Member States obligation to guarantee fundamental rights safeguards when implementing or derogating from EU law.

By analysing the nexus between domestic legislation and the Return Directive and the Directive 2005/85, the Court confirmed its ruling in Kadzoev about the unlawfulness of the detention of an asylum seeker on the sole ground that he is an applicant for asylum. However, at the same time the relevant EU asylum law does not provide the grounds on which the detention of an asylum seeker could be ordered\textsuperscript{432}. Therefore, it is the discretion of each Member State to decide upon those grounds\textsuperscript{433}.

The Court noted that Mr Arslan had given reason to believe, with his conduct, he had submitted the application for asylum only to delay or even jeopardise the return decision taken against him. The Court found that in such circumstances and since it is up to the discretion of each Member State to decide on the ground for detaining an asylum seeker, the detention can indeed be justified under the given circumstances\textsuperscript{434}. As long as the detention is being carried out in accordance with Article 18(1) of the Directive 2005/85\textsuperscript{435}. However, despite the fact that the Return Directive is not applicable in the given situation, does not mean that the return procedure is definitively terminated but it may continue if the application for

\textsuperscript{431} Paragraph 42 of Arslan judgment
\textsuperscript{432} Paragraphs 54-55 of Arslan judgment
\textsuperscript{433} Paragraph 56 of Arslan judgment
\textsuperscript{434} Paragraph 57 of Arslan judgment
\textsuperscript{435} Paragraph 58 of Arslan judgment
asylum is rejected\textsuperscript{436}. The asylum procedure should not become a means to secure an automatic release from detention with a view to return.

Therefore, the Directives 2003/9 and 2005/85, do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85 after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return\textsuperscript{437}.

The judgment confirms that asylum-related detention and return-related detention are covered by two different legal regimes with respective legal safeguards adapted to the specific situation of asylum seekers and returnees. The Court made clear that the existence of these two differing regimes does not imply an obligation on a Member State to automatically release detained returnees, once they make an asylum application\textsuperscript{438}.

Both cases, Kadzoev and Mehmet Arslan, are important landmark cases regarding the interpretation and the scope of application of the Return Directive as they challenge the interplay between the EU’s legislation on asylum and irregular immigration. In the case of Kadzoev, the Court, via limiting the scope of application of the Article 15, clarified the scope of the entire Directive. The Court, rather cleverly, provided an interpretation for the ‘illegal stay’ in Article 3 of the Return Directive, even though it had not been referred under preliminary ruling to the Court to answer. In a sense the Court used its right for judicial activism and indirectly went further in its judgment. The reasoning was later confirmed in the case of Arslan which provided a much needed clarification of the scope \textit{ratione personae} of the Return Directive.

\textsuperscript{436} Paragraph 60 of Arslan judgment
\textsuperscript{437} Case law commentary, University of Leiden, available at \url{http://media.leidenuniv.nl/legacy/case-c-534-11.pdf} (last accessed 30 September 2016)
\textsuperscript{438} European Commission, COM(2014), 199 final, p 28
Although the Court’s judicial activism in the Kadzoev and further consistency in the Arslan cases provided the much needed interpretation of the scope of application of the Return Directive, it is still frustrating to think that ambiguity of the wording in Article 2 may have been intentional or at least rather explicit shortcoming in the legislative work of the EU institutions. The distinction of asylum law as a reflection of international solidarity, and immigration law, as an instrument at the disposal of States had been unchallenged for decades. Although they should in theory respond to separate phenomena, there can be a need to examine and regulate them together, particularly in the case of regulating the return of irregular immigrants as the objective to be achieved, i.e. tackling irregular immigration, is common to both regimes. The ambiguously stipulated scope of the Return Directive raises concerns whether the objective to combat irregular immigration by conjoining the two areas of law, has already found its place in the EU. That could be supported by the ‘fear’ of the possibility to abuse the right to seek asylum based on the supposition that economic migrants seek the use of the right to asylum as a parallel immigration route; and to curb the influx of immigrants who would potentially pose problems to social and economic stability, as well as the completion of the internal market.

Whether the ambiguity in the wording of Article 2(1) was intentional or not, it can be argued that such a shortcoming in the main body of the Directive, without Court’s interference and activism could have resulted in the merger of the two areas of law, immigration and asylum. It serves to demonstrate the minimum nature of harmonisation in the area of asylum and migration at EU level, in particular as regarding the grounds for detention of asylum seekers and irregular immigrants.

Furthermore, both cases evince the Court striking a balance between attaining the objective of the Return Directive whilst protecting the fundamental rights safeguard

during the return procedure. By referring to recital 2 in the Preamble of the Directive the ECJ confirmed not just the existence of the fundamental rights of irregular immigrants but also their position as one of the objectives of the Directive that must be followed during its implementation. The Court said explicitly that it is the duty of a Member State to guarantee that the return and removal of irregular third-country nationals would take place in a humane manner safeguarding the fundamental rights of the persons concerned. This statement can have some far reaching effects, as it finally establishes that the Directive, although not a human rights instrument, should still respect and follow the rights of irregular immigrants.

In Europe, many third-country nationals are deprived of their liberty in the course of asylum and/or return procedures. The extent to which EU law places limits on the powers of the Member States in this regard is frequently brought before the ECJ. These cases provide more clarity on the power of the Member States to detain asylum seekers, against whom prior to their asylum request a return decision was issued. In a way the Court contradicts its previous judgments where it had said that the detention of irregularly staying third-country nationals is not lawful under the Return Directive if the person concerned applies for asylum during the return procedure. In this case, the Court seemed keen to avoid that the asylum procedure be abused to secure release from detention with a view to forced return, as such hindering the effectiveness on the Return Decision. The “abuse of law” consisting in the use of the asylum procedure to frustrate removal, does not seem to remove a claimant from the scope of the Procedures Directive, but merely allows for an accelerated procedure.

1.2. Entry bans

1.2.1 Return Directive and national practices

The re-entry ban is believed to be a major deterrent to irregular stay given the harsh consequences for the migrant it entails. The length of the re-entry ban will be determined with due consideration of all relevant circumstances of the individual case. Normally, the ban should not exceed 5 years. Only in cases of serious threat to public policy or public security, may the re-entry ban be issued for a longer period. The ban could be withdrawn, in particular in the event of specified good behaviour by the person concerned, and could be ‘suspended on an exceptional and temporary basis in appropriate individual cases’. The ban was to be without prejudice to the right to seek asylum in a Member State.

Article 11 of the Return Directive regulates the question of issuing entry bans and the conditions thereof. Member States are required to issue an entry ban where a return decision was issued without a period for voluntary departure being granted or where an obligation for return was not complied with, and may issue such a ban in other circumstances. Given that the circumstances under which a period of voluntary departure can be refused are broadly defined, it is quite conceivable that the combined application of Articles 7 and 9 may lead to the systematic imposition of entry bans on persons subject to return procedures, considerably increasing the number of people for whom the EU will be off limits in the future. In fact, the Commission evaluation showed that overall the Return Directive contributed to convergence across Member States regarding the maximum length of return-related entry bans of five years. Most countries now determine a maximum length of regular entry bans issued in their country, which are usually issued for a

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443 A. Baldaccini, (2009), op cit., no 348, pp 1-17
445 Article 9(3) of the Commission proposal, COM(2005) 391 final, Brussels 01.09.2005
447 For further information on the estimated number of irregularly staying migrants that have been forced to leave and refused entry see for example European Commission, Staff Working Document accompanying the Communication Preparing the next steps in border management in the European Union. SEC(2008) 153, Brussels 13.02.2008
maximum of five years. Many countries also determine a maximum length of entry bans issued for public order reasons, which is usually ten years. Although in eight Member States, the length of entry bans was reduced as a result of the implementation of the Return Directive, in six Member States, the number of entry bans that are issued to returnees had increased\textsuperscript{448}. Most countries assessed automatically issue an entry ban if a person has not been granted a period for voluntary departure or if a person has not complied with the obligation to return. In addition, all Member States offer the possibility to request withdrawal or suspension of the entry ban to irregular migrants. Almost all Member States register every entry ban decision in the SIS or SIS II, preventing migrants from obtaining a visa in other Schengen countries\textsuperscript{449}.

The maximum length of an entry ban is five years and it may be exceeded only if the individual in question represents a serious threat to public policy, public security or national security. However, since the Directive does not specify the notion of ‘serious threat’, Member States, using their discretion, may use this provision to impose a permanent entry ban on returned third-country nationals. This is particularly concerning in the situation of the rejected asylum seekers, as the Directive does not forbid issuing an entry ban once their application has received a negative response. This can, however, have far-reaching implications because the EU-wide entry ban does not take into account possible changes in the countries of origin that may entail risk of persecution and force individuals to leave again after they have been returned. Having an entry ban for a significant period of time may then prevent them from seeking asylum in EU and thus potentially setting them in a situation of serious risk, where their only option may be illegal entry.

According to Article 11(3), the only mandatory prohibition on issuing entry bans concerns victims of trafficking in human beings who have been granted a residence permit pursuant to other EU legislation, unless they too have not complied with a return decision or constitute a threat to public policy, public security or national

\textsuperscript{448} European Commission, COM(2014), 199 final, p 26
security. Additionally Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian or other reasons. The latter provision is an optional clause which is the compromise between Parliament’s and Council’s positions. It can be argued that this is potentially one of the Return Directive provisions that will be subject to questions referred to the Court of Justice for a preliminary ruling because the Directive remains vague as to what exactly constitutes a humanitarian reason and leaves interpretation at the discretion of the Member States.

The entry bans will be stored in the Schengen Information System (SIS) that will then serve to keep track of the individuals without a right to enter or stay in the Schengen Area. According to the Commission the entry bans issued under the Return Directive are primarily preventive. The value of entry bans as a deterrent measure is doubtful, however, and might even be considered counter-productive, as they might reinforce the circle of irregular migration for the many who will find themselves banned and for whom illegal entry remains the sole option available.

1.2.2 The Court on the length of an entry ban

Thus far the Court has provided only one judgment regarding the interpretation of Article 11 of the Return Directive. The case of Filev and Osmani relates to the validity of “historic” entry bans issued before the entry into force of the Return Directive, as well as rules on the length of entry bans. In its judgment on 19 September 2013, the ECJ confirmed that Article 11(2) precludes a provision of national law which makes the limitation of the length of an entry ban subject to making an application seeking to obtain the benefit of such a limit. Placing the

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450 Article 11(3), Return Directive
451 During the period 2008-2013 an average of approximately 700,000 Schengen-wide entry bans were stored in the SIS. That makes on average of approximately 140,000 Schengen-wide entry bans being issued a year which is a rather excessive amount and demonstrates the wide usage of such a preventive measure in the Union. See European Commission, Communication on EU Return Policy, COM(2014), 199 final, Brussels 28.03.2014, p 4
452 A. Baldaccini (2009), op cit., no 348, pp 1-17
453 ECJ C-297/12 Filev and Osmani [2013], judgment of 19 September 2013, not yet published
454 Filev and Osmani were expelled from Germany in the 1990s and received entry bans of unlimited duration. Although they were informed of their right under German law to apply for a time limit to the entry bans, they did not exercise this right. They returned to Germany in April 2012 and were prosecuted for breach of their entry bans.
455 Paragraph 27 of Filev and Osmani judgment
burden on the recipient of the ban to apply for a time limit is seen as insufficient to meet the objective of Article 11(2), namely to limit the ban to 5 years unless security considerations apply.\footnote{Paragraphs 31-33 of Filev and Osmani judgment}

The Court further clarified that an entry ban which was handed down more than five years before the date of the entry into force of the national legislation implementing that directive cannot develop further effects, unless the person constitutes a serious threat to public order, public security or national security. This means that in principle no criminal sanction is allowed for breaching an entry ban which has been imposed more than five years before the date of re-entry or the date of applicability of the Return Directive - the period between the date on which that directive should have been implemented and the date on which it was implemented.

Albeit, being consistent with the general disapproval of the criminalisation of irregular entry and/or stay, the judgment did not solve the dilemma of entry bans in general and was nothing but a slight frowning upon the imposition of criminal sanctions. According to the Court, Member States may not exclude third-country nationals from the scope of the Directive, irrespective the risk they may pose and are thus compelled by the general principles of EU law. It can be argued thus, that in the case of Filev and Osmani the ECJ applied the Return Directive as a measure of protection limiting national discretionary powers to criminalise irregular stay and to prevent Member States from curbing the level of protection for persons within the scope of the Directive.\footnote{V. Mitsilegas (2015), The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law, Springer, London, p 73} However, the extent of such protective effects still remains questionable, as the practice of entry bans is commonly spread and shows the tendency of increasing.\footnote{See European Migration Network study ‘Good practices in the return and reintegration of irregular migrants: Member States’ entry bans policy and use of readmission agreements between Member States and third countries’ published in 2014. Available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_reentry_bans_and_readmission_agreements_final_december_2014.pdf (last accessed 30 September 2016)}
Moreover, it is still questionable how issuing an entry ban along with a return decision promotes voluntary return, as there is little incentive for leaving voluntarily if the sanction to be faced turns out the same\footnote{A. Baldaccini (2009), op cit., no 348, pp 1-17}, although Member States must “consider” withdrawing or suspending an entry ban in the event of compliance with a return decision. Likewise, they retain a general power to refrain from issuing a ban or to withdraw or suspend it in individual cases or certain categories of cases for other reasons\footnote{Article 11(3), Return Directive}. In practice it means that suspension and withdrawal of an entry ban is largely at the discretion of Member States, which evidently contributes towards the uncertainty of the rights of migrants and undermines the minimum safeguards during the return procedure.

1.3. Pre-removal detention

1.3.1 Return Directive and national practices

Article 15 of the Return Directive regulates the detention of third-country nationals subject to return procedures. The Directive now provides that Member States may only keep in detention a third-country national who is subject to return procedures, in order to prepare return and/or carry out the removal process, in particular (i) when there is a risk of absconding or (ii) if the person concerned avoids or hampers the removal process. It is only justified to detain a returnee while removal arrangements are in progress and executed with due diligence and the detention should be for as short a period as possible. Furthermore, detention should only be carried out if no other sufficient but less coercive measures can be applied in the specific case.

Therefore, detention can last no longer than six months\footnote{Article 15(5), Return Directive} and has to ensure successful removal. Member States may extend the detention for a further twelve months if the removal process is likely to last longer due to lack of cooperation by
the third-country national concerned or because of delays in obtaining the necessary documentation from third countries\textsuperscript{462}.

Regarding the conditions of detention, recital 17 of the Directive provides that detainees should be treated in a ‘humane and dignified manner’ with respect for their fundamental rights and in compliance with international law. Whenever Member States impose detention under Articles 15-17 of the Directive, this must be done under conditions that comply with Article 4 of the EU Charter, which prohibits inhuman or degrading treatment. The practical impact of this obligation on Member States is set out in detail in the standards established by the Council of Europe Committee on the Prevention of Torture (‘CPT standards’)\textsuperscript{463}. These standards represent a generally recognised description of the detention-related obligations, which must be complied with by Member States in any detention as an absolute minimum, in order to ensure compliance with European Convention on Human Rights obligations and obligations resulting from the Charter when applying EU law\textsuperscript{464}.

Regarding procedural guarantees and judicial review, the Directive derives from ECHR requirements where \textit{lex specialis} is being provided for in article 5(4)\textsuperscript{465}, thus the reasons for maintaining a person in temporary custody must be regularly reviewed by a judicial authority\textsuperscript{466}. Member States must provide for speedy judicial review of the lawfulness of detention or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review.

The Directive remains ambiguous as to what exactly constitutes a speedy judicial review. In the case law of the ECtHR, the Court has taken a view that the number of days taken by proceedings is obviously relevant, but not necessarily a decisive element and the question whether Article 5(4) is complied with, has to be

\textsuperscript{462} Article 15(6), Return Directive
\textsuperscript{464} European Commission, COM(2014), 199 final, p 18
\textsuperscript{465} Article 5(4), ECHR ‘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’
\textsuperscript{466} Article 15(2), Return Directive
determined in the light of the circumstances of each case\textsuperscript{467}. The Court has further outlined that the existence of the remedy under Article 5(4) must be sufficiently certain not only in theory but also in practice, implying that there must be a genuine possibility of challenging the detention\textsuperscript{468}.

The grounds for detention are defined very broadly in the Article 15 of the Directive. The wording in paragraph 1 referring ‘in particular’ to the existence of a risk of absconding and to situations in which a third-country national hampers or avoids removal, thus suggesting that this provision is not exhaustive. Furthermore, the Directive does not define the term ‘objective criteria’, instead leaving its clarification to the discretion of Member States. This raises reservations concerning the potential arbitrariness of the detention as the reasoning is left to the discretion of Member States and cannot be contested in the light of the Directive under judicial review. Such an ambiguity means also that the understanding of the risk of absconding is most likely to vary across the EU. Moreover, it enables Member States to automatically assume that third-country nationals who no longer have a legal basis to remain in their territory are likely to abscond and should therefore be detained\textsuperscript{469}.

However, it is important to remember that in the absence of a reference to national law, the implementation of the Directive provisions is still subject to general principles of EU law such as non-discrimination and proportionality. Moreover, Recital 16 of the Directive expressly makes the use of detention subject to the principle of proportionality. Hence, if detention is automatic or arbitrary, the principle of proportionality has not been observed\textsuperscript{470}.

The most important clause regarding the detention is the successful removal requirement. If it results from judicial review that the detention is not lawful, the third-country national concerned has to be released immediately, particularly, if

\textsuperscript{467} ECtHR 22 May 2008, \textit{Sadyakov v. Bulgaria}, No 75157/01, para 31
\textsuperscript{468} Ibid, para 34
\textsuperscript{470} Human Rights Committee, \textit{A. v. Australia}, 560/1993, 30 April 1997, paragraph 9(2)
there is no longer a reasonable prospect of removal or if the reasons for ordering detention (e.g. risk of absconding) no longer exist.

The Commission points out correctly that the Return Directive has had a harmonising effect on national measures, as before the adoption of the Directive the maximum length of detention varied significantly across Member States, and some of them did not have an upper ceiling on how long irregular migrants could be detained\textsuperscript{471}. Maximum time limits shall ensure that temporary custody cannot be unduly extended. This harmonisation of national rules on temporary custody is also aimed at preventing secondary movements between Member States of irregularly staying persons subject to measures under this Directive\textsuperscript{472}. Even though this can definitely be seen as one of the positive impacts of the Return Directive, in reality, pushing the maximum limit to 18 months allows for an increase in the length of detention in the States where it was previously less than that. Indeed, legal reforms in France for instance, rose the maximum detention period\textsuperscript{473} as well as in Romania\textsuperscript{474} and Italy\textsuperscript{475}, maximum detention time rose from 6 months to 18 months.

Subsequently, implementation of the said provision has proved to be cumbersome in the Member States. This can be seen in the amount of case law that has reached the Court of Justice under preliminary reference. Despite the problematic detention provisions, in the hands of the Court, the Directive has proven to be instrumental towards the limitations of national criminalisation practices and the Court has set safeguards and boundaries by establishing a clear link between detention and a


\textsuperscript{472} A. Baldaccini (2009), op cit., no 348, pp 1-17


prospect of removal on one hand and maximum, albeit lengthy, period of detention on the other.

1.3.2 Prolonging the period of pre-removal detention

ECJ rulings have clarified several aspects of the Directive’s provisions on detention. In its judgment in the case of Kadzoev, the ECJ expressly confirmed the protective elements of the detention-related articles of the Return Directive by highlighting that “detention ceases to be justified and the person concerned must be released immediately if there is no real prospect of removal to a non-EU country within the authorised maximum period of detention”\(^{476}\). The Court stressed that this only applies if the maximum periods of detention, i.e. 6 + 12 months have not expired\(^{477}\). Moreover, the ECJ clarified that reasons of public order and safety cannot be used as justification for detention under the Return Directive\(^{478}\).

A judgment in the case of Arslan, dealt with the relation between return related detention and asylum-related detention (under Directive 2003/9) and clarified that the existence of the two differing regimes does not imply an obligation on Member States to automatically release detained returnees once they make an asylum application, provided that States take a prompt decision under national law to continue detention in compliance with the asylum *acquis*.

The ruling in the case of G. and R.\(^{479}\) concerned a decision of national authority to prolong detention without properly having heard the parties concerned before the adoption of the extension decisions. The question was raised whether in such circumstances the decision to prolong detention is invalid and detention must be lifted. The Court answered negatively reasoning their judgment once again with the argument of effectiveness. Namely, the Court found that if any violation of rights would lead automatically to the annulment of the decision prolonging detention, it would risk undermining the effectiveness of the Return Directive\(^{480}\), reiterating that the return of illegally staying third-country nationals is a Member States’ priority.

\(^{476}\) Paragraph 63 of *Kadzoev* judgment
\(^{477}\) Paragraph 61 of *Kadzoev* judgment
\(^{478}\) Paragraph 70 of *Kadzoev* judgment
\(^{479}\) ECJ C-383/13 PPU, *M.G. and N.R.* [2013], judgment of 10 September 2013, not yet published
\(^{480}\) Paragraph 41 of *G. and R.* judgment
under the Directive\textsuperscript{481}. Even though the Court left the margin of discretion for Member States to apply effective remedies, it made a reference to Recital 13 of the Directive about implementation of the Directive being subject to general principles of EU law, mainly the principles of proportionality and effectiveness\textsuperscript{482}.

The judgment in this case was disconcerting with the Court closing an eye towards the breach of defence rights to prolong detention due to the lack of cooperation. Even though it is somewhat understandable that the breach of defence rights should not result automatically in abolishment of detention altogether, the Court’s unwillingness to touch upon an important legal safeguard demonstrates limitations of the Return Directive and the application of EU law in general.

The Mahdi\textsuperscript{483} case offered the ECJ the opportunity to clarify the meaning of the phrase “a lack of cooperation by the third-country national concerned” and concerned immigration detention and the status of unreturnable undocumented immigrants\textsuperscript{484}. The questions referred to the CJEU regarded mainly the possibility to prolong the initial period of detention merely because the third-country national concerned is not in possession of identity documents and interpreting the ‘risk of absconding’ ‘a lack of cooperation with deportation’ as grounds for prolonged detention. Article 15(6) establishes that third-country nationals subject to return procedures may be detained for up to 18 months in the event of uncooperative behaviour on the part of the individual concerned, or when there are delays in obtaining the necessary documentation from third countries. The grounds for extending the detention period could cover a potentially large number of third-

\textsuperscript{481} Paragraph 44 of G. and R. judgment
\textsuperscript{482} Paragraph 42 of G. and R. judgment
\textsuperscript{483} ECJ C-146/14 PPU Mahdi [2014], judgment of 5 June 2014, not yet published
\textsuperscript{484} B.M.A. Mahdi is a Sudanese national without identity documents in Bulgaria, who was caught when attempting to cross illegally the Bulgarian-Serbian border. He is placed in an immigration detention centre for the execution of a return decision. Two days after his detention he signed a declaration for voluntary return to his country – Sudan. In order for him to return to Sudan it is necessary that the embassy of Sudan confirms his identity and issues him free of charge a passport substitute. According to the Migration Directorate at the Bulgarian Ministry of Interior, at a meeting with a representative of the Sudanese embassy Mr Mahdi declared that he did not want to return to Sudan. On those grounds the embassy only confirmed the identity of Mr Mahdi, but refused to issue him a passport substitute.
country nationals\(^{485}\) not because of the broad wording of the provisions but rather the substance it encompasses.

In particular, it is well documented that the reluctance of the countries of origin to accept their own nationals back constitutes one of the main obstacles to return\(^{486}\). Furthermore, under Article 3(3) the country of return is not necessarily the country of origin, but can also be a country of transit or another third country. These countries are likely to be even less willing to accept non-nationals, even if this goes against their readmission obligations. The latter is also obvious in the case of Kadzoev, where neither the State of ethnic origin nor the State of nationality was willing to accept the person back, nor issue him the necessary documentation.

The Court stated that the risk of absconding is not one of the two conditions for extending detention set out in the Directive. That risk is therefore relevant only in relation to the re-examination of the circumstances that initially gave rise to the detention\(^{487}\). Additionally, the Court concluded that it is only if there continues to be a risk of the third-country national absconding, that the fact that there are no identity papers may be taken into account. Accordingly, the lack of such documentation may not, on its own, justify extending the detention\(^{488}\). Nonetheless, the Court left the national judge free to take into account such an element to decide upon the extension of detention. Regarding the procedural requirements of detention, the Court confirmed that detention as well as extending of detention of illegally staying third-country national, has to be ordered in writing with reasons being given in fact and in law\(^ {489}\).


\(^{487}\) Paragraphs 66–70 of Mahdi judgment

\(^{488}\) Paragraph 73 of Mahdi judgment

\(^{489}\) Paragraph 48 of Mahdi judgment
However, the situation of Mr Mahdi, is quite clear: at the time of his arrest he did not hold any valid identity document, and later his State of nationality refused to provide an identity document because he refused to go back to his country of origin. It remains questionable whether such a situation can be considered as a lack of cooperation by Mr Mahdi. In any case, prolonging detention due to the unwillingness or inability of a country to provide documentation is particularly unjust, as it amounts to penalising individuals for circumstances that are completely beyond their control490. The Court could have taken a stronger stand in the subject matter instead of avoiding the questions by asserting that it, the Court, is not competent enough to examine the facts of the case, leaving them to the national court to decide. However, the Court did provide an interesting and noteworthy point: “lack of cooperation’ within the meaning of the Directive only if an examination of his conduct shows that he has not cooperated in the implementation of the removal and that it is likely that the latter will take longer than anticipated because of that conduct. It is for the referring court to determine that issue”491. The latter is a cautious attempt by the Court to provide a narrow interpretation for Article 15(6) of the Return Directive, the consequence of which would limit the legitimate grounds for detention of illegally staying third-country nationals.

In the case of Zh and O492 the Court assessed on the scope of the obligation to grant voluntary departure, or rather the State’s right to derogate from it as stipulated in Article 7(4). The obligation to grant voluntary departure determines whether the third-country national concerned will be detained. The meaning of Article 7(4), in particular the meaning of the words ‘poses a risk to public policy’ was essentially the question sent to the Court under preliminary reference. First of all, the Court confirmed that the grounds for refusing an opportunity of voluntary departure, limiting the period, or imposing obligations during that period are exhaustive493. As

491 Paragraph 85 of Mahdi judgment
492 ECJ C-554/13 Zh. and O. [2015], judgment of 12 February 2015, not yet published
493 Paragraph 25 of Zh. and O. judgment
for the public policy exception, the ECJ ruled that it should be interpreted strictly\textsuperscript{494} and by analogy with the similar provisions with EU free movement law\textsuperscript{495} yet by reference to its wording, purpose and context of the Return Directive\textsuperscript{496}. The Court held that it is up to Member States to prove the ‘risk to public policy’ and on case-by-case basis according to Recital 6\textsuperscript{497}. Even though the Member States can essentially decide whether a third-country national poses a risk to public policy within the meaning of Article 7(4) of the Directive they must keep in mind that the scope of that derogation is essentially a matter of EU law\textsuperscript{498}.

Opposite to the narrow interpretation adopted by the ECJ in the case of G. and R., the judgments in the Zh and O and Mahdi cases were a beautiful example of the Court using the EU law as a protection and limitation on discretionary powers of the Member State. The ECJ with its ruling in Zh and O curbed the option of Member States to refuse voluntary departure and detain a third-country national for mere suspicion of committing a criminal act, or even a criminal conviction. By applying a strict interpretation of Article 7(4) in conjunction with Recital 6 the Court confirmed that illegal stay in itself does not automatically represent a risk to public policy, public security or national security\textsuperscript{499} and the existence of a suspicion cannot be a justification for the conclusion that there is a ‘risk to public policy’. In particular because deprivation of liberty constitutes an extreme sanction for people whose only crime may be working without permission or not having the necessary documentation, it should be used only as a last resort and for the shortest period possible. Furthermore, there is evidence that the effectiveness of detention in terms of facilitating return decreases the longer detention lasts\textsuperscript{500}.

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\textsuperscript{494} Paragraph 45 of Zh. and O. judgment
\textsuperscript{495} Paragraphs 50-53 of Zh. and O. judgment
\textsuperscript{496} Paragraph 57 of Zh. and O. judgment
\textsuperscript{497} Paragraphs 63 and 68 of Zh. and O. judgment
\textsuperscript{498} Paragraph 70 of Zh. and O. judgment
\textsuperscript{499} See on this case ECJ C-459/99 MRAX, judgment of 25 July 2002, 2002 ECR I-06591
\textsuperscript{500} A Swiss report has shown that between 60 and 80 percent of all ordered detention in all the Cantons do not last longer than one month, and where it does the rate of successful removal is not significantly higher, see Parlamentsdienste/Services du Parlement, \textit{Evaluation der Zwangsmassnahmen im Ausländerrecht, Schlussbericht zuhanden der Geschäftsprüfungskommission des Nationalrates/Evaluation des mesures de contrainte en matière de droit des étrangers, Rapport final à l’attention de la Commission de gestion du Conseil national, March 2005. Also, the large majority of deportations from France are carried out during the first 17 days of detention, see J. Bochet (2011), ‘Indefinite immigration detention: or the absurdities of an incompatible policy with
1.3.3 Conditions of detention

The Directive also sets some basic conditions that must be respected in relation to the detention of returnees, such as the fact that their detention must take place in specialised facilities (not prisons), or at least they should be kept separated from ordinary prisoners. In this regard, German courts submitted three preliminary references to the ECJ in 2013.

In cases Bero and Bouzalmate⁵⁰¹, the Court was asked whether a Member State is obliged under the Article 16(1) of the Return Directive to only detain returnees in specialised detention facilities if it only possesses specialised detention facilities in some of its regional sub-entities, but not in others⁵⁰².

The Advocate General provided an extensive opinion on the meaning and purpose of the Article 16(1) of the Directive, saying that under the second sentence of Article 16(1) of the Directive, a Member State may order the detention of an illegally staying immigrant in a prison in situations where it ‘cannot’ detain him in a specialised detention facility⁵⁰³. However, only if there are exceptional and legitimate grounds, such as those alleging necessity, showing incontestably that the weighing up of interests requires that solution. It must, furthermore, give reasons for its decision with regard to the circumstances of the case and fulfil the obligations imposed on it by Article 18(2) of the Directive⁵⁰⁴. Detaining an illegally staying immigrant in a prison on the pretext that there are no specialised detention facilities in part of the territory of the Member State is not an acceptable reason⁵⁰⁵.

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⁵⁰¹ ECJ Joined cases C-473/13 and C-514/13 Bero and Bouzalmate, judgment of 17 July 2014, not yet published
⁵⁰² In the case C-473/13, Ms Adala Bero, who is a Syrian national, was placed in detention from 6 January to 2 February 2011, in the prison of the city of Frankfurt-am-Main, Hesse, having no specialised detention facility that could accommodate women. It is clear from the observations submitted by Ms Bero that she was not separated from ordinary prisoners or persons held on remand. In the case C-514/13, Mr Ettayebi Bouzalmate, who is a Moroccan national, was detained from 14 July 2013 in a separate area of the Munich city prison, for lack of specialised detention facilities in Bavaria, for a period of three months. See paragraphs 9-19 of the ECJ judgment of 17 July 2014
⁵⁰³ Paragraph 124 of the AG Bot opinion of 30 April 2014 on joint cases C-473/13 and C-514/13 Bero and Bouzalmate and C-474/13 Thi Ly Pham
⁵⁰⁴ Paragraph 136 of the AG opinion Bot opinion of 30 April 2014
⁵⁰⁵ Ibid, Paragraph 140
The Court did not provide in this case a lengthy discussion and simply stated, being in line with the opinion of the AG Bot, that it is a rule to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility even\(^{506}\). That rule must be followed even in the Member State with federal structure, like Germany, and even if the federated State competent to decide upon and carry out such detention does not have such detention facility\(^{507}\). In this case, it is the responsibility of a federated State to find the suitable accommodation for an illegally staying third-country national\(^{508}\).

The case of Thi Ly Pham\(^{509}\) concerns the compatibility with Article 16(1) of a national administrative practice to place a pre-removal detainee in accommodation together with ordinary prisoners if he/she consents to such accommodation\(^{510}\). The Advocate General concluded that such consent could not constitute a valid ground for the Member State to derogate from the requirement of separation in Article 16(1) of the Directive\(^{511}\): “the verb ‘to consent’ (‘einwilligen’ in German) implies a previous request”\(^{512}\). That presupposes that the competent national authorities first ‘asked’ the person concerned, in one form or another, to waive that guarantee. Furthermore, Article 16(1) of the Directive is perfectly clear and forms the basis of an unconditional and precise requirement. The EU legislature provides for no exception to the requirement of separation, so that a Member State may not, on the basis of the Directive, derogate from that principle, except in the emergency situations referred to in Article 18 thereof\(^{513}\). The AG concluded that the Article 16(1) of the Directive must be interpreted as precluding a Member State from considering that it need not separate a third-country national detained for the

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\(^{506}\) Paragraph 32 of *Bero and Bouzalmate* judgment

\(^{507}\) Paragraph 33 of *Bero and Bouzalmate* judgment

\(^{508}\) Paragraph 31 of *Bero and Bouzalmate* judgment

\(^{509}\) ECJ C-474/13 *Thi Ly Pham*, judgment of 17 July 2014, not yet published

\(^{510}\) In the case C-474/13, Ms Thi Ly Pham, who is a Vietnamese national, was placed in detention from 29 March to 10 July 2012 in the Nuremberg city prison (Bavaria) and, furthermore, consented to be detained with ordinary prisoners because she wanted contact with compatriots who were in that prison. See paragraphs 8-9 of ECJ judgment of 17 July 2014

\(^{511}\) Paragraph 191 of the AG Bot opinion of 30 April 2014

\(^{512}\) Paragraph 186 of the AG Bot opinion of 30 April 2014

\(^{513}\) Paragraph 192 of the AG Bot opinion of 30 April 2014
purpose of their removal in prison from ordinary prisoners on the grounds that they consented to being placed with them\textsuperscript{514}.

The Court once again followed the AG’s opinion and ruled that Article 16(1) does not preclude a Member State from the obligation to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners, even if the third-country national in question consents thereto\textsuperscript{515}. The Court explained that the purpose of the separation requirement is to protect the interests and the welfare of the illegally staying third-country national to comply with the requirement of the EU legislator to guarantee the observance of the rights of third-country nationals in detention\textsuperscript{516}. The separation requirement thus is not only a procedural rule but carries in itself a much deeper substantive meaning without observance of which the requirement would render void and constitute a non-compliance with the Return Directive\textsuperscript{517}. Therefore, the separation requirement cannot be ignored and the consent and wishes of the third-country national cannot be taken into consideration\textsuperscript{518}.

In both cases, Bero and Bouzalmante as well as Pham, the Court took a very strong rights-based approach clarifying the meaning and the purpose of the Article 16(1) of the Directive. It was positive to see the Court making a more defined nexus between the implementation of the Return Directive and fundamental rights protection. However, it would have been nicer to see some judicial activism in such an important question as the detention of irregularly staying third-country nationals. Both judgments remained quite short and focussed strictly on the two specific situations. It would have been welcomed by the Court to take a stronger stand and discuss the matters of detention at length. However, the Court’s briefness may be explained by the significant and detailed opinion of the Advocate General that took a very strong stand on the side of fundamental rights.

\textsuperscript{514} Paragraph 204 of the AG Bot opinion of 30 April 2014
\textsuperscript{515} Paragraph 23 of Thi Ly Pham judgment
\textsuperscript{516} Paragraphs 18-19 of Thi Ly Pham judgment
\textsuperscript{517} Paragraph 21 of Thi Ly Pham judgment
\textsuperscript{518} Paragraph 22 of Thi Ly Pham judgment
The effects of Bero and Bouzalmante shall hopefully trigger changes in the German as well as other federal States like Austria and Switzerland legislation and practice of using prisons for immigration detention purposes. Additionally, this shall also assist to limit the substance of the second sentence of Article 16(1), which read in conjunction with Article 18 enables a Member State to order detention in prison “only if there are exceptional and legitimate grounds, such as those alleging necessity, showing uncontestably that the weighing up of interests requires that solution”\textsuperscript{519}.

Moreover, the ECJ’s ruling in Pham on the separation obligation not only used the Return Directive as a limitation on controversial national practices but it put the Directive’s provisions in line with international human rights standards. Namely, the Court found the separation obligation to be a “substantive condition” rather than merely a procedural one, for detention of migrants carried out in prison, without compliance of which such detention, would, in principle, not be consistent with the Directive\textsuperscript{520}. This entails that when a state cannot ensure separated accommodation in prison, it would not be able to invoke the derogation clause under article 16(1)\textsuperscript{521}.

1.4. Procedural safeguards in cases of return: effective legal remedies

1.4.1 The concept of effective legal remedies: the right to be heard and suspensive effect

The procedural safeguards describing the rights of third-country nationals during the return process are laid down in Article 12 and 13 of the Return Directive. Article 13 of the Return Directive stipulates the regulations for enabling judicial remedies for the third-country nationals who are affected by the issued Return decision. Namely, the contracting State is obliged to afford them an effective remedy to appeal against, or seek review of decisions related to return before a competent judicial or administrative authority, or a competent body composed of members that are impartial and who enjoy safeguards of independence. According to the

\textsuperscript{519} Paragraphs 124-136 of the AG opinion Bot opinion of 30 April 2014
\textsuperscript{520} Paragraph 21 of \textit{Thi Ly Pham} judgment
Directive the appeal body does not have to be a judicial authority, i.e. a court or a tribunal, but the appeal can also be legitimately processed by administrative authorities as long as their members are impartial and independent in their decisions. However, Member States are compelled to provide for translation and interpretation where necessary, so the individual concerned understands the legal process he/she finds him/herself in and the consequences of it. The obligations for Member States to offer the third-country nationals the possibility to obtain legal advice, representation and linguistic assistance when an appeal has been lodged and to grant, on request, free of charge the necessary legal assistance and/or representation to irregular migrants appealing their return decision are provided respectively under Article 13(3) and (4) of the Return Directive. The latter had the delayed transposition deadline due to its increased financial predicaments.

The ECHR contains several provisions that can be invoked when the issue of procedural review of a measure of expulsion is at stake. At first glance, the most appropriate would be Article 6 that concerns the right to fair trial. However, the ECtHR has said that this provision relates only to disputes concerning a person’s civil right or criminal charges and is therefore not applicable to decisions regarding entry, stay and deportation of aliens.

The concept of an effective remedy is essential to give meaning to the rights set forth in EU law and to avoid Member States impeding the enjoyment of EU rights with procedural rules that could render those rights ineffective. The right to an effective remedy is also enshrined in Article 47 of the EU Charter of Fundamental Rights, which is based on Article 13 of the ECHR.

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522 K. Hailbronner (2010), op cit., no 71, p 1538
523 ECtHR 5 October 2000, Maaoiua v France, No 39652/98, paragraph 40
524 Article 47 of the EU Charter states: ‘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 in so far as such aid is necessary to ensure effective access to justice.’
525 Article 13 ECHR states: ‘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.’
According to ECtHR Article 13 of the ECHR, requires that States must make available to the individual concerned the effective possibility of challenging the removal order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum, offering adequate guarantees of independence and impartiality. The Convention does not specify whether the appeal body has to be a judicial authority, but the purpose of the article is to provide protection for individuals against arbitrariness under domestic law. Moreover, in connection to expulsion of aliens invoking Article 3 ECHR and potentially resulting in treatment contrary to Article 3 ECHR in the receiving country, the ECtHR has underlined the importance of the possibility of an independent and thorough review of the expulsion order, especially regarding the consequences of the expulsion.

Given the irreversible nature of an expulsion decision, a vital issue here is whether the appeal has suspensive effect. In the Commission’s proposal the judicial remedy was thought to have either suspensive effect or comprise the right of the third-country national to apply for the suspension of the enforcement of the return decision or removal order, in which case the return decision or removal order shall be postponed until it is confirmed, or is no longer subject to a remedy that has suspensive effects.

Yet the final text in paragraph 2 of the Article 13 Return Directive states that the appeals do not have automatic suspensive effect, but the appeal bodies under national law must at least have the legitimate possibility to temporarily suspend the enforcement of any decision related to return. The Directive does not specify but a narrow interpretation of the provision implies that the suspension of the enforcement of the return decision must not only take place in law but also in fact. This has also been confirmed by the Commission, stating that not receiving such

528 See for example ECtHR 30 October 1991, Vilvarajah and others v United Kingdom, Application no. 13163/87; ECtHR 11 July 2000, Jabari v Turkey, Application no. 40035/98 and ECtHR 4 February 2005, Mamatkulov and Askarov v Turkey, Application no. 46827/99
529 ECtHR 15 November 1996, Chahal v. United Kingdom, Application no 22414/93, paragraph 131
530 K. Hailbronner (2010), op cit., no 71, p 7
suspension of the enforcement of the return and/or the removal decision would turn the possibility of an effective legal remedy into a ‘dead letter’, as the irregular immigrant is at risk being deported before his or her appeal has been decided on.\textsuperscript{531}

The Strasbourg Court has not taken an affirmative stand but strongly implied that ‘the notion of an effective remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible’.\textsuperscript{532} However, in the cases of refoulement the remedy, in order to be effective within the meaning of the Convention, must have automatic suspensive effect.\textsuperscript{533} This may either mean that the appeal itself suspends the execution of expulsion or that there is a possibility for a request for interim measures during the handling, of which the individual may not be expelled.\textsuperscript{534}

The Commission has detected several shortcomings in the implementation of Article 13. Even though a legal provision for appeal exists in national law of all Member States, in practice a number of factors come into play that can compromise the right to a real legal remedy. Firstly, information about the available remedies is not always sufficiently communicated in practice to third-country nationals in all Member States in a language the returnee understands (translation and explanation/legal aid issue). Secondly, the possibility of an effective appeal may be reduced due to ineffective provision of legal aid, in cases in which Member States make extensive use of the provision under Article 13(4) of the Directive to make free legal aid subject to conditions listed in Articles 15(3) to (6) of Return Directive. As a result, implementation of the Article 13(4), due to it being a discretionary provision subject to rules and regulations in national legislation, has been patchy and fragmented and in several Member States return decisions were not often appealed in practice, or to a lesser extent than expected.\textsuperscript{535} For instance,

\textsuperscript{532} ECtHR 5 February 2002, \textit{Conka v. Belgium}, Application no. 51564/99, paragraphs 61, 62, 63
\textsuperscript{533} ECtHR 26 April 2007, \textit{Gebremedhin v. France}, Application no. 25389/05, paragraph 66
\textsuperscript{534} Ibid
\textsuperscript{535} For more detailed information on implementation see European Commission, \textit{Evaluation on the application of the Return Directive (2008/115/EC), Final Report} 22 October 2013, pp 126-128
\textsuperscript{536} European Commission, COM(2014), 199 final, p 23
several Member States have made granting free legal assistance dependant on a means test in which the individual concerned has to prove that he/she has insufficient means to pay for legal assistance itself. Similarly, some Member States (Cyprus, Greece) apply a merits test according to which granting legal aid is subject to the case having reasonable chance of success\textsuperscript{537}.

Implementation of the Return Directive has demonstrated that an appeal generally temporarily suspends enforcement of the return and/or removal decision, whereas with some exceptions the returnee has to apply for the temporary suspending effect, which may be rejected or granted by the judge in specific circumstances\textsuperscript{538}. This kind of arrangement, although not completely contradicting the ECHR standards, does provide certain insecurity when it comes to dealing with potential \textit{refoulement} cases or the ones with possibility where the return may result in treatment prohibited under Article 3 ECHR in the receiving country.

Additionally, detention orders are not automatically subject to judicial review, while no access to legal aid and effective remedy is ensured, in breach of the EU Return Directive which was transposed into Cyprus law in November 2011\textsuperscript{539}. The reports particularly criticised the “routine detention of irregular migrants”, even for those who cannot be removed (e.g. lack of travel documents; statelessness) and the authorities’ “failure to examine less coercive measures” as required by the Return Directive\textsuperscript{540}.

\textit{1.4.2 The right to be heard}

The Court’s case law regarding the Member States’ obligation to provide effective remedies has had at the very least a much appreciated clarifying effect to the extent and substance of the obligations and discretions under Article 13 of the Return Directive. Yet at the same time the Court’s case law has been anything but consistent. It is interesting to see how the Court has achieved such different results


\textsuperscript{538} European Commission, COM(2014), 199 final, p 23

\textsuperscript{539} M. Martin, Statewatch analysis, \textit{We are not animals: concern intensifies over detention of migrants in Europe}, p 2, available at http://www.statewatch.org/analyses/no-182-eu-detention-centres.pdf (last accessed 30 September 2016)

\textsuperscript{540} Ibid
interpreting the extent of the same provision. It appears from the case law that the Charter and the Court’s willingness to apply it, has proved to be the key variable in the outcome of jurisprudence.

The first case referred to the Court of Justice regarding implementation of Article 13 of the Return Directive concerned granting defence rights in the case of prolonging detention. The ECJ seemingly confirmed the narrow interpretation of Art 13(2) Return Directive. In its judgment in case G and R\(^{541}\) the Court confirmed that the rights of the defendant referred to in Article 41(2) of the EU Charter, the right to be heard and the right to have access to the file, must be observed when taking decisions under the Return Directive, even when this Directive does not expressly provide for these\(^{542}\). However, it concluded that not every irregularity in the observation of the rights of the defence brings about the annulment of the decision. Such effect would only take place if the national court considers that the infringement at issue, actually would have led to a different outcome\(^{543}\).

Such a ruling by the Court, applying a narrow and literal interpretation of Article 13 provided the Member States with a wide margin of appreciation regarding judicial remedies with suspensive effect tying the granting of a suspensive effect to the test of merits of the right to be heard. Thus, the Court, referring to but not applying the Charter reached an inevitable outcome that essentially had the depriving effect to the right to be heard as enshrined in Article 13 of the Return Directive. Such a strong deprivation of the principle of this right is not complemented by the strong protection that it actually implies.

However, the more recent judgments provided a different impact on the efficient and uniform application of the Directive. In the case of Mukarubega\(^{544}\) the Court was asked whether the right to be heard before a decision is taken under Article 41(2) of the Charter applies to return procedures even if there is a risk of

\(^{541}\) ECJ C- 383/13 PPU G and R [2013], judgment of 10 September 2013, not yet published. G and R were detained for the purpose of removal by the Netherlands authorities. They then requested judicial challenge to the decision to extend their detention, on the ground that their defence was not properly heard. The court of first instance accepted that their rights to a defence were infringed, but declined to rule the extension unlawful.

\(^{542}\) Paragraph 32 of G and R judgment

\(^{543}\) Paragraphs 39-40 of G and R judgment

\(^{544}\) ECJ C-166/13 Mukarubega [2014], judgment of 5 November 2014, not yet published
absconding. In the case of Boudjilida\textsuperscript{545}, the referred question concerned with the extent of the right to be heard and whether the third-country national concerned should have the right for instance, to contest his right of residence.

In both rulings the Court recognised the importance of the right to be heard, even though the Return Directive does not establish a specific procedure for hearing a third-country national before the adoption of a return decision. The ECJ followed the Advocate General’s reasoning concluding that the procedural autonomy of the Member States together with the absence of a specific procedure in Return Directive cannot result in a third-country national being deprived of the right to be heard by the competent national authority before the adoption of a return decision\textsuperscript{546}. Furthermore, the Court conceded that albeit the Directive does not specify whether, and under what conditions, observance of the right to be heard of those third-country nationals [is] to be ensured\textsuperscript{547}, the right to be heard is considered by the ECJ as a fundamental principle of EU law\textsuperscript{548}.

In both judgments the Court ruled that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the legality of his stay and on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced\textsuperscript{549}. Furthermore, the Court stated that a right to legal assistance is provided for by the Directive only when an appeal has been brought in order to challenge a return decision. The Court adds, however, that an illegally staying third-country national may always have recourse, at his own expense, to the services of a legal adviser in order to have the benefit of the latter’s assistance when being heard, provided that the exercise of that right does not affect the due progress of the return procedure and does not undermine the effective implementation of the directive. Member

\textsuperscript{545} ECJ C-249/13 Boudjilida, judgment of 11 December 2014, not yet published
\textsuperscript{546} Paragraph 56 of the AG Wathelet opinion of 25 June 2014 in the case of C-249/13 Boudjilida
\textsuperscript{547} Paragraph 41 of Mukarubega judgment; Paragraph 29 of Boudjilida judgment
\textsuperscript{548} Paragraph 42 of Mukarubega judgment; Paragraph 30 of Boudjilida judgment
\textsuperscript{549} Paragraphs 62 and 66 of Mukarubega judgment; Paragraph 51 of Boudjilida judgment
States are not required to bear the costs of that assistance by providing free legal aid\textsuperscript{550}.

The Court was much more lenient adopting a wider interpretation of the right to be heard and applied it in light of the Charter waving the test of merits and abandoning the focus on factual circumstances. Consequently, the Court held that the right to be heard must be respected by Member States when adopting decisions, including return decisions, falling within the scope of EU law. In such a manner the Court used the EU legislation as a limitation to national measures that contradict the said EU law but also that may fall short in respecting the fundamental principles deriving from the EU Charter.

\textit{1.4.3 Judicial review with a suspensive effect}

If in Mukarubega and Boudjilida cases the Court took a protective approach, then in Abdida\textsuperscript{551} it became adopted a super-protective approach using the EU law not only as a limitation on domestic measures but turned the Return Directive into a borderline human rights instrument. In the case of Abdida the Court clarified on judicial remedies that should be available to an illegally staying third-country national to challenge that declaration when he claims he needs to stay to get medical treatment and whether such a judicial review should have a suspensive effect on the return procedure with the right to social assistance to cover his basic needs pending his appeal\textsuperscript{552}.

The Court dealt with the referred questions under the Return Directive and with a reference to Recital 2 of the Directive held that a third country national must be afforded an effective remedy to appeal against or seek review of a decision ordering his return, the wording of the Directive does not require that the remedy should necessarily have suspensive effect\textsuperscript{553}. However, the Court continued interpreting the Return Directive in the light of the EU Charter, ECHR and the case law of the

\textsuperscript{550} Paragraphs 64-65 of \textit{Boudjilida} judgment
\textsuperscript{551} ECJ C-562/13 \textit{Moussa Abdida} [2014], judgment of 18 December 2014, not yet published
\textsuperscript{552} Mr Abdida, a Nigerian national diagnosed with AIDS, applied to the Belgian authorities to remain in Belgium on medical grounds, stating he needed medical treatment there for a serious illness. His request to remain in Belgium was turned down and his social assistance was then withdrawn. He appealed against those decisions. See paragraphs 21-24 of \textit{Abdida} judgment
\textsuperscript{553} Paragraphs 43 and 44 of \textit{Abdida} judgment
ECtHR ruling that Articles 5 and 13 of Return Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter, precludes domestic legislation that does not provide for a remedy with suspensive effect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health. Such a decision to remove a third-country national concerned may raise an issue under Article 3 ECHR, albeit in very exceptional cases where the humanitarian grounds against removal are compelling and respectively such a decision would be in breach of Article 5 of Return Directive taken in conjunction with Article 19(2) of the Charter. Since the latter is related to Article 47 of the Charter and Article 3 of ECHR the interpretation of the ECtHR in the respective matter must be taken into consideration. Namely, the Strasbourg Court has held that when a State decides to return a foreign national to a country where there are substantial grounds for believing he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR, requires that a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to the persons concerned. It appears from this that any national measure which does not provide a judicial remedy with a suspensive effect is precluded under the Return Directive in conjunction with the Charter and, moreover, the Return Directive requires Member States to provide for the basic needs of a third-country national in the said condition.

It was clearly an interesting judgment in a positive sense, in particular it provided for a remarkable opportunity to see how far the Court can actually stretch the Return Directive from its original notion. It appeared that interpreting the Directive not only in conjunction with the Charter but respectively also the ECHR and the case law of the Strasbourg Court, the Return Directive provided for an effective

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554 Paragraph 53 of Abdida judgment
555 See ECtHR 27 May 2008, N. v. the United Kingdom [GC], Application No. 26565/05
556 Paragraph 47 of Abdida judgment
557 Paragraphs 48 and 49 of Abdida judgment
558 See ECtHR 26 April 2007, Gebremedhin (Gaberamadhien) v France, Application No. 25389/05; ECtHR 23 February 2012, Hirsi Jamaa and Others v. Italy [GC], Application No. 27765/09
559 Paragraph 52 of Abdida judgment
560 Paragraphs 58 and 59 of Abdida judgment
protection from *refoulement* in conformity with Article 3 ECHR and essentially set a precedent to a situation in which the return of illegally staying third-country nationals can be prevented altogether.

Albeit this being an interesting turn of events, it raises the questions about the effectiveness of the Return Directive and the attainment of the objective of the Directive, which inherently is the successful return of illegally staying third-country nationals from the territory of the EU. According to the previous case law that seemed to be the main concern and focus of the Court’s reasoning and it is peculiar to see the Court drifting so far from its original disposition.

The impacts of the Abdida judgment remain to be seen in the Member States. It should not be forgotten that thus far these are the only express substantive grounds for objecting to a return set out in the Directive, albeit accompanied by a procedural safeguard established in Boudjlida that the right to a hearing on the expulsion decision encompasses an obligation to consider all of the arguments that the migrant might as regards the various considerations that Member States have to take into account. However, it remains to be seen whether the Court of Justice will follow with the standards set in Abdida and Mukarubega and Boudjlilida or will return to the effectiveness of the Return Directive. It should be noted that any inconsistency in the Court’s jurisprudence has a potential consequence of invalidating the meaning and importance of the right to be heard and essentially depriving it of its effectiveness. Not to mention that such a form would undermine the *effet utile* and uniform application of EU legislation and essentially reduce legal certainty in the EU.

2. Criminalisation of irregular stay: can EU law provide limitations?

2.1. Criminalisation practices in Member States

The Return Directive, albeit some duly contested provisions, has not criminalised irregular stay per se, it is evident that Member States’ practice has been somewhat different in that respect. In the fight against irregular immigration, several Member States have resorted to criminal law measures to deter migrants from entering or
staying in their territory in an irregular manner. The range of measures adopted to
tackle irregular immigration and punish the individuals in breach of immigration
rules range from imposing a custodial sentence to financial penalties in the form of
fines, as well as issuing a re-entry ban with a return decision preventing the
individual from returning to the territory of the State.

The following section of the Chapter enters partly in the realm of domestic law and
examines the application of the Return Directive in national legal regimes. As for the
EU law, matters of immigration and asylum belong in the shared competence of the
EU and Member States whereas the criminal law measures belong mainly to the
sovereignty of national law. Such an arrangement can, however, prove to be
problematic as the distinction between criminal and immigration law may not
always be as clear cut as one might expect. This was also evidenced in the
implementation of the Return Directive that enabled the Member States to exclude
returns as criminal law sanctions from the scope of the Directive but did not specify
sufficiently what exactly constitutes a return as a criminal sanction or where exactly
to draw the line. The confusion in the implementation of the Directive was also
indicated by questions regarding the nexus between criminal law sanctions and
those under the scope of the Return Directive raised by several Member States. The
Commission’s position did not provide much of a relief, as it merely reiterated the
discretionary nature of Article 2(2) (b) and if a Member State wishes to use its
discretionary powers to implement the said provision, it means they may exclude
the cases of twofold sanctions, e.g. a crime is punished with imprisonment leading
to removal of the said individual, from the scope of the Return Directive561.

It will be particularly interesting to see how the Court of Justice will approach the
weighing of interests of national sovereignty to adopt criminal law measures and
the principle of primacy of EU law measure applicable in situations of irregular
immigration. In particular because, according to the Commission, the Return
Directive nor any other EU legal instrument prevent Member States from

561 European Commission Contact Committee, Notes of the Meeting on Return Directive,
September 2016)
considering irregular entry and/or stay as a criminal offence under their national criminal law. Simultaneously, the Court of Justice, referring to the duty of loyal cooperation, has confirmed that Member States are precluded from applying criminal law rules that are liable to undermine the application of the common standards and procedures established by the Return Directive and thus to deprive it of its effectiveness. It follows from this that imposing any punitive measure under domestic law on a third-country national in an irregular situation for the offence of having unlawfully entered or stayed in the territory of a Member State must not, therefore, take precedence over applying the Return Directive, including its fundamental rights safeguards.

Irregular entry and stay are considered unlawful in all EU Member States and it in general triggers a return procedure. However, in addition, Member States have demonstrated that there are still national laws in place criminalising irregular entry and/or stay in different forms in the majority of Member States. Examples include the treatment of irregular entry and residence or the non-compliance with a return decision as a criminal offence. Hence, legislation in seventeen Member States punishes irregular entry with imprisonment and/or a fine. Eight Member States punish it with a fine only, although in aggravated circumstances the punishment may be imprisonment as well, in particular if the individual concerned is not capable to pay the fine. Irregular stay is considered a criminal offence punishable with imprisonment and/or a fine or a fine turning into a custodial sentence in aggravated

562 European Commission, COM(2014), 199 final, p 24
563 Article 4(3) TEU
564 Paragraphs 55-59 of El Dridi judgment
567 Austria, the Czech Republic, Hungary, Italy, the Netherlands, Poland, Slovakia and Slovenia. For further see European Agency for Fundamental Rights, Criminalisation of migrants in an irregular situation and of persons engaging with them, Annex. Position paper of March 2014
568 Ibid
circumstances in twenty five Member States\textsuperscript{569}. Such sanctions are in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the Member State\textsuperscript{570}.

Such punitive national measures can pose serious challenges to both EU migration law, as well as the work of the Court of Justice, as was already seen in the case of El Dridi. The matter gains importance in respect of the fundamental rights safeguard and compliance with international human rights obligations. In light of the aforementioned personal scope of the Return Directive, it can be argued that the Directive would have benefitted from making the Article 2(2) mandatory for the Member States to transpose. However, it could be observed that even though the exclusion provisions are optional, Member States are still compelled by the international human rights standards at all times, meaning that the non-criminalisation of irregular stay should be strictly followed.

Moreover, it raises an interesting point that even though Member States are left with the discretion to legislate on irregular migration and to adopt measures that would criminalise irregular entry or residence they are still bound by their EU law obligations and respect of fundamental rights when doing so. It therefore suggests that at times the EU law is capable of posing restrictions on Member States discretion to criminalise irregular migration. For instance, there are several ECJ judgments that have limited and constrained Member States’ ability to keep returnees in prison as a consequence of illegal entry or residence. The following examination of the case law will aim to discuss the role of the EU law and the ECJ in decriminalising illegal stay.

The following section will aim to examine the punishments used for irregular entry or stay of third-country nationals, starting with general discussion on criminalisation practices and moving on to issuing entry bans and finishing with imposing a custodial sentence for irregular entry or stay for persons to whom the safeguards of the EU Return Directive should apply. The Court’s jurisprudence in this aspect has

\textsuperscript{569} For further see European Agency for Fundamental Rights, \textit{Criminalisation of migrants in an irregular situation and of persons engaging with them}, p 5 and Annex. Position paper of March 2014

\textsuperscript{570} \textit{Ibid}, p 5
been particularly interesting, demonstrating how EU law is on the one hand capable of curbing national measures and practices providing protection of irregular third-country nationals; and on the other hand the same EU legislative act can be applied in a punitive manner itself, limiting the protection of irregular third-country nationals. In a way, the Court’s jurisprudence in respect of criminalisation of irregular entry and stay is the most appropriate to see how the Court aimed to strike a fair balance between the protection of rights and humanity of irregular third-country nationals subject to return decision whilst securing their effective removal.

2.2. Exclusions from the scope: expulsion as a criminal law sanction

According to the wording of Article 2(2) the Member States may decide not to apply the Return Directive to persons who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law or who are the subject of extradition procedures. 571 Being another ‘may’ clause in the Return Directive the clause is subject to discretion of Member States regarding its interpretation and implementation in the domestic law measures. The narrower interpretation of Article 2(2) suggests that the exclusion from the scope ratione personae of the Directive can apply only in so far as the return obligation of a foreign national is imposed as a criminal law sanction, or is the consequence of such a sanction. However, the case law of the Court of Justice will not only provide for a common interpretation but will clarify the scope of its application in national laws.

That possibility for Member States was not contained in the initial proposal of the Directive, but was inserted later during the negotiations with the Council in order to clarify that the Directive does not aim to harmonise issues of criminal law or extradition. The provision enables Member States to keep full discretion as to extradition procedures and expulsions for criminal law reasons, either as part of the penal sanction or as a consequence of a penal sanction, including in cases where, according to national law, illegal entry and stay is a criminal offence. 572

571 Article 2(2) (b) Return Directive
572 K. Hailbronner (2010), op cit., no 71, p 1506
The ECJ discussed the scope of the Directive and namely, the exclusion under Article 2(2)(b) in the case of El Dridi and Achughbabian in which irregularly staying third-country nationals were sentenced to imprisonment. In the case of El Dridi the individual concerned was sentenced to incarceration for not complying with a return order, whereas in the case of Achughbabian the question referred to the ECJ concerned with sentencing an imprisonment on the sole ground of irregular stay. In both cases, the Court was set to adjudicate on implementation of Article 2(2) of the Return Directive in domestic laws.

The Court’s reasoning followed the one presented by the Advocate General Mazák in El Dridi. The AG, addressing the applicability of the Return Directive to the case and interpreting article 2(2)(b) observed that exclusion from the scope *ratione personae* of the Directive can apply only in so far as the return obligation of a foreign national is imposed as a criminal law sanction, or is the consequence of such a sanction. Consequently, the AG did not find the argument in this individual case compelling, as the issued return order were administrative decisions adopted on account of the illegal stay of the person and not linked to his criminal conviction.

In fact, the AG observed that the imprisonment of Mr El Dridi was not the cause of his obligation to return but vice versa, his incompliance with the obligation to return is the cause for his imprisonment. The Court concurred with the views of AG Mazák and interpreted Article 2(2)(b) narrowly concluding that it only allows for exclusions from the scope of the Directive in so far as a return obligation is imposed as a criminal law sanction. In the case of Mr El Dridi, on the contrary, the obligation to return derived from an administrative decision: his situation therefore fell within the scope of the Return Directive. The Court went even further in

573 ECJ C-61/11 PPU, *El Dridi* [2011], judgment of 01 April 2011, ECR I-03015
574 ECJ C-329/11, *Achughbabian* [2011], judgment of 6 December 2011, ECR I-12695
575 For instance, according to the Italian immigration law (law decree 286/98), which has not been amended in order to transpose the Return Directive, if the illegally staying third-country national does not comply with return order, he/she commits an offence punishable by detention for up until 4 years, according to article 14 paragraph 5 ter; the maximum sentence increases to 5 years in case of reiteration. See R. Raffaeelli (2011), ‘The Return directive in light of the El Dridi judgment’ in *Perspectives on Federalism*, Vol 3, issue 1, 2011, p 35
576 Opinion of Advocate General Mazák, 01 April 2011 on the case of C-61/11 PPU, *El Dridi*
577 Paragraph 24 of the AG opinion
578 Paragraph 25 of the AG opinion
579 Paragraph 26 of the AG opinion
580 Paragraph 49 of *EL Dridi* judgment
Achughbabian case stating expressis verbis that Article 2(2)(b) of the Directive may only be applied to exclude from the scope of application of the directive those third-country nationals who have committed crimes unrelated to their immigration status\textsuperscript{581}.

The Court adjudicating on the scope of the Return Directive adopted a narrow interpretation on the facultative exclusion clauses. Both, the El Dridi and Achughbabian cases demonstrated that in order to exclude a third-country national from the scope ratione personae of the Return Directive, the obligation to return has to be the consequence and not the reason of the criminal law sanction. Furthermore, the judgments provided a clarification on the implementation of the Return Directive and its application in domestic law measures. It was observed that a Member State that has not adopted the provisions transposing a directive cannot rely on the application of a right deriving from it, such as the right to restrict the scope ratione personae of the directive, as otherwise the State would be able to benefit from rights deriving from the directive, without fulfilling its obligations to transpose it\textsuperscript{582}.

The Court’s interpretation had a curbing impact on Member States’ discretion to exclude third-country nationals form the scope of the Directive. Both decisions provided common interpretation as to what do the ‘criminal law sanction’ or ‘as a consequence of a criminal law sanction’ mean. Bearing in mind the reasoning in the El Dridi and Achughbabian rulings, EU legislation operated as a protective instrument in the hands of the Court. The ECJ stressed that it is crucial to avoid imposing criminal sanctions on third-country nationals simply for illegal entry or stay, even if such a provision is legal and practiced in national law. Considering that Member States are not bound by the fundamental rights protections under the Directive if a person falls out of the scope of the Directive, the Court’s interpretation limits the Member States’ discretion to exclude individuals and thus prevent lowering the general level of legal safeguards applicable in Member States.

\textsuperscript{581} Paragraph 41 of Achughbabian judgment
\textsuperscript{582} Paragraph 28 of the AG opinion
Albeit, the Court’s interpretation provides some relief and application of common standards in the EU, there is still no clear cut definition to the extent of the scope of Article 2(2) (b) and the risk of having patchy levels of protection of legal safeguards across the Member States pertains. Consequently, this still leads to questioning the importance of fundamental rights referred to in the Preamble of the Directive. The lack of common standards leaves the interpretation of the provisions first up for the Member States and potentially for the Court of Justice to provide.

2.3. Return Directive constrains criminalisation practices

When it comes to case law of the ECJ on Return Directive, it is evident that whilst providing interpretation to the provisions of the Directive the Court has had a difficult task of finding the balance between humane treatment of irregularly staying third-country nationals who are subject to return and promoting the objective of the Return Directive that is the efficient removal of irregularly staying third-country nationals. Peers has called it accurately balancing efficiency with humanity583. In this, the Court has been assisted by the general principles of EU and mainly the principle of proportionality584, weighing the measures of national laws against the suitability and necessity to avoid disproportionate penalties.

Even though the most significant of the ECJ case law in this respect concerns with custodial sentences and the safeguards relating to the grounds for and conditions of immigration detention under the Return Directive, the matters of imposing fines or issuing entry bans also form an integral part of the criminalisation measures and are being discussed in the following pages.

There are now several cases in which the Court has successfully used the application of general principles of EU law via interpretation of the Return Directive to pose limits on national criminalisation measures that treat breaches of immigration rules as criminal offences. In particular, two cases stand out in which the Court

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condemned the national law sanctioning mere irregular entry or stay, El Dridi, which was already briefly mentioned in the previous section and Achughbabian.

El Dridi was in many ways a landmark case, dealing with many issues of the implementation of the Return Directive, such as the personal scope, period of voluntary departure and imposing criminal sanctions for irregular stay. The Court firstly confirmed that although criminal law is a matter that essentially belongs to the competence of a Member State, it may still be affected by EU law. Therefore, even though Article 8(4) of the Directive allows Member States to adopt criminal law measures in case the previously adopted coercive measures do not lead to the effective removal of an illegally staying third-country national, Member States may not provide for a custodial sentence on the sole grounds that a third-country national did not comply with the return decision or expulsion order and the pursued removal proved to be ineffective. Rather, the Member States should ‘pursue their efforts to enforce the return decision continuing to produce its effect’. Acting otherwise would risk jeopardising the attainment of the Directive’s objective of returning illegally staying third-country nationals.

Conclusively, the Court confirmed that the Directive does not allow for the application of criminal imprisonment in the course of the Return procedure: once the Return procedure begins, States may not interrupt it, but they must pursue their efforts to enforce the decision. The Court, most importantly narrowed the scope of Articles 15 and 16 by excluding under its umbrella detention on the soul grounds of non-compliance with a return decision, if the Member State has failed to pursue effective removal of the person concerned. Also, the Court has confirmed

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585 Mr El Dridi was a third-country national who had entered Italy illegally and he did not hold a valid residence permit. In 2004 a deportation decree was issued against him, on the basis of which an order to leave the national territory within five days was issued in 2010 by the Questore He had been granted a period for voluntary departure of 5 days (instead of 7), the national court underlined that article 7 of the Directive also provides for exceptions, and that, in the specific circumstances of the case, a shorter period could be justified given the existence of a risk of absconding.

586 Paragraph 53 of *EL Dridi* judgment

587 Paragraph 58 of *EL Dridi* judgment

588 Paragraphs 58-59 of *EL Dridi* judgment

the prevalence of the Return procedure and its effective and efficient attainment as the main purpose of the Directive. This means, that Member States must refrain from activities and procedures that may hinder the successful removal, or delay the Return procedure in general.

The El Dridi judgment may affect all national legal systems providing for detention of irregularly staying third-country nationals merely based on their migration status, since in it the Court has set a balance between national criminal legislation and European immigration policies. The latter is particularly important in Member States like Italy, where the national legislation regulating expulsion of irregularly staying third-country nationals was actually stricter than the Return Directive provisions. For instance, Member States where irregular entry was a criminal offence per se and provided for a custodial sentence are now forced to change their national laws accordingly, as criminalisation of irregular migration frustrates the removal procedure and may most likely interrupt return procedure.

In Achughbabian, where the irregularly staying third-country national was held in detention for irregular stay, the Court confirmed the findings of the El Dridi judgment and clarified the relationship and nexus of the Directive and national criminal law and moreover, took a step further clarifying the scope and the objective of the Directive and the beginning of the return procedure. The question at stake was whether irregular immigrants could be subjected to garde à vue (police custody), since this measure, according to the French code of criminal procedure, may only be applied to persons who are suspected of having committed a crime punishable by imprisonment\textsuperscript{590}. Furthermore, the question was whether providing for the custodial sentence of irregularly staying immigrants before the issuance of a return decision is still in non-compliance with the Directive, since one of the reasoning in the El Dridi judgment was the delays the detention may cause to the enforcement of the return decision\textsuperscript{591}.

The Court stated explicitly that the Return Directive does not preclude national legislation that criminalizes illegal stay and provides for a term of imprisonment for such an offence\textsuperscript{592}, nor detention of third-country nationals with a view to determining whether or not their stay is lawful either\textsuperscript{593}. Referring to recital 17 of the Preamble, the Court established that it is the duty and the right of the authorities of Member States to determine the legality or illegality of the stay of third-country nationals and in doing so, the authorities are entitled to provide brief but reasonable period arrests of the persons concerned. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the Directive adopt a return decision\textsuperscript{594}. The Court has thus explicitly rejected the argument according to which Member States would be able to delay the application of the Return Directive by postponing the adoption of the return decision to after the illegal immigrant has served a custodial sentence\textsuperscript{595}. The ECJ’s position on this point is extremely clear: the obligation to carry out the removal must be fulfilled as soon as possible and without any delays\textsuperscript{596}.

Thus, criminal provisions punishing irregular immigrants may be applied neither before nor during the return procedure. Whenever doubts arise as to the legality of the presence of a third-country national on the territory of a member State, national authorities may only apprehend them in order to identify them, acting with due diligence; if their stay appears to be illegal, they shall issue a return decision, thus opening the return procedure. Moreover, the Court confirmed that national law sanctioning mere irregular stay with a threat of criminal law imprisonment was incompatible with the Return Directive.

Despite the clarifications, the Achughbabian judgment does not provide solutions to all the doubts and questions regarding the Return Directive. First, it still remains unclear regarding the custodial sentence, as the judgment allows for circular interpretation. It states that while Member States are not allowed to prosecute and detain immigrants for their irregular stay they are allowed to detain them for as

\textsuperscript{592} Paragraph 32 of Achughbabian judgment
\textsuperscript{593} Paragraph 29 of Achughbabian judgment
\textsuperscript{594} Paragraphs 30-31 of Achughbabian judgment
\textsuperscript{595} Paragraphs 44-45 of Achughbabian judgment
\textsuperscript{596} Paragraph 45 of Achughbabian judgment
long as necessary to determine their irregular stay. Although this interpretation of the judgment is not purposeful it can be seen coming up in the future case law.

In the case of Md Sagor\textsuperscript{597} the question of imposing a financial fine as a criminal law sanction for irregular stay was being discussed. The Italian court asked the Court of Justice whether the Return Directive precludes the possibility that a third-country national who is considered by the Member State to be illegally staying there may be liable to a fine that may be substituted with a home detention as a criminal-law sanction, solely as a consequence of that person's irregular entry and/or stay\textsuperscript{598}.

The Court found that the Return Directive does not preclude national legislation which penalises illegal stays by third-country nationals by means of a fine, which may be replaced by an expulsion order\textsuperscript{599}. The Directive does not preclude the possibility of classifying an illegal stay as an offence and laying down criminal sanctions to penalise it, as long as this does not lead to a delay or otherwise obstacle to the removal\textsuperscript{600}. Moreover, the possibility that a criminal prosecution may lead to a fine is also not liable to impede the return procedure established by the Directive, as it does not prevent a return decision from being made and implemented in full accordance with it\textsuperscript{601}. Finally, the Directive does not preclude the decision imposing the obligation to return from being taken in the form of a criminal judgment.

Where a fine is replaced by a home detention order, the Court found that the order, imposed in the course of the return procedure, does not help to achieve the physical transportation of an illegally staying third-country national out of the Member State concerned. On the contrary, that home detention order may delay and impede measures such as deportation and forced return by air\textsuperscript{602}. Hence the Return Directive precludes national legislation which allows irregular stays by third-

\textsuperscript{597} ECJ C-430/11 Md Sagor [2012], judgment of 6 December 2012, not yet published
\textsuperscript{598} Mr Sagor, who claims to have been born in Bangladesh, had entered Italy in 2009. He was a street vendor of no fixed abode in Italy. As he did not possess a residence permit, in 2010 he was summoned before the Tribunale di Rovigo (District Court, Rovigo, Italy) for the offence of illegal stay. It was not established whether Mr Sagor had entered Italy illegally.
\textsuperscript{599} Paragraph 47 of Sagor judgment
\textsuperscript{600} Paragraph 47 of Sagor judgment
\textsuperscript{601} Paragraph 36 of Sagor judgment
\textsuperscript{602} Paragraph 45 of Sagor judgment
country nationals to be penalised by means of a home detention order without guaranteeing that the order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible.

Although in principle following the El Dridi and Achughbabian judgments, the ruling in Sagor is somewhat disappointing in terms of the Court’s slightly more lenient approach. Namely, if the Court accepted the fact that there are criminal sanctions at place and allowed for the imposition of financial fines for irregular stay as long as it does not prolong the removal process. Considering that most of the irregular immigrants, like in the present case, are financially in a difficult position, the imposition of unrealistic financial obligations can only lead to their substitution with detention, which in turn does not solve the situations but aggravates it, even if the detention can only be carried out in strict terms and conditions.

2.4. Return Directive does not preclude criminalisation of irregular stay

After the Court had been consistent with its interpretation of the Return Directive in respect of applying national criminal law measures and used the EU law to redeem the third-country nationals in irregular situation, the cases of Zaizoune\textsuperscript{603} and Celaj\textsuperscript{604} brought a much different breeze and the Court seemed to take a little detour from its earlier course of reasoning.

Both judgments were given by the ECJ in 2015 as a response to an intense anticipation. Zaizoune case touched once again upon the matters of criminalisation of irregular stay but brought along a new implementation issue, that of Article 4 subparagraphs 2 and 3 of the Directive. The said provisions enable the Member States to adopt or maintain more favourable provisions for the third-country national relating to immigration and asylum as long as such provisions are compatible with the Return Directive. Considering that Article 4 (2) and (3) was a vaguely worded discretionary “may” provision its implementation was likely to bring up questions requiring uniform interpretation by the ECJ.

\textsuperscript{603} ECJ C-38/14 Zaizoune [2015], judgment of 23 April 2015, not yet published
\textsuperscript{604} ECJ C-290/14 Celaj [2015], judgment of 1 October 2015, not yet published
In the case of Zaizoune the Court dealt with Spanish legislation adopted prior transposition of the Return Directive in 2009 that considered irregular stay as a general rule not of sufficient gravity to order expulsion from the territory but stipulated a fine as the only sanction. Expulsion was only possible when aggravating circumstances occurred and only upon application of the principle of proportionality taking into account the degree of fault, the harm caused and the risk arising from the offence and its effects.

Mr Zaizoune, a Moroccan national, was arrested in Spain and since he was unable to present his identity documents on that occasion coupled with his criminal record in Spain, a procedure to remove him from Spanish territory was commenced. In principle, the Court discussed the compatibility of imposing a fine under national law as the main sanction for irregular stay, interpreting the notion of the possibility of Member States adopting “more favourable provisions” than the Return Directive, as permitted by Article 4(2) and (3) of the Directive. Much to the dismay of the academic authors the Court chose efficiency of the Directive over “more favourable provisions” and ruled that the Directive precludes national legislation, which provides for either a fine or a removal, depending on the circumstances, since the two are mutually exclusive measures.

The Court reasoned its judgment with the application of effet utile of the Directive opting for a narrow and literal interpretation of Article 4(2) and (3) stating that national measures that allow to substitute removal with a fine are likely to jeopardise the achievement of the objectives pursued by the Return Directive, i.e. the removal of the third-country national concerned in which case the Directive would be deprived of its effectiveness. Furthermore, the Court stressed that the Member States are only allowed to adopt “more favourable provisions” if they are compatible with the Directive. In case a national measure contradicts or

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605 See paragraphs 11-16 of Zaizoune judgment
606 Paragraphs 15 and 16 of Zaizoune judgment
608 Paragraph 41 of Zaizoune judgment
609 Paragraphs 39-41 of Zaizoune judgment
undermines the basic objective of the Directive\textsuperscript{610}, Member States’ powers of discretion are restricted by the said EU law measure.

The Court continued with the \textit{effet utile} reasoning in the shortly followed judgment in the case of Celaj where the question of imposing a custodial sanction for the breach of an entry-ban was raised. In its previous cases of El Dridi, Achughbabian and Sagor, the ECJ had dealt with the compatibility of national measures imposing respectively either a prison sentence or home detention for non compliance with a return decision. In all these decisions the ECJ based its judgments not so much on the wording or the underlying principles but the effectiveness of the Directive. The Court followed the logic that imposing custodial sentences for immigration law breaches undermines the effectiveness of the Directive, which essentially is the implementation of a successful removal of illegally staying third-country national.

In Celaj the situation concerned the third-country national not complying with an entry ban. Mr Celaj was arrested by the police after having re-entered Italy despite a removal order and accompanying three-year entry-ban. He was subsequently sentenced to a term of imprisonment of eight months. The question referred to the ECJ asked the Court to clarify whether the Return Directive precludes national legislation penalising re-entry in breach of an entry ban with a prison sentence of up to four years.

Even though the Court adopted the effectiveness approach, its judgment that the Directive does not preclude such measures, deviated from Advocate General’s opinion according to which the imprisonment for a breach of entry ban as a criminal law penalty is incompatible with the Directive because it would delay removal of the individual concerned\textsuperscript{611} and hence prevent the implementation of the objectives of the Directive. The AG, took a stance that the distinction made by the national court whether a return procedure is or is not ongoing, is in reality artificial and invited the Court to be consistent with its previous case law\textsuperscript{612} on criminalising illegal stay and rule against imposing custodial sentences for breaches of

\textsuperscript{610} Paragraph 38 of \textit{Zaizoune} judgment

\textsuperscript{611} Paragraphs 60-62 of AG Szpunar Opinion of 28 April 2015 on the case of C-290/14 \textit{Celaj}

\textsuperscript{612} Paragraphs 32-42 of AG Szpunar Opinion
immigration law. Instead, the Court was persuaded by the arguments presented by the European Commission and intervening governments\textsuperscript{613} and found that because of the distinctive circumstances of the case\textsuperscript{614} the ruling can deviate from its previous judgments in El Dridi and Achughbabian\textsuperscript{615}.

The Court provided reasoning for its ruling with the argument of effectiveness of the Directive, just like the Advocate General had suggested, however, adopting a more specific provision-focussed approach reached a different result. According to the ECJ, the purpose of the Return Directive is a successful return of illegally staying third-country national, which would be severely undermined if removal would be delayed by a criminal prosecution leading to a term of imprisonment\textsuperscript{616}, whereas, in this case the individual concerned was not subject to a first return procedure but was sentenced a custodial punishment for a breach of an entry ban. The Court focussed in its judgment on the effectiveness of Article 11(1) of the Directive that enables Member States to couple a return decision with an entry ban and held that such discretion should not be undermined\textsuperscript{617}. Concerning the overall objective of the Directive, the Court relied on the argument of distinctive factual circumstances and strangely enough, did not consider at all whether criminal proceedings against Mr Celaj would in this case delay his return and thus jeopardise the attainment of the objective of the Return Directive. Rather, the ECJ adopted the approach that because the return procedures had not yet begun and the custodial sentence was for the breach of entry ban, it could not delay the return as it was not part of or imposed during the return procedure\textsuperscript{618}.

The Court provided a more narrow interpretation in each case, however, still condemning the criminalisation of irregular entry and/or stay throughout the judgments. Despite the fact that there are still numerous Member States foreseeing criminal sanctions on the grounds of mere irregularity of a person’s entry and/or

\textsuperscript{613} Paragraph 46 of AG Szpunar Opinion
\textsuperscript{614} Paragraph 28 of Celaj judgment
\textsuperscript{615} Paragraph 29 of Celaj judgment
\textsuperscript{616} Paragraph 26 of Celaj judgment
\textsuperscript{617} Paragraph 24 of Celaj judgment
\textsuperscript{618} Paragraphs 26-30 of Celaj judgment
stay, the Court’s position in its earlier case law is definitely a step forward towards changing that.

Despite the fact that the Court has assisted for uniform application and implementation of the Return Directive, the judgments in Zaizoune and Celaj have indicated that the Court is taking a detour from its role to assist the return of irregularly staying third-country nationals with EU law principles. It was somewhat surprising to see that the Court, albeit adopting the effectiveness argument, reached different solutions than in its own previous rulings. If in Sagor the ECJ found that substituting criminal sanctions with a fine is not precluded by the Return Directive as it does not necessarily undermine its objective, then in Zaizoune the Court held that imposing fines as a criminal sanction for a breach of immigration law precludes successful removal of an irregularly staying third-country national and is hence not in compliance with the effectiveness of the Return Directive. It can be said that in Zaizoune the Court imposed the *effet utile* of the Directive at the compromise of “more favourable provisions” and limited the scope of discretionary implementation and the substance of Article 4 (2) and (3) of the Directive. Even though the attainment of the objective of the Directive should not be compromised, such reasoning indicates the Court’s intention to simply limit the discretionary powers of Member State to implement the Directive. The ruling also raises inconsistency concerns regarding the general principle of applying higher standards than the ones foreseen in the EU legislation. In the context of minimum standards legislation, the Member States may set higher domestic standards. Even though the Return Directive aims to set common standards, the wording in Article 4(3) implies the right of Member States to employ higher standards than those established in the Directive by applying “more favourable provisions”. Such interpretation would also be in line with the concept of shared competence and principle of proportionality according to which the upward flexibility is of crucial importance. This does not mean that the Member States are left completely free to set their own standards but the opportunity to enjoy an appropriate degree of

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619 C. Costello (2016), op cit., 131, p 30
latitude in implementation of the Union legislation, as provided in the said legislative act. Moreover, if EU legislation leaves the Member States a margin of appreciation, it enables them to apply the rules of the Directive in a manner consistent with the requirements flowing from the protection of fundamental rights, implying that application of different standards is not precluded as long as they are in compliance with fundamental rights requirements. Assuming the same logic of reasoning regarding higher standards applies also in the case of the Return Directive, the Zaizoune judgment does not seem to serve any purpose other than a reminder of the supremacy of EU law to the Member States. It should be noted that EU legislation on legal migration generally permits Member States to establish higher standards without requiring that such national measures be compatible with the Directive in question. Seeing the Court’s ruling in Zaizoune raises questions whether the Court endorses the application of double standards for implementation of measures regulating legal and illegal migration. Albeit, the Court’s reasoning in Zaizoune contributes towards a uniform application of the Return Directive and EU law, at the same time, such a deviation and inconsistency in the Court’s case law raises concerns from a fundamental rights perspective and certainly reduces legal certainty in the application of EU law.

The Celaj judgment also provided some concerning moments and confused the implementation of the Return Directive. The underlying justification in Achughbabian, El Dridi and also in Sagor was that custodial sentence as a criminal law penalty would delay the removal of an illegally staying third-country national and thus impede the objective pursued by the Directive. Yet, the Court in Celaj, awarded much significance to factual circumstances and held that imposing a custodial sentence for a breach of entry ban does not undermine successful return and is therefore allowed. It is important to note that the Directive itself does not provide a distinction whether return procedure has started for illegal entry or illegal re-entry, as long as the objective is pursued according to the rules and regulations set out in the Directive. In this respect, the Court’s ruling in Celaj was truly

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620 ECJ C-540/03, Parliament v Council, Opinion of AG Kokott of 8 September 2005, paragraphs 36-39
621 ECJ C-540/03, Parliament v Council, judgment of 27 June 2006, paragraph 104
622 S. Peers (2011), op cit., 44, p 393
surprising. Applying the effectiveness of the Directive it would have been more logical to follow the AG’s opinion and construe that if a third-country national is found in breach of immigration law, the Member State in question would start a return procedure rather than impose a criminal law sanction that may essentially impede the removal and objective of the Directive. The Court’s central “distinction” argument in the Celaj ruling, however, suggests that by allowing custodial sanctions for illegal re-entry serves the political purpose to dissuade migrants from breaching entry bans and hopefully deter illegal entries. Although it can be argued that the absence of penalties for violating an entry ban would risk rendering the European immigration system obsolete\(^\text{623}\), such violations could have other and more uniform legal consequences than domestic criminal measures. In fact, it can be even questioned whether domestic law is the most suitable means to provide a meaning and effectiveness to the EU legal system.

Therefore, the Court’s rulings, albeit being helpful regarding the implementation of the Directive, have not provided any liable solutions for the abolition of criminalisation of illegal entry and/or stay. Furthermore, inconsistencies in the lines of argument have confused the purpose and the scope of the Directive regarding its interplay with national criminal law measures. Considering the rulings in Celaj and Zaizoune, the Court has actually seemingly undermined the effectiveness argument and essentially also compromised effective and uniform application of the Return Directive. Instead these judgments accord discretion to Member States to apply their national criminal law provisions and promote the Return Directive as a deterrence measure to prevent illegal entry and/or stay in the EU.

The role of the ECJ should not be underestimated, nevertheless as it has successfully used the application of EU law as a way of controlling and limiting criminalisation of illegal stay by the individual Member States. Given the fact that immigration and criminal law measures are strongly related and often even intertwined, the Court’s interpretation on the scope and implementation of the

Return Directive has been of crucial importance, in particular given the political sensitivity of the matter. Its findings in the earlier cases of El Dridi, Achughbabian and Sagor demonstrated how the EU law may have a protective function placing limits on national measures criminalising illegal stay. Assessing domestic measures in the light of implementation of EU law the Court successfully linked criminalisation of national immigration law to enforcement of Return Directive making it harder for individual Member States, such as France and Italy, to use sovereignty as a scapegoat for criminalisation measures. With that, the Court seemingly also upheld the protection of fundamental rights and the principle of proportionality. Being bound by the application of EU law, the Member States are also bound by the said general principles of EU law, which inherently should increase the protection of migrants in vulnerable situations.

However, in particular in the light of the aforementioned discussion, it is concerning to witness the Court’s deviation in Zaizoune and Celaj. Allowing Member States to impose custodial sentences for a breach of entry ban undermines the protective function of EU law. Using the Return Directive as a means to prevent illegal entry by setting an example of punishment indicates that the Court, with the EU legislator, chooses to criminalise illegal entry and residence by criminalising migrants directly. It has been argued that the Celaj judgement is ‘a response to the needs of the times,’ especially in the context of an increased influx of migrants into Member States with external borders of the European Union. The ruling, in the interpretation of the Return Directive gives priority to the sovereignty of a Member State in dealing with the migration influx\textsuperscript{624}.

This, however, suggests that the Court approves the application of the very same measures in EU law that it has previously condemned in domestic law. Not only does it send out confusing signals regarding the uniform interpretation of legislative measures but it can also lead to legal framework with limited legal certainty and fundamental safeguards. In fact, thus far four Member States, Cyprus, France, France, France, France.

\textsuperscript{624} A. M. Kosińska (2016), 'The Problem of Criminalisation of the Illegal Entry of a Third-Country National in the Case of Breaching an Entry Ban—Commentary on the Judgment of the Court of Justice of 1 October 2015 in Case C 290/14, Skerdjan Celaj’ in European Journal of Migration and Law, Volume 18, Issue 2, pp 243-257, at p 254
Hungary and Italy, have recently changed their legislation as a consequence of the jurisprudence of the ECJ and the rulings in El Dridi, Achughbabian and Sagor. In Italy, the law now provides a set of criteria for the expulsion procedure instead of imprisonment, whereas in France and Hungary, illegal stay and entry ceased to be a criminal offence\(^{625}\). Albeit, this improves the uniformity in the domestic measures of the EU Member States, it still serves the purpose of the efficiency and effective application of the Return Directive and is not so much concerned with the protection of the rights of illegally staying third-country nationals. Moreover, it is difficult to estimate whether specific safeguards could be compromised at the expense of EU law enforcement.

**Conclusions**

The Return Directive was due to be transposed by Member States by the end of 2010 with the exception of the obligation to provide free legal assistance due one year later. All the Member States bound by the Directive notified its full transposition by 2012\(^{626}\). Once the transposition deadline expired, all legal and political control mechanisms that exist under EU law to ensure compliance with its provisions became applicable. The previous chapter observed some of the issues that occurred in the Return Directive in the drafting and during the negotiations between the Council and the Parliament. In particular, it was noted that the disconcerting amount of facultative provisions would make the transposition of the Directive, as well as its application, a challenging process. The concerns over the shortcomings in the Directive were exacerbated by the fact that the first case\(^{627}\) was referred to the Court of Justice before the expiration of the transposition deadline. These aspects were an indication that the application of the Return Directive in practice would give rise to uncertainties regarding the interpretation and


\(^{626}\) European Commission, COM(2014), 199 final, p 12

\(^{627}\) ECJ C-357/09 PPU Kadzoev [2009], ECR I-11189. The application was submitted to the ECJ 7 September 2009 whereas the transposition deadline of the Return Directive expired 24 December 2010 with an exception of Article 13(4) which was due to be transposed in national legal orders by 24 December 2011.
implementation of its provisions resulting in extensive number of questions referred to the Court of Justice for a preliminary ruling.

This Chapter set out to examine the shortcomings and gaps in law that appeared in the implementation phase of the Return Directive and whether the interpretation of the Court of Justice provided any assistance to overcome these shortcomings. It was observed in the analysis of the provisions of the Return Directive and the subsequent case-law that that the amount of cases referred to the Court of Justice within the past seven years is in itself, an indication of the serious shortcomings in the Return Directive, regardless of whether these shortcomings appeared in the legislative or implementation phase of the Directive. However, when examining the existing jurisprudence, it is evident that the Court has played a pivotal role as regards to the implementation of the Return Directive, providing for at least some interim as well as more permanent solutions to pertaining shortcomings deriving from the ambiguities in the Directive, as well as its interaction with domestic measures.

The Court, interpreting the Return Directive in conjunction with the Charter and the jurisprudence of the ECtHR, confirmed on several occasions the obligation to respect fundamental rights and international law when applying and implementing the Directive is incumbent upon Member States, as they are responsible for its implementation and the EU institutions are not involved in its enforcement. Indeed, since States are expected to ensure compliance with EU law, they are not allowed to jeopardise the achievement of the objectives pursued by the Directive, depriving it of its effectiveness. It is therefore clear that the compatibility of national legislation with EU law will have to be examined by making reference to the objectives pursued by the latter. With regard to the Return Directive, the ECJ has argued that its aim is not only to establish an effective return policy, but also to ensure full respect for the immigrants’ fundamental rights and dignity.

Yet, the Chapter revealed the Court of Justice has not always been able to fill in the gaps in the law and provide a unified and consistent approach in application of the

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628 Paragraph 55 of El Dridi judgment
629 ECJ, Arslan judgment
Return Directive. In the jurisprudence concerning the application of the Return Directive, the ECJ found itself caught between two principles, that of protection of fundamental rights of irregular immigrants and securing their effective removal, aiming to strike a fair balance between the two. As these are not the easily reconcilable principles, the Court’s case law has demonstrated inconsistencies. There are judgments in which the prevalence has been given to achieving the objectives and effectiveness of the Return Directive, as well as the judgments in which the Court has favoured fundamental rights safeguards over effectiveness of common Union law. It appeared in the Chapter that the Court’s jurisprudence ranges from non-protective in Zaizoune, Celaj and G and R where the Court gave prevalence to ensuring effective removal of irregular third-country nationals; to protective in the cases of El Dridi, Achughbabian, Sagor, Bero and Bouzalmante and Mukarubega, where the Court applied the Directive as a protective measure of irregularly staying third-country nationals and restricted the Member States practices criminalising irregular entry and stay and securing removal at the expense of rights. Finally, the Court took a super-protective approach in the striking judgment in Abdida providing the protecting of humanity of irregular immigrants at the expense of effectiveness of the Directive and strengthened the guarantees of the Return Directive, even recognising that in some cases return should be not enforced\textsuperscript{630} and challenged the lack of access to social assistance.

In addition to the inconsistent jurisprudence of the Court of Justice, the obligation to uphold fundamental rights in return procedure seems not to be fully supported by the text of the Directive itself. Notwithstanding the strong reaction of the various human rights organisations, under international law, conformity or non-conformity with fundamental rights and obligations can only be established by a court ruling on a concrete individual case, taking into account Member State’s transposition measures and enforcement practice\textsuperscript{631}. As the Court has repeatedly said the main purpose of the Directive is the expulsion of irregularly staying third-country nationals and the Member States have to do everything in order to achieve that


\textsuperscript{631} K. Hailbronner (2010), op cit., no 71, pp 1507-1508
goal, even if it comes at the cost of fundamental rights of irregular immigrants. Thus, while the Directive’s sole objective and purpose seems to be the establishment of an effective return policy\textsuperscript{632}, the common procedures it sets are limited by the need to ensure respect for the immigrants’ fundamental rights and dignity.

It is also important to note here that the Court’s role is merely reactive and not proactive. The Court can only reconcile the gaps in law as well as safeguard fundamental rights protection when it has been asked to do so by a domestic court. Therefore, the inconsistency of the Court’s jurisprudence is particularly disconcerting, as the appropriate level of protection of fundamental rights is dependent on the whim of the Court’s interpretation of the Return Directive’s provisions. Ultimately, relying on the Court’s willingness to improve the position of the most vulnerable poses certain limits and may not necessarily provide expected outcome. This, in turn, can have a negative impact on guaranteeing legal certainty in the EU.

In conclusion, albeit the Return Directive has posed boundaries to national legislation criminalising irregular entry and stay and thus improved the protection of fundamental rights in returning irregularly staying third-country nationals, the application of the Return Directive in such a protective manner is still rather volatile and depends on the general principles of EU law and the Member States’ adherence to them. In this matter, the Charter and the jurisprudence of the ECtHR will play a pivotal role providing guidelines for interpretation of Return Directive and assisting to uphold the fundamental rights in return procedures.

\textsuperscript{632} Recital 20 of the Preamble of the Return Directive
CHAPTER V Return Directive and fundamental rights

Introduction

The Return Directive, adopted in 2008, constitutes the main component of the EU’s common policy regulating the return of third-country nationals in irregular situations. The Directive covers a broad range of issues, including an obligation to return, treatment of third-country nationals subject to return decision, entry bans, conditions and grounds for detention, as well as procedural rights. Yet, at the time of the adoption, as well as during the transposition period, the Directive has been mostly the subject of scrutiny, due to its non-compliance with the fundamental rights protection.

The EU has recognised the respect of human rights as the general principle of law and is compelled to follow the obligations rising thereof at all times. The Member States have the same obligation when implementing or derogating from the Union law and moreover, they are compelled by the obligations under international human rights treaties that all the EU Member States have ratified. The discussion in the previous chapters demonstrated that the expulsion of aliens should be carried out in conformity with international human rights law.

The Return Directive was supposed to be in full compliance with the human rights principles and ascertain that the fundamental rights of immigrants would be respected and protected at all times during the return procedure. Furthermore, even if the Directive itself has shortcomings in respect of fundamental rights, the implementation of the Directive should take place in compliance with those international human rights obligations that the Member States have signed on to. These include, first and foremost, the principle of non-refoulement, as laid down in the Refugee Convention and in several international and European law principles.

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633 Article 6(3), TEU
634 Article 51(1) EU Charter of Fundamental Rights
636 In international law see for example Article 3(1) of the Convention against Torture and the Article 7 of the ICCPR. In European law see Article 3 of the 1950 ECHR. The jurisprudence of the ECtHR has expanded the scope of protection against deportation by interpreting Article 3 of the 1950 ECHR
In addition, prohibition of collective expulsions\textsuperscript{637} and the obligations to safeguard and prioritise the best interests of the child in all actions concerning children\textsuperscript{638} are pivotal for every positive measure regulating the return of immigrants in irregular situation. However, States still retain the right to restrict certain human rights guarantees under specified conditions or derogate from some human rights in special circumstances to the extent permissible under international human rights law\textsuperscript{639}.

In reality, the Return Directive, although containing several references to the protection of fundamental rights in its preamble, remained vague and ambiguous and devoid of detailed human rights safeguards. Although the Commission has said in its proposal\textsuperscript{640} that the Return Directive is a return instrument and not a human rights instrument, it made an explicit reference in the Preamble as well as the main body of the Directive to relevant fundamental rights and international law obligations. Meaning that the Directive should serve both interests, that of the sovereign’s right to expel and the obligation to protect and respect fundamental rights in so doing. Moreover, the reference aims for full compatibility with fundamental rights and should not violate any of those rights\textsuperscript{641}.

In the eight years since its adoption, the Return Directive has been the subject of a vast amount of litigation at the ECJ, indicating several shortcomings and ambiguities in its provisions, in particular in respect of the fundamental rights. The questions before the Court of Justice have mostly been derived from the Member States’ struggle to strike a fair balance between achieving the objective of the Directive and safeguarding fundamental rights protection. The Court’s interpretation, as seen in the previous chapter, has provided a variety of outcomes and albeit being slightly inconsistent, has still demonstrated the significance of the general principles of EU law as well as the increasing role of the Charter. As a result, the Court’s as prohibiting expulsion where there is a risk of torture or inhuman or degrading treatment, or of execution.

\textsuperscript{637} Article 4 of Protocol No 4 ECHR
\textsuperscript{638} Article 3 of the 1989 United Nation Convention on the Rights of the Child (UNCRC)
\textsuperscript{640} European Commission, COM(2005) 391 final, p 5
\textsuperscript{641} \textit{Ibid}
jurisprudence has brought along interpretation assisting the implementation of the Return Directive.

The concerns over the Return Directive’s compliance with the fundamental rights principles pertain even now, after eight years since its adoption and six years after expiry of its transposition deadline. However, the concerns have perhaps shifted slightly compared to the ones existent at the time of its adoption. Hence, this chapter is aimed to examine whether the fundamental rights concerns were caused in the legislative or rather in the implementation phase of the Return Directive and whether the Court’s interpretation has eased some of these concerns, and consequently improved the Directive’s compliance with fundamental rights. As the Court’s jurisprudence in matters of the Return Directive evolved alongside the increasing role of the general principles of EU law and the Charter of Fundamental Rights, the question to be focussed on, is whether the Return Directive can, or will be, salvaged by the general principles of EU law and the application of the Charter.

The chapter is divided into four sections, starting with some general comments on the Return Directive and fundamental rights. The chapter will then deal with matters of voluntary departure, prohibition of return and detention analysing the respective provision in the light of fundamental rights. All these matters will be examined in the light of the Charter and European Convention on Human Rights as well as the jurisprudence of the ECtHR. The general principles of EU law, in particular, the principle of proportionality will be revisited again in the light of the Return Directive. The chapter will discuss the respective human rights enshrined in the Charter that are the most relevant. Based on the implementation and the ECJ’s case law, four provisions are of particular interest: the scope of Article 4 prohibiting torture, inhuman and degrading treatment and punishment; Article 6 establishing the right to liberty; Article 19 regulating expulsion safeguards; and Article 47 of the Charter, which stipulates the right to effective remedy and fair trial.

The Chapter aims to examine whether and to what extent does the Return Directive provide for fundamental rights safeguards. The purpose of the analysis is not only to weigh the Return Directive’s compliance with the fundamental rights but to
examine whether the human rights protection can be, or has been, strengthened by
the application of the Charter and general principles of EU law.

1. Fundamental rights in the Return Directive: general comments

At the time when the Return Directive was still in the negotiation phase, it was
subject to a severe criticism by practitioners as well as academics due to its lack
of human rights safeguards. The Directive was widely seen as a highly punitive
measure that offered little protection for irregular migrants. Additionally, it was
believed that the final text of the Directive would only encourage the Member
States to lower their common standards of return practices. These concerns
resulted in the Return Directive to be titled ‘Directive of shame’. As a response to
the criticism, the Commission explicitly stated that the Directive is primarily
intended to be a return instrument and not a human rights instrument with the
primary purpose to provide for an effective return policy and migration
management.

Despite some shortcomings, the Return Directive is not completely devoid of
fundamental rights safeguards but entails several references to relevant
international legal principles. These references as well as the general objective of
the Directive, which is stipulated in Article 1, indicate the Directive’s double
nature: seeking to attain successful removal of third-country nationals in irregular

European Policy Studies, CEPS: Brussels, 13 November, 2009; Also UNHCR Position on the
Proposal for a Directive on Common Standards and Procedures in Member States for Returning
Illegally Staying Third-country nationals, 16 June 2008, available at
http://www.unhcr.org/4d948a1f9.pdf (last accessed 30 September 2016); ECRE Information note 7
2008; Amnesty International comments on the draft Directive COM(2005) 391 final, Brussels May
amnesty-dir-rimpatri.pdf (last accessed 30 September 2016)
643 S. Peers, ‘The EU’s Returns Directive: Does it improve or worsen the lives of irregular migrants?’,
post of 28 March 2014, available at http://eulawanalysis.blogspot.co.uk/2014/03/the-eus-returns-
directive-does-it.html (last accessed 30 September 2016)
644 F. Lutz (2010), op cit., 324, p 75
646 Recital 4 of the Return Directive Preamble
647 Article 1 of the Return Directive stipulates: ‘This Directive sets out common standards and
procedures to be applied in Member States for returning illegally staying third-country nationals, in
accordance with fundamental rights as general principles of Community law as well as international
law, including refugee protection and human rights obligations.’
situations whilst ensuring the necessary protection of the individuals subject to return. Other fundamental rights references in the Directive can be found in the preamble, as well as in the main body of the provisions. The clearest fundamental rights references are enshrined in Recitals 21 to 24 in the Preamble as well as in Articles 1 and 5 respectively, which will all be dealt with in the following pages. Furthermore, the Preamble makes an explicit reference to general principles of EU law, namely the principles of proportionality and effectiveness. Lastly, Article 4(3) of the main body of the Directive secures that the Member States may adopt or maintain provisions that are more favourable to a person to whom it applies.

As per Article 1 of the Return Directive, Member States are obliged to apply the Directive in compliance with fundamental rights as general principles of EU law as well as with relevant international law requirements. The same obligation is echoed also in Recital 24 of the Directive confirming the respect for fundamental rights, in particular the ones enshrined in the Charter. In short, the Directive compels the Member States to apply the provisions of the Directive in conformity with fundamental rights.

In order to analyse the Return Directive in the light of human rights, it is necessary to clarify what the aforementioned requirement means. As per the jurisprudence of the ECJ and the interpretation of Article 6 TEU that recognises fundamental rights as general principles of EU law, the EU institutions have the obligation to act and legislate in conformity with fundamental rights. The Member States are bound by the general principles when they implement the EU measures or derogate from EU law. Hence, Member States, when they apply the provisions of the Return Directive are obliged to ensure the protection of fundamental rights at all times.

It is also important to determine the sources and scope of fundamental rights the Member States are compelled by. As was already briefly stated in Chapter one of this dissertation, in the EU legal system the main source of human rights principles,

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648 Recital 13 of the Return Directive Preamble
650 See for example ECJ Cases C-112/00 Eugen Schmidberger [2003], judgment of 12 June 2003, ECR I-5659 and C-36/02 Omega [2004], judgment of 14 October 2004, ECR I-9609
in addition to international human rights treaties the Member States are signatories to, is the Charter. However, the Charter largely mirrors the same code of rights as the ECHR. Hence, following the clarification provided in Article 52(3) of the Charter, in so far as the rights of the Charter correspond to the ones guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. Such a wording implies that the substance of rights must be also, by extension, consistent with the interpretation and jurisprudence of the ECHR. However, the contracting parties are permitted to more generous interpretation of the Charter rights by applying higher standards of human rights protection than the ECHR.

Consequently, Article 1 of the Return Directive read in conjunction with Recital 24 of the preamble obliges the Member States to apply the provisions of the Directive in conformity with the fundamental rights principles enshrined in the international human rights treaties that they are parties to. Furthermore, the fundamental rights safeguards enlisted in the Charter in conjunction with the ECHR and the case law of ECtHR continue to provide binding guidelines and principles for the implementation of the Return Directive.

The discussion above leads to questioning why the Return Directive was faced with such a severe criticism. Perhaps one of the reasons the Directive was criticised for its lack of fundamental rights safeguards is due to the comparison of the final text of Directive to the initial proposal submitted by the Commission. Namely, the initial proposal of the Directive aimed for a full compatibility with fundamental rights and relevant international and regional human rights principles. For instance, the preamble to the original proposed Directive referred to the best interests of the child and respect for family life as primary considerations (recital 18), and provided that the Directive is without prejudice to Refugee Convention obligations (recital 19) and respects fundamental rights (recital 20). Additionally, the initial Article 5 required Member States to take account of the nature and solidity of third-country

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653 Statewatch analysis, The original EU Directive on return (expulsion), December 2007, p 6
nationals’ family relationships, the duration of their stay in the Member State and the existence of family, cultural and social ties with their country of origin. Member States must also take account of the best interests of the child in accordance with the UN Convention on the Rights of the Child. The Article 6(4) as originally drafted provided for the obligation to safeguard the principle of non-refoulement and the subsequent subsection enabled for the option to stay for humanitarian reasons.

The end result of the Directive turned out to be much different due to the opposition of the Member States during the Council meetings and discussions. Thus, in the final version, the human rights clause is simply deleted from the main text of the Directive, and inserted in part into the preamble instead. In the main body of the Directive, there is no recall to fundamental legal instruments per se but instead the following international legal principles are mentioned: non-refoulement, family unity and the best interests of the child.

It has been scrutinised that being the focal legislative return measure, the Directive does not contain any explicit reference to the prohibition of collective expulsion. The latter is a renowned fundamental right enshrined in Article 19(1) of the Charter mirroring Protocol 4 Article 4 of the ECHR and interpreted in the jurisprudence of the ECtHR. Expulsion en masse, also called mass expulsion or collective expulsion

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654 Statewatch analysis, The original EU Directive on return (expulsion), December 2007, p 6
655 Art 6(4) provided that no return decision may be issued where return would breach fundamental rights such as non-refoulement. See Statewatch analysis, The original EU Directive on return (expulsion), December 2007, p 6
656 Article 6(5) enabled Member States to offer a right to stay for compassionate, humanitarian or other reasons. See Statewatch analysis, The original EU Directive on return (expulsion), December 2007, p 6
658 Recitals 22-24 of the Preamble, Return Directive
659 Articles 4(b), 5 and 9(1)(a), Return Directive
660 Articles 5(b) and 14(1)(a), Return Directive
661 Articles 5, 10(1) and 17(5), Return Directive
662 A. Baldaccini, (2009), op cit., 348, pp 1-17
of non-nationals is prohibited also by several instruments of international law\textsuperscript{664}. According to the European Court of Human Rights, collective expulsion is any measure compelling non-nationals, as a group to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-national of the group\textsuperscript{665}. This is also mirrored in a line of case law of ECtHR in which the assessment of collective expulsion is based on whether there has not been an individual examination of the facts and circumstances of the individual to be expelled\textsuperscript{666}. The ECtHR has held that collective expulsion is prohibited because each person is entitled to a consideration of his or her claim to remain or to leave the territory separately taking into account individual facts and circumstances\textsuperscript{667}. Article 19(1) of the Charter like Protocol 4 Article 4 of ECHR applies equally to everyone and is not solely confined to asylum seekers or non-residents.

Considering that the Return Directive is the main instrument of common Union return policy, the lack of explicit reference to one of the main principles ensuring humane and dignified return is concerning. However, it cannot be said that the Directive is completely silent about the prohibition of mass expulsions. Namely, Recital 6 of the preamble stresses the Member States' obligation to adopt decisions under the Return Directive on a case-by-case basis and based on objective criteria in accordance with general principles of EU law. Applying a broad interpretation of the Recital 6 in conjunction with the Recital 24 and Article 1 of the Directive, binding the Member States to apply the Directive in conformity with the Charter, it can be argued that the reference to ‘individual case-by-case’ assessment implies the compliance with Article 19(1) of the Charter and by extension the ECtHR case law regarding prohibition of expulsion \textit{en masse}. Supported by the general requirement of the Member States to implement and apply the Directive provisions in


\textsuperscript{665} ECtHR \textit{Andric v. Sweden}, No 45917/99, 23 February 1999 and ECtHR \textit{Čonka v. Belgium}, No 51564/99, 5 February 2002, paragraph 59

\textsuperscript{666} ECtHR \textit{Čonka v. Belgium}, No 51564/99, 5 February 2002; ECtHR \textit{Hirsi Jamaa & Others v Italy}, No 27765/09, 23 February 2012

\textsuperscript{667} E. Guild (2014), op cit., 563, p 549
compliance with the Charter and fundamental rights as general principles of EU law, it suggests at least a certain level of fundamental rights safeguards in the Directive. Albeit, this being a rather wide interpretation of the provision applied by the analogy of the wordings expressed in the relevant ECtHR jurisprudence, it nevertheless can be seen as arguing against the statement that the Directive does not entail any reference to a prohibition of collective expulsion.

Hence, it would be incorrect to state that the Return Directive is devoid of human rights safeguards. Albeit, most of the references being enshrined in the preamble of the Directive, the intent to ensure Directive’s full compliance with fundamental rights, can be found also in the main body of the Directive, in the very first substantive article no less. As the Hague Programme is the political basis for the Return Directive, the preamble and Article 1 of the Directive, make an explicit reference to the respect of fundamental rights as general principles of the Union law, as well as the continued application of obligations deriving from several international instruments that the Member States are Parties to.668 The explicit reference to the respect of fundamental rights as general principles of EU law is also in line with Article 6(3) TEU that is a codification of the ECJ’s jurisprudence on human rights in EU law.

However, the references to human rights in the main body of the Directive remain rather vague and limited, placing the main weight and safeguards in the implementation phase of the Directive. The obligation to respect fundamental rights and international law when applying the Return Directive is incumbent upon Member States as they are responsible for its implementation.669 Albeit, the EU institutions also being compelled by the fundamental rights obligations when they legislate, are not involved in the enforcement or application of the adopted regulations in practice. Thus, the extent of the fundamental rights safeguards entailed in the Directive and whether the provisions are actually capable of providing sufficient amount of protection can only be assessed taking into

668 The Hague Programme provides that common standards on return must ensure that persons are returned “in a humane manner and with full respect for their human rights and dignity”, The Hague ; Brussels European Council Conclusions, 45 November 2004, p 1.6.4
669 K. Hailbronner (2010), op cit., 71, p 1509
consideration not only the adopted text but also by looking at how Member States have decided to implement and apply the Directive in practice. The application of the Directive is of particular importance when assessing the human rights safeguards, considering the vast amount of discretion ‘may’ provisions in the Directive that were also pointed out in chapters three and four of this dissertation. Consequently, conformity or non-conformity with fundamental rights and obligations under stipulated in international law as well as in the Charter can only be established in a legally binding way by the Court of Justice. However, ECJ can only provide uniform interpretation on Return Directive provisions in compliance with legal safeguards on a concrete individual case under the preliminary reference, taking into account Member States’ transposition measures and enforcement practices, whereas in general such conformed application of the EU law is the responsibility of national courts.

Irrespective of the shortcomings regarding explicit fundamental rights safeguard references in the main body of the Return Directive, Member States are obliged to apply the provisions in conformity with legal principles contained in international human rights instruments to which the Member States are signatories to. These include for instance the European Convention on Human Rights as interpreted by the ECtHR and Refugee Convention. In line with general principles of EU law, as stated in Recital 21 of the Preamble, Member States are compelled by the non-discrimination requirements. Finally and most specifically, Member States are bound to implement the Return Directive in conformity with the Charter and general principles of EU law, as depicted in Recital 24 of the Preamble and Article 1 of the Directive.

2. Voluntary departure

Promotion of voluntary departure has and will continue to be one of the main policy objectives of the EU’s return policy to ensure fundamental rights compatible return procedures and coherent return policies in EU Member States.\(^{670}\)

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Accordingly, voluntary departure also occupies an important place in the Return Directive.

Being subject to a serious debate and disagreements during the negotiations of the Return Directive\textsuperscript{671}, the issue of voluntary departure remains a focal point in the application of the Directive provisions for both conceptual and legal reasons. Namely, the voluntary departure provisions are inextricably linked to the matters of detention and entry bans, thus having a serious impact on the procedural rights of the third-country national subject to return. Additionally, the articles that regulate the rules of voluntary return contain several optional provisions, the so called “may-clauses”, which increases the weight on correct implementation of the Directive by the Member States to ensure the compliance with fundamental rights.

In the final text of the Directive, as a rule, any return decision must allow for a period of voluntary departure, ranging between 7 and 30 days\textsuperscript{672}. The second paragraph of the same article allows for the extension of the time period taking into account individual circumstances, for example if children are attending school and for the existence of other family and social links\textsuperscript{673}. Article 7(4) provides Member States with the option to refrain from granting a period for voluntary departure or to shorten the period under specific circumstances, which will be discussed below. Likewise, Member States may provide in their national legislation that such a period of voluntary departure shall be granted only following an application by the third-country national concerned\textsuperscript{674}. In Member States that have chosen this option, the information of the third-country national of the possibility to submit such an

\textbf{Programme: An Open and Secure Europe Serving and Protecting Citizens, 5731/10, Brussels 3 March 2010, p 108}

\textsuperscript{671} The debates involved the mandatory length of voluntary departure as well as the grounds for invoking and excluding from it. The common concern amongst Member States was the potentially delaying effect voluntary departure period would have on successful removal process. The Commission’s view was from the beginning that the possibility for voluntary return should have to be respected by Member States at all times when applying Return Directive and carrying out return procedures. See the relevant discussion in Chapter 3.

\textsuperscript{672} Article 7(1) Return Directive

\textsuperscript{673} Article 7(2), Return Directive

\textsuperscript{674} Article 7(1), Return Directive
application has to be provided in an individualised form, in line with the Directive’s main objective to promote voluntary return\textsuperscript{675}.

2.1. Some conceptual issues

Before discussing the legal implications deriving from the said provisions, some conceptual issues should also be paid brief attention to. Article 3\textsuperscript{(8)} defines ‘voluntary departure’ as compliance with the obligation to return within the time-limit fixed for that purpose in the return decision. It is interesting to note that the provided definition differs from the concepts that are in general used in international human rights language. Under international law voluntary return is often confused with repatriation\textsuperscript{676}. The latter is considered as the personal right of a refugee, prisoner of war or a civil detainee to return to his or her country of nationality under specific conditions laid down in various international instruments\textsuperscript{677}, human rights instruments\textsuperscript{678}, as well as customary international law.

Voluntary return is its assisted process also referred to as assisted voluntary return, meaning the situation where the return based on the will if the returnee is being supported by administrative, logistical, financial and reintegration aid. In general, this kind of aid is being provided for rejected asylum seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin\textsuperscript{679}. The European Council has defined voluntary return as ‘the assisted or

\textsuperscript{675} Article 7\textsuperscript{(1)}, Return Directive
\textsuperscript{676} International human rights instruments refer either to the ‘the right to return’ or ‘the right to enter one’s country.’ In international refugee law and international humanitarian law, the term used is ‘repatriation’.
\textsuperscript{679} IOM website \url{http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Assisted-Voluntary-Return} (last accessed 30 September 2016)
independent departure to the country of origin, transit or another third country based on the will of the returnee. References to ‘return decision’ and to the ‘obligation to return’ in Article 3(8) of the Return Directive suggest that in the context of the Directive and EU common return acquis voluntary return refers to the voluntary compliance with an obligation to return to a third country (emphasis added). Thus, it does not carry in itself the notion of voluntary repatriation or any sort of truly voluntary movement but rather refers to an obedient behaviour in compliance with administrative decision of a third-country national in an irregular situation. In fact, the European Commission has clarified that since the Return Directive applies only to illegally staying third-country nationals, the concept of “voluntary departure” does not cover cases in which legally staying third-country nationals decide to go back to their home country based on their own decision. However, the departure of illegally staying third country nationals who have not been detected/apprehended yet (e.g. over stayers), can be considered as covered by the definition of "voluntary departure" as these persons are already under an "abstract" obligation to return under the Return Directive.

Albeit, this may seem like an unnecessary matter of language and semantics, the perplexity of definitions can nevertheless raise some concerns if looked through the lens of fundamental rights. It is of particular importance since in international law it is recognised that individuals should have an opportunity to leave the territory of their own accord as an alternative to forced removal. Thus, the use of the term ‘voluntary’ to describe all departures that are undertaken as an alternative to forced

680 The Return Action Programme, Annex 1, p 29
681 The definition of return clarifies that for the purpose of this Directive the notion of return only covers the process of going back to a third country and leaving the territory of the EU. See Article 3(3) Return Directive
683 Ibid
removal, may lead to confusion and misunderstanding. The reference to the ‘return decision’ and the ‘obligation to comply’ in the Directive definition, albeit voluntarily, do not imply voluntary repatriation or leave, i.e. a voluntary migratory movement that would have been the individual’s wish or preferred choice but rather infer a mandatory return, i.e. a movement that is an inevitable result of a decision adopted by authorities and cannot in this case, be voluntary at all. Furthermore, it raises concerns as to whether an individual in an irregular situation has been guaranteed the actual and real, as opposed to potential and hypothetical, possibility to leave voluntarily. Likewise, it cannot be seen to follow the generally expressed view of the Commission which places the promotion of voluntary departure is one of the key objectives of the Return Directive685. Rather, such confusion of terminology suggests that an irregular third-country national has no other option but to be subject to an administrative measure of punitive nature once his or her status has changed. Finally, such conceptual incoherence raises questions whether the Return Directive really promotes voluntary return, as it not only links but makes the element of coercion prerequisite to the voluntary movement.

2.2. Legal implications of voluntary departure

Despite some conceptual issues discussed above, the Return Directive still makes a strong case for voluntary departure promotion obliging the Member States to grant a period of voluntary departure to irregularly staying third-country nationals. Article 7(1) is a mandatory provision for the Member States to transpose and following grammatical interpretation of its explicit wording686, it can be said that the voluntary departure constitutes a general rule in the Directive. As of that, and applying the Court’s reasoning by analogy in the case of Chakroun687, any exception to a general rule must be interpreted strictly688 and applied narrowly without discrimination and be based on the individual assessment of each case689. The idea

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685 European Commission, COM(2015) 6250 final, p 34
686 Article 7(1) first sentence stipulates: ‘A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4.’
687 ECJ C-578/08, Rhimou Chakroun v Minister van Buitenlandse Zaken [2010], judgment of 4 March 2010, ECR I-01839
688 D. Acosta (2011), op cit., 417, p 12
689 K. Hailbronner (2010), op cit., 71, p 1525
that voluntary departure is the general rule is also supported by Recital 10 of the
preamble, which states that voluntary return should be preferred over forced
return. Hence, as a general rule, an appropriate period of voluntary departure must
be granted.

2.2.1 Extension of the period granted for voluntary departure

The Return Directive provides for exceptions to the general rule of voluntary
departure. Namely, grounds to extend the period of voluntary departure and the
reasons to refrain from providing one. Paragraph two of Article 7 provides the
possibility to extend, where necessary, 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. Even though the provision uses the word
‘shall’, the addendum of ‘where necessary’ makes it a discretionary clause subject
to interpretation and the decision of the returning Member State and its national
implementing legislation. Furthermore, the Directive does not specify what
constitutes as ‘other social or family links’, leaving that to the discretion of each
Member State. The Directive remained silent as to the maximum length of the
extension, however, the Commission later clarified that considering the reference in
the text to children attending school (logically linked to the idea of letting children
finish their school year) extensions of up to 1 year are certainly covered by the
Directive690.

The wording of the Directive, i.e. ‘such as’, suggests that the grounds for extension
of the period for voluntary departure are non-exhaustive. Albeit, the wording of the
exception lacking in clarity, it can be argued that as the second paragraph is an
exception to the rule it must be interpreted narrowly and strictly. Furthermore, the
application of Article 7(2), if implemented, has to be in compliance with Recital 6 of
the preamble obliging the Member States to apply the exceptions on a case-by-case
basis following objective criteria, taking into consideration the particular situation
of the individual concerned and subject to general principles of EU law. Moreover,

Member States, being bound by the human rights obligations, have to ensure that they apply the said provision in accordance with the Charter and respectively the jurisprudence of the ECJ and ECtHR.

As these exceptions make an explicit reference to ‘family and social links’, it can be argued that the provisions of Article 8 ECHR as interpreted by the Court of Human Rights, shall provide necessary fundamental rights constraints in the implementation of Article 7(2). Furthermore, for the extension of the period for voluntary departure, each individual case should be treated on its own merits in accordance with national implementing legislation and administrative practice. Finally, the concept of ‘family links’ must be interpreted and understood in the context of jurisprudence of the ECtHR, in the matters of expulsion and respect for private and family life.

Based on the wording of Article 7(2), its substance and purpose seems to be not only the requirement of case-by-case assessment of each individual case but it seems to imply also a certain respect for family and private life or the very least serious consideration of the situation of settled migrants whose status may have changed. Article 8 ECHR permits settled migrants to resist removal in recognition of the de facto ties with host countries. The ECtHR has confirmed that in assessing the impact of removal, or refusal to renew a residence permit, the social ties the settled migrant has with the community he or she lives in, constitutes part of the ‘private life’ concept within the meaning of Article 8 ECHR, meaning that irregular migrants may invoke Article 8 ECHR to preclude their removal. Thus, it can be derived that if the existence of ‘social and family ties’ are a sufficient argument to be invoked to preclude removal, they can serve as grounds to extend period of voluntary departure within the same meaning.

Thus, if Article 7(2) was to be applied in conformity of fundamental rights as general principles of EU law, the wording ‘family or social links’ should follow the

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691 For more detailed information on this see the analysis of the relevant case law in S. Peers (2011), op cit., 44, pp 398-404
692 C. Costello (2016), op cit., 131, p 114
693 ECtHR Üner v The Netherlands (2007), 18 October 2006, Application no. 46410/99, EHRR 421
interpretation of the ECtHR as described above and result in the extension of period
granted for voluntary departure if not preclude the removal all together. Albeit, this
being an appropriate interpretation within the fundamental rights context it raises
concerns regarding effectiveness of the Directive. Article 7(2) is a discretionary
provision that Member States may choose to apply based on the individual
assessment of the case. If chosen to be implemented, the application of the said
provision has to be in compliance with fundamental rights and follow the line of
interpretation developed in the ECtHR jurisprudence. The latter, as seen above, has
provided a wide net of protection against removal and established Article 8 ECHR as
efficient grounds to be invoked by irregular migrants, which may deter the Member
States from applying Article 7(2). Such a result would not only undermine the
general effectiveness of the Return Directive but also question whether and to what
extent the promotion of voluntary departure and the possibility for an extension of
the period granted for voluntary departure, is actually ensured by the Directive.
Furthermore, it can be argued that the commitment to interpret the Directive
provisions in the light of fundamental rights may contradict the rule that exceptions
to the general rule must be interpreted narrowly. Additionally, it may come at the
account of the effectiveness of the Directive and turn out to be counterproductive
towards the purpose of the provision, which aims to ensure legal safeguards.

2.2.2 Grounds precluding voluntary departure

The main concerns regarding the provisions of voluntary departure lie, however, in
the list of grounds providing Member States to refrain from granting the period of
voluntary departure. Namely, Article 7(4) lays down a list of three situations: when
there is a risk of absconding, when an application for a legal stay has been dismissed
as manifestly unfounded or fraudulent, or when the person concerned poses a risk
to public policy, public security or national security. Out of all these grounds, the
risk of absconding is the only one that is also been given a more specific definition
within the context of Return Directive as ‘the existence of reasons in an individual
case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond.695

'The risk of absconding'

The existence (or absence) of a "risk of absconding" is a decisive element for determining whether a period of voluntary departure shall be granted or not and for deciding on the need of detention. As the Directive itself does not provide sufficient fundamental rights safeguards regarding the application of Article 7(4) in conjunction with Article 3(7), it raises concerns of applying the said provisions in an arbitrary manner. For instance, third-country nationals in an irregular situation, once they have received return decision, will most likely not be willing to cooperate with the set requirements that would result in nonconformity with the decision. Often, the irregular immigrants are involved in a lower end of income level and thus do not have the sufficient independent resources to execute the departure. Some of them do not possess the necessary travel documents or even adequate ID. In latter cases, irregularly staying third-country nationals may be unidentifiable, or obtaining valid ID or travel documents may turn out to be a cumbersome task even for the authorities of the expelling State. These situations, without specific guidelines, can all be interpreted as an individual being in a 'risk of absconding' and accordingly deprived of a voluntary departure period.

However, since there is no specific fundamental rights safeguards regarding the application of Article 7(4) in conjunction with Article 3(7), assistance must be sought in the general principles of EU law, making the interpretation of these provisions in the light of human rights standards as crucial.

First, the wording in the provision gives evidence that the list of grounds to refrain from granting a period of voluntary departure or to grant a shorter period than 7 days, is exhaustive and not subject to being arbitrarily expanded.696 Moreover, as these reasons are exceptions to the general rule, they have to be interpreted

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695 Article 3(7) Return Directive
696 This interpretation has also been confirmed by the Commission as well as by the ECJ. See European Commission, COM(2015) 6250 final, p 37 and ECJ C-554/13 Zh. and O., judgment of 12 February 2015, para 25, not yet published
narrowly to avoid frustrating the provision’s overall objective. Such an argument is also supported by paragraph 3 of Article 7, which covers situations in which a potential risk of absconding may be averted by imposing certain obligations for the duration of the period of voluntary departure. Second, the argument is supported by the interpretation of Recital 6 in the preamble, which establishes the requirement to adopt the decisions under the Return Directive on a case-by-case basis and relying on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. The latter has also been confirmed by the Commission providing suggested criteria to execute the individual case-by-case assessment in compliance with general principles of EU law, in particular the principle of proportionality. Third, the Commission has suggested that the overall assessment of the individual situation should take into account all relevant factors including the age and health conditions of the persons concerned, which may in certain cases lead to a conclusion that there is no risk of absconding even though one or more of the criteria fixed in national law are fulfilled.

Therefore, narrow interpretation of Article 7(4) together with Recital 6, suggests that the mere existence of one or more elements provided by the Commission should not provide for a convenient or a sole excuse to automatically assume a ‘risk of absconding’. Each case has to be assessed individually taking into careful consideration all the factual circumstances and be in compliance with general principles of EU law, in particular the principle of proportionality, to legitimately assume a ‘risk of absconding’. Hence, it can be argued that the mere fact that someone is an irregular immigrant in a Member State cannot presuppose that he or she would abscond, as it would violate the constraints deriving from Recital 6 as

697 A. Baldaccini, (2009), op cit., 348, pp 1-17
698 Article 7(3) states: ‘Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.’
699 K. Hailbronner (2010), op cit., 71, p 1526
700 See the list of individual assessment criteria recommended by the Commission in European Commission, COM(2015) 6250 final, pp 11-12
701 Ibid, p 12
702 D. Acosta (2011), op cit., 417, p 13
well as the principle of proportionality: the view that has also been confirmed by the Court of Justice\textsuperscript{703} and the Commission\textsuperscript{704}.

‘Risk to public policy, public security or national security’

However, it can be argued that the Directive, as it stands, did not provide sufficient amount of legal safeguards from the said provisions being interpreted in a derogatory manner. One of the concerns that the provision can pose is the use of derogatory term ‘public policy, public security or national security’. Concerns were expressed that since no definition was given of the notion of ‘risk to public policy, security or national security’ Member States may use this provision to shorten the period of voluntary departure or refuse to grant one\textsuperscript{705}.

First, it is necessary to state that the use of the reasons of protecting ‘public order’ or ‘public safety’ is one of the most commonly accepted justifications for an expulsion\textsuperscript{706}. Yet, the case-law of the ECtHR, for instance, has recognised a wide margin of discretion with regard to restrictions of fundamental rights in the interest of national security and public order\textsuperscript{707}. This, however, sets the expelling State in a better position giving prevalence to exercising sovereignty and preserving its nationhood rather than protecting individual rights. The expelling State has the right to determine whether the presence of an alien is a continued threat to its public order and safety. The approaches as to how one can be considered a threat varies by continent and state practice. In the EU, the common ground for expulsion can be a violation of immigration regime, such as entering or residing without permission, as well as being engaged in criminal activities or ‘undesirable’ political activities that undermine the public safety.

\textsuperscript{703} ECJ C-61/11 PPU, \textit{El Dridi} [2011], ECR I-03015 and ECJ C-329/11, \textit{Achughbabian} [2011], ECR I-12695

\textsuperscript{704} European Commission, COM(2015) 6250 final, p12


The Return Directive does not define what constitutes a risk to public policy or security leaving that to the matter of national law and subject to discretion of Member States. However, concernedly, Member States are more likely to be in a position where irregular immigrants as a phenomenon alone may pose a threat to public security or public order. Additionally, a third-country national may be asked to return to a country that is no longer a desirable place to live. If a third-country national’s migration has lasted for a long period of time, he or she may no longer have any social or family ties with the country of origin, let alone any other country not of his nationality. Considering all of the above, it would be highly likely that an irregularly staying third-country national would not only be in the risk of absconding but considered as a risk to public policy. The Member States are thus interested in ending the irregular stay as urgently as possible in order to avoid the unwanted immigrant further residing in their territory and to speed up the decision making and execution process.

However, being an exception to the rule the ‘risk of public policy, public security or national security’ has to be interpreted narrowly and in compliance with Recitals 6 and 24 and general principles of EU law. To apply it widely would be contrary to the principle of proportionality and the obligation to carry out a case by case assessment that would undermine the effet utile of Article 7, i.e. promotion of voluntary departure. This approach was also confirmed by the ECJ in the case of Zh and O. However, the ECJ went further providing an interpretation for the public policy exception, ruling that first it should be interpreted strictly and second by analogy with the similar provisions with EU free movement law yet by reference to its wording, purpose and context of the Return Directive. Hence, the Court confirmed that the public policy, public security and national security exceptions are primarily matters of EU law and subject to interpretation in conformity with general principles of EU law and ECJ’s jurisprudence on the meaning of those terms. In

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708 ECJ C-554/13 Zh. and O., judgment of 12 February 2015, not yet published
709 Paragraph 45 of Zh. and O. judgment
710 Paragraphs 50-53 of Zh. and O. judgment
711 Paragraph 57 of Zh. and O. judgment
712 Paragraph 70 of Zh. and O. judgment
713 See for example ECJ C-97/05 Mohamed Gattousi v Stadt Rüsselsheim [2006], judgment of 14 December 2006, ECR I-11917
other words, the Court ensured that irregular presence in itself cannot automatically represent a risk to public policy, public security or national security and must be assessed on case-by-case basis (Recital 6)\textsuperscript{714}.

Albeit, the Directive demonstrated in itself some shortcomings in respect of fundamental rights safeguards, the Court’s case-law provided for more specific standards compelling Member States when applying Article 7. The ECJ with its ruling in Zh and O curbed the option of Member States to refuse voluntary departure and detain a third-country national for a mere suspicion of committing a criminal act, or even a criminal conviction. By applying a strict interpretation of Article 7(4) in conjunction with Recital 6, the Court confirmed that irregular stay in itself does not automatically represent a risk to public policy, public security or national security\textsuperscript{715} and the existence of a suspicion cannot be a justification for the conclusion that there is a ‘risk to public policy’.

2.2.3 Voluntary departure and entry ban

The length of the period for voluntary departure and the grounds for refraining to provide shorter period or to deny it all together have been severely critiqued for the ramifications they entail. As was briefly mentioned before and will be discussed in more detail below, the term ‘risk of absconding’ can also be a grounds for detention. Moreover, refusing to grant a period for voluntary departure is closely linked to issuing an entry ban.

The matters of entry ban were already examined in the previous chapter. For the purpose of this chapter, the discussion will focus on Article 11(1) and (2). Subparagraph 1 imposes an obligation on Member States to issue an entry ban when no period for voluntary departure has been granted and when the obligation to return has not been complied with; subparagraph 2 stipulates the maximum length of entry ban, which in principle should not exceed five years, unless the third-country national represents a serious threat to public policy, public security or national security, in which case a maximum period is not provided for in the

\textsuperscript{714} Paragraphs 63 and 68 of Zh. and O. judgment

\textsuperscript{715} See on this case ECJ C-459/99 MRAX [2002], judgment of 25 July 2002, ECR I-06591
Directive. However, Member States may use their discretionary power to issue an entry ban also in other cases,\textsuperscript{716} including if the third-country national concerned has departed voluntarily\textsuperscript{717}.

Entry bans foreseen in the Return Directive are intended to have preventive effects and to foster the credibility of EU return policy, by sending a clear message that those who disregard migration rules in EU Member States will not be allowed to re-enter any EU Member State for a specified period\textsuperscript{718}. Considering this and Member States natural desire to fight irregular migration, it can be argued that Member States are more interested to enforce the removal of unwanted migrants from their territories as quickly as possible and prevent them from returning. Hence, it can be assumed that Member States are prone to invoke both, Article 7(4) to refrain from granting a period for voluntary departure and subsequently, issue an entry ban preferably exceeding five year time period under Article 11(1) and (2).

Taking into account the above argument and the fact that the Directive does not provide for a specification as to what constitutes ‘a serious threat to public policy, public security or national security’, an ambiguous regulation for refusing to grant a period of voluntary departure and seemingly allowing to issue entry bans for an unlimited period, the Return Directive really raises concerns in respect of ensuring the appropriate level of legal safeguards. It has thus given grounds for concerns that the combined application of Articles 7 and 11 may lead to the systematic imposition of entry bans on persons subject to return procedures\textsuperscript{719}. Furthermore, since no definition is given of the notion of ‘serious threat’, it has been argued that Member States may use this provision to impose a permanent entry ban on returned third-country nationals\textsuperscript{720}.

The aforementioned concerns were not mitigated by the wording in Article 11(2), which obliges the length of an entry ban to be determined with due regard to all

\textsuperscript{716} Article 11(1) (b) second indent, Return Directive

\textsuperscript{717} K. Hailbronner (2010), op cit., 71, p 1533. This was confirmed also by European Commission. See European Commission, COM(2015) 6250 final, p 57

\textsuperscript{718} Ibid, p 54


\textsuperscript{720} Ibid
relevant circumstances of the individual case. Additionally, Recital 14 of the preamble clarifies 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. These wording suggest that a third-country national in irregular situation cannot be automatically imposed a five year entry ban simply for irregular residence without taking into account his or her personal circumstances. Along the same line of reasoning, it can further be argued that the competent national authorities can issue an unlimited entry ban only if they have based their decision on objective criteria after having carried out an individual examination of all relevant circumstances of the concrete case. Further, Recital 13 of the preamble expressly invokes the principles of proportionality, stating that the use of coercive measures should be expressly subject to the principles of proportionality and effectiveness, with due regard to the means used and objectives pursued. An entry ban can surely be considered an element with a coercive effect and hence application of Article 11 is clearly subject to principle of proportionality.

However, given the fact that the entry ban provisions are seen as one of the main indications of the Return Directive criminalising irregular stay and “exacerbating illegality”, it really feeds into the questions regarding its capacity to provide respect of fundamental rights protection. Article 11 contains several discretionary elements that may lead to Member States installing a system in domestic law to issue entry bans in a vast majority of return cases and potentially even all the cases. This is exacerbated by the fact that the Return Directive fails to provide concrete human rights standards to constrain the possibility of implementing the said provisions in a derogatory manner and instead contains only bald references to human rights compliance.

722 K. Hailbronner (2010), op cit., 71, p 1534
723 C. Costello (2016), op cit., 131, p 97
Articles 7 and 11, since they entail broad references to concepts that are not defined in the Directive, means that their interpretation is not yet harmonised and thus currently left to Member States’ domestic laws relying on their obedience to apply the EU law provisions in compliance with general principles and fundamental rights. However, as mentioned in the previous subsection, these concepts, because they have not been defined in the Directive, have a Union law meaning and as have to be interpreted narrowly in conjunction with Recitals 6 and 24 and in this case also Recital 14.

In the light of the aforementioned arguments, the ECJ’s ruling in the case of Zh and O becomes even more significant. Interpreting Article 7(4) in a very strict manner with a strong reference to obligations deriving from Recital 6, the Court used the EU law as a constraint on the discretionary powers of the Member State. Furthermore, the Court’s jurisprudence is the first legally binding codification of a concrete human rights standard, which places the general principles of EU law and fundamental rights on the foreground and reduces the possibility for applying the provisions in a derogatory manner.

However, it is still questionable as to how issuing an entry ban along with a return decision promotes voluntary return, as there is little incentive for leaving voluntarily if the sanction to be faced turns out the same. Likewise, Member States still retain wide discretionary powers to issue an entry ban with a vast majority of return cases, which evidently contributes towards the uncertainty of the rights of migrants and undermines the minimum safeguards during the return procedure.

3. Procedural safeguards and the principle of non-refoulement

One of the aims of the Return Directive was not only to ensure the successful removal of irregularly staying third-country nationals from the territory of the EU but to execute that in compliance with fundamental rights. This means that return procedures must be carried out respecting the principle of non-refoulement,

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725 A. Baldaccini (2009), op cit., no 348, pp 1-17
which is an inherent part of asylum and immigration law and common return policy. Concurrently, the Return Directive, as the main legislative return instrument, makes references to the said principle, albeit in very broad terms. As a result, the Directive has received most of its criticism for falling short ensuring the sufficient fundamental rights safeguards, in particular the protection of the prohibition of return.

3.1. References to non-refoulement in the Return Directive

The central element of the Return Directive is the obligation laid upon Member States to issue a return decision to any third-country national staying illegally on their territory\(^{727}\). Yet, several provisions state restrictions to that obligation. First, Article 5 of the Directive compels Member States, when implementing the Directive, to take due consideration of the best interests of the child, family life, the state of health of the third-country national concerned and the principle of non-refoulement. Second, Article 4(4) with regard to a third-country national excluded from the scope of the Directive, require that the principle of non-refoulement must always be respected and their treatment and level of protection is not less favourable than is set out in several provisions of the Directive. Third, Article 9(1) obliges the Member States to postpone the removal of a third-country national if the removal would violate the principle of non-refoulement. Fourth, Article 1 and Recitals 22, 23 and 24 of the preamble make a general reference to fundamental rights framework in which the issuing and executing of return procedure must take place, in particular by recalling obligations and principles under Refugee Conventions, the UN Convention on the rights of the child, ECHR and the Charter.

From a brief onset, it seems that the Return Directive entails necessary provisions capable of having protective effect from refoulement and ensuring human rights safeguards. However, it is important to note that the Directive does not provide any explanation or definition of the principle of non-refoulement or family life, nor does it specify how and to what extent these principles should be followed by the Member States implementing the Directive. Hence, it can be argued that just like

\(^{727}\) Article 6(1) Return Directive
Article 1, these provisions do not have any direct regulatory element and primarily serve as a means of interpretation for the implementation of the Directive by Member States. In a way, the references to human rights principle listed in Article 5 serve as reminders to a correct application of the Directive. However, this does not mean that the said provision only serves as ‘window-dressing’ but, if interpreted and applied in accordance with fundamental rights, can provide protection for a third-country national subject to the return decision.

Arguably, the principle, albeit not defined in the Directive, should not be subject to domestic interpretation but rather should have an EU law meaning in accordance with international law and human rights obligations. This argument is supported by the fact that the Directive makes specific references in its preamble to obligations under the UN Refugee Convention, the ECHR and the Charter. Thus, it can be derived that the principle of non-refoulement has to be ensured and executed in the application of the Directive provisions.

3.2. The scope of the principle of non-refoulement

In broad terms it is generally agreed that the prohibition of refoulement prohibits the forced or indirect removal of an individual to a country or territory where he runs a risk of being subject to serious human rights violations. The first and initial source of legislation to provide for interpretation of the Return Directive, is the Refugee Convention that prohibits the expulsion or return of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of persecution. Additionally, the principle is considered a rule of customary international law. As such, it is binding on all States, regardless

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728 K. Hailbronner (2010), op cit., 71, p 1531
729 S. Peers (2011), op cit., 44, p 566
731 Article 33 of the Convention Relating to the Status of Refugees provides as follows:
   “1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
   2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”
of whether they have acceded to the Refugee Convention or 1967 Protocol. A refugee seeking protection must not be prevented from entering a country as this would amount to *refoulement*. However, the protection does not expand to refugees who are reasonably regarded as a danger to the security of the country, or having been convicted of a particularly serious crime, are considered a danger to the community.\footnote{UNHCR} However, the principle of *non-refoulement* has attained a broader application as a significant limitation on the return of individuals to countries in which they may face torture, inhumane or degrading treatment, or where their readmission is uncertain and their security precarious.\footnote{See for example B. Gorligk, ‘The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees’, *International Journal of Refugee Law*, Vol 11, 1999, pp 479–495; K. Hailbronner, ‘Non-Refoulement and ‘Humanitarian’ Refugees: Customary International Law or Wishful Legal Thinking?’, *Virginia Journal of International Law*, Vol 26, 1985–1986, pp 857–896; and D. Perluss and J. F. Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’, *Virginia Journal of International Law*, Vol 26, 1985-1986, pp 551-626} A State expelling an alien into a country where such a violation is likely to take place would commit a breach of international law.\footnote{R. Arnold (1992), ‘Aliens’, in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, Vol 1, p 104} Expulsion and deportation violate human rights guarantees if they are undertaken by the expelling State with full knowledge of the fact that the expellee runs a very serious risk of being tortured in the country to whose territory he or she is sent to.\footnote{This concept has been recognized by the European Commission of Human Rights in the Amekrane case as part of the prohibition of torture and inhuman treatment as early as 1973. See *Amekrane v. United Kingdom*, Yearbook of the European Convention on Human Rights, 1973, p 357. Since then, it has become the basis for a rich case law by the European Court of Human Rights that recognizes a right to protection against inhuman return as part of Article 3 ECHR.} On the universal level the principle has been codified as a specific human rights guarantee in Article 3(1) of the 1984 Convention against Torture barring the return of a person ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ Another provision prohibiting indirect *refoulement* is to be found in Article 7 of the ICCPR, establishing once again the prohibition of availing a person via *refoulement* to torture and degrading or inhuman treatment.

However, since the Return Directive is an EU law measure, the *non-refoulement* references in its provisions should be interpreted foremost within the meaning of EU law. The principle of *non-refoulement* is codified in both, the Charter and the ECHR. Article 19(2) of the Charter confirms the State party’s obligations under the ECHR not to return a or extradite a person to a State where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment. Article 19(2) thus codifies not only the Articles 2 and 3 of ECHR but the rich jurisprudence of the ECtHR on the prohibition of return. Therefore, to analyse whether the Return Directive can provide sufficient safeguards against *refoulement*, its provisions need to be foremost examined in the light of the ECtHR case law. Additionally, on one hand the jurisprudence of the Court of Justice is limited in the application of Article 19(2) of the Charter and on the other hand, the Court of Justice and the Member States still give prevalence to the Convention rather than the Charter.

The European Court of Human Rights has interpreted the prohibition to return not only to apply in implementation of Article 3 ECHR (prohibition of torture, degrading or inhuman treatment or punishment) but also of Article 2 ECHR (prohibition of death penalty). The prohibition on return of a person to country where he or she would be subject to the death penalty arises also from Protocols 6 and 13 to the

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736 Article 19(2), EU Charter of Fundamental Rights
737 The ECJ successfully applied the Article 19(2) of the Charter in the case of *Abdida* providing the interpretation of Article 19(2) and the principle of *non-refoulement* in the application of the Return Directive. See the discussion in the previous chapter and in the following section on the case of C-562/13 *Moussa Abdida*, judgment of 18 December 2014, not yet published.
ECHR that resulted in the absolute prohibition of death penalty without any exception even under Article 15 ECHR (time of armed conflict etc).\(^\text{739}\)

According to well established case law of the European Court of Human Rights, the prohibition of return does not require a link to a persecution ground and protects more than life and freedom. Moreover, Article 3 has been held to enshrine one of the fundamental values of democratic society\(^\text{740}\) making the prohibition of return absolute if it would violate Article 3. Accordingly, the Court has further expanded the scope of Article 3 to hold that the activities of the individual in question, even if undesirable or dangerous, cannot be a material consideration\(^\text{741}\), meaning that irrespective of the applicant’s conduct or undesirability to the expelling society, Article 3 ECHR prohibits “action (taken) by a Contracting state which has as a direct consequence the exposure of an individual to ill-treatment”\(^\text{742}\).

The ECtHR has further expanded the interpretation of the principle of non-refoulement beyond the Articles 2 and 3. Namely, it has accepted, albeit in limited terms, a possibility of prohibition of return under Article 4 (prohibition of slavery and forced labour)\(^\text{743}\), Article 5 (right to liberty and security)\(^\text{744}\), Article 6 (the right to a fair trial)\(^\text{745}\), Article 7 (prohibition of punishment without law)\(^\text{746}\), Article 8 (right to family and private life)\(^\text{747}\) and Article 9 (freedom of thought, conscience and


\(^\text{740}\) ECtHR Soering v. the United Kingdom, judgment of 7 July 1989, Series A No 161, para 113


\(^\text{742}\) H. Battjes (2006), European Asylum Law and International Law, op cit., no 64, pp 115-116

\(^\text{743}\) ECtHR Ould Barar v. Sweden, judgment of 19 January 1999, 28 EHR 213 demonstrated that the ECtHR is open to claims under Article 4 ECHR, but in this case found no risk of treatment contrary to Article 4 on return.

\(^\text{744}\) ECtHR Tomic v UK, judgment of 14 October 2003

\(^\text{745}\) ECtHR Soering v. the United Kingdom, judgment of 7 July 1989, Series A No 161; Drozd and Janousek v France and Spain, judgment of 16 June 1992, 14 EHR 743; Einhorn v France, judgment of 16 October 2001; Mamakulov v Turkey, judgment of 4 February 2005, 41 EHR 25; Al-Moayad v Germany, judgment of 20 February 2007, 44 EHR SE22; Stapleton v Ireland, judgment of 4 May 2010, 51 EHR SE1; Othman (Abu Qatada) v. UK, judgment of 17 January 2012

\(^\text{746}\) ECtHR Gabarri Moreno v Spain, judgment of 22 July 2003, 39 EHR 40

\(^\text{747}\) ECtHR F v UK, judgment of 22 June 2004, ECHR 723; Rodrigues Da Silva and Hoogkamer v The Netherlands, judgment of 31 January 2006; Butt v Norway, judgment of 4 December 2012
Yet, the expelling State is precluded from returning an individual to a country only when there is a risk of suffering a “flagrant denial” of the rights contained in the respective articles, hence the threshold is set slightly higher than the one under Article 3. With that, the ECtHR’s jurisprudence has established a hierarchy of norms. While Article 3 is seen as a ‘fundamental value’, Article 6 is held to enjoy a ‘prominent place in a democratic society’. Hence, Article 3 remains central regarding the assessment of prohibition of removal cases in so far as the ECtHR often treats severe infringements of other Convention rights as ‘inhuman treatment’ contrary to Article 3 ECHR. The scope has been expanded over the years and now includes cases from death penalty and torture to severe illness with no prospect of medical care or family support, albeit the latter requires a higher threshold of ‘exceptionality’. Furthermore, the ECtHR has held that removal to a third State, whether another EU Member State or one outside the EU, is not permissible if there is a real risk that the person concerned would be subject to prohibited treatment there or sent onwards to another country where such a risk arises. The prohibited treatment in this case can also include inhuman living conditions which constitute inhuman treatment contrary to Article 3 ECHR. It is important to note that as a result of the ECtHR jurisprudence, which was later

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748 ECtHR Z and T v UK, judgment of 28 February 2006
750 C. Costello (2016), op cit., 131, p 181
752 See ECtHR MSS v. Belgium and Greece, judgment of 21 January 2011, 53 EHRR 2
echoed also in the case law of ECJ\textsuperscript{753}, EU Member States cannot rely on a secondary EU legislation to circumvent their Article 3 obligations and are subject to careful scrutiny as the good faith of Member States cannot be assumed in this field\textsuperscript{754}.

3.3. Application of the principle of non-refoulment in the Return Directive

3.3.1 Non-refoulment as a general principle in the Return Directive

One of the main concerns regarding the prohibition of return was that the existing references in the Return Directive are not sufficient to ensure the protection from refoulement to asylum seekers and the third-country nationals not covered within the scope of the Return Directive\textsuperscript{755}. It was argued that the risk of refoulement could arise for third-country nationals who may have international protection needs, as they could be subject to an entry ban or might be apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and thus be excluded from the scope of application of the Directive\textsuperscript{756}. The Directive provided an additional ambiguity with a broad wording applying to ‘illegally staying third-country nationals’ but not specifying how it relates to the persons whose asylum application had been rejected or asylum seekers in general. On one hand, it allowed to conclude that a third-country national who has applied for asylum in a Member State, should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force\textsuperscript{757}, but on the other hand, posed serious concerns due

\textsuperscript{753} ECJ joined cases C-411/10 N. S. v SSHD and C-493/10 M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, judgment of 21 December 2011, 1-13905

\textsuperscript{754} For more extensive discussion see V. Moreno-Lax (2012), ‘Dismantling the Dublin System: MSS v. Belgium and Greece’ in European Journal of Migration and Law, Vol 14, Issue 1, pp 1-31


\textsuperscript{757} Recital 9 of the preamble, Return Directive
to the lack of specific guidelines regarding implementation of the said provision. However, Article 4(4) nonetheless requires that the principle of non-refoulement must always be respected and their treatment and level of protection is not less favourable than is set out in several provisions of the Directive. Remarkably, a similar minimum protection with regard to the other irregularly staying third-country nationals was not included in the Directive\textsuperscript{758}, except for the broad reference in Article 5 requiring the Member States to apply the Return Directive in conformity with the principle of non-refoulement. Although this does not excuse the Member States from respecting their obligations under the human rights instruments or Refugee Convention, the lack of detailed requirements makes it that much more difficult to guarantee the minimum protection of rights in the course of the implementation of the Return Directive.

As a result, the first case regarding the application of Return Directive that was referred to the Court of Justice concerned in particular the expulsion of the third-country national whose asylum application had been rejected. That already was an indication of the Directive’s shortcomings to ensure sufficiently clear and precise guidelines regarding the application of the Directive and to a certain extent, the principle of non-refoulement. The Court provided a clarification in terms of the scope of the Return Directive and held that the Directive does not apply to a third-country national that has applied for international protection during the making of the application, until the result of that application\textsuperscript{759}. Therefore, the Court established that as long as a third-country national has a pending asylum application processed by the authorities of a Member State, that third-country national is excluded from the scope of the Return Directive and should not be considered an ‘illegally staying third-country national’ within the meaning of Return Directive, meaning that he or she is protected from refoulement.

Hence, it can be argued that it was the jurisprudence of the Court of Justice that provided for clarification and protection of irregularly staying third-country nationals that have applied for asylum during the return procedures. By referring to

\textsuperscript{758} P. Boeles et al (2009), \textit{European Migration Law}, Intersentia, Antwerp, Oxford, p 413

\textsuperscript{759} Paragraph 23 of Kadzoev judgment and paragraph 49 of Arslan judgment
recital 2 in the Preamble of the Directive, the CJEU confirmed not just the existence of the fundamental rights of irregular immigrants but also their position as one of the objectives of the Directive that must be followed during its implementation. The Court said explicitly that it is the duty of a Member State to guarantee that the return and removal of irregularly staying third-country nationals would take place in a humane manner safeguarding the fundamental rights of the persons concerned. This statement can have some far reaching effects, as it finally establishes that the Directive, although not a human rights instrument, should still respect and follow the rights of irregular immigrants, including the principle of *non-refoulement*. Albeit, the Court did not refer to the application of the Charter in this question, as it was still an indication of the Court’s willingness to interpret and apply the Return Directive in the light of fundamental rights as general principles of EU law. This, in an eventual expanded reading by the Court of the prohibition of *refoulement*, will also have to be taken into consideration when applying the Return Directive in the future.

Another important aspect of the principle of *non-refoulement* in the Return Directive, concerns the procedural safeguards and the postponement of removal. Article 9 lists a number of situations in which removal must or may be postponed. Member States are obliged to postpone the removal if it would violate the principle of *non-refoulement* or for as long as suspensory effect is granted during the examination of an appeal against a removal decision in accordance with Article 13(2). However, as already stated, the Directive does not provide for any detailed explanation as to how exactly the Member States are obliged to guarantee the prohibition of *refoulement*, nor does it clarify which circumstances preclude Member State from returning an irregularly staying third-country national. Furthermore, paragraph 2 of Article 9 explicitly allows Member States (another ‘may’ clause) to also postpone removal in other cases depending on the specific circumstances of the individual case, taking into consideration physical or mental capacity of the individual concerned and technical reasons that may hinder or fail

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760 Article 9(1) Return Directive
the successful removal. Thus, regarding the postponement of return, Member States entail rather broad discretionary powers.

Since the postponement of removal is an exception to the main purpose of the Directive, i.e. successful expulsion of an irregularly staying third-country national, it has to be interpreted narrowly in the meaning of EU law. This implies that Member States are compelled to apply the principle of *non-refoulement* as established and developed in international law and foremost in the Charter, ECHR and the extensive jurisprudence of ECtHR. As was examined in the previous section, the ECtHR has defined the prohibition of *refoulement* in wider terms than originally depicted in the Refugee Convention Article 33. Hence, it can be argued, that Member States are obliged to examine each return decision on case-by-case basis taking into consideration all of the individual circumstances. The burden of proof relies on the expelling Member State to determine that upon return the third-country national concerned would not be subjected to any ill-treatment prohibited under Articles 2 or 3 ECHR. Whereas it is clear, in the light of the consistent and extensive jurisprudence of the ECtHR in respect of Article 3, that any form of treatment that might constitute torture, inhuman or degrading treatment or punishment would result in postponement of removal under Article 9(1) (a) of Return Directive, the interpretation of other individual circumstances provides lesser certainty.

As was observed above, despite the ECtHR has demonstrated the willingness to consider the prohibition of *refoulement* under other Convention articles, it has installed a higher threshold for their application in the cases of return and moreover, established their nexus to application of Article 3. This means, that the Court recognises the prohibition of return under other Convention articles only in so far as they are ancillary to Article 3 and the violation of the said articles would constitute an ‘inhuman treatment’ within the meaning of Article 3. Therefore, the extent of protection under Article 8 ECHR, which safeguards the right to private and family life, against *refoulement* under the Return Directive remains questionable. This is also exacerbated by the fact that the Strasbourg Court has not brought about a general degree of protection in that aspect regarding the return of irregular migrants. Indeed, the ECtHR has only found in two cases that the deportation of
irregular residents would violate Article 8 ECHR, and both these cases involved either minor children of an irregularly resident mother or two siblings whose irregular entry and stay was primarily a decision of their parents. In short, the Court has confirmed that the removal of the applicants would be incompatible with Article 8 ECHR only in exceptional circumstances. The same threshold of ‘exceptionality’ applies also in cases of return of irregularly staying immigrants under other Convention articles as well.

3.3.2 Impact of the Charter

Therefore, it is not clear as to how far the protection from non-refoulement actually stretches under the Return Directive. On one hand, the ECtHR has established a generous scope of Article 3 and non-refoulement but on the other hand, it has installed the ‘flagrant breaches’ principle and the test of ‘exceptionality’ under other Convention provisions. In this respect it was interesting to see the Court of Justice judgment in the case of Abdida that not only clarified the scope and interpretation of Article 5 of the Return Directive, but it did so applying Article 19(2) of the Charter precluding domestic legislation, which does not provide for a remedy with suspensive effect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health. Such a decision to remove a third-country national concerned may raise an issue under Article 3 ECHR, albeit in very exceptional cases where the humanitarian grounds against removal are compelling and respectively such a decision would be in breach of Article 5 of Return Directive taken in conjunction with Article 19(2) of the Charter.

It was clearly an interesting judgment in a positive sense, in particular it provided for a remarkable opportunity to see how far the Court can actually stretch the

762 ECtHR Antwi v Norway, judgment of 14 February 2012
763 Paragraph 53 of Abdida judgment
764 See ECtHR 27 May 2008, N. v. the United Kingdom [GC], Application No. 26565/05
765 Paragraph 47 of Abdida judgment
766 Paragraphs 48 and 49 of Abdida judgment
Return Directive from its original notion. It appeared that interpreting the Directive not only in conjunction with the Charter but respectively also the ECHR and the case law of the Strasbourg Court, the Return Directive provided for an effective protection from *refoulement* in conformity with Article 3 ECHR and essentially set a precedent to a situation in which the return of irregularly staying third-country nationals can be prevented all together.

However, it can be argued that with the Abdida judgment, the Court of Justice established a new form of protection, that Peers called ‘alternative protection’

767 the consequences of the ruling are not that clear or predictable regarding the principle of *non-refoulement* in the EU migration legislation.

768 Namely, the ECJ ruling in asylum matters on the Qualification Directive regarding the *principle of non-refoulement* in ‘medical cases’ did not apply the same reasoning and consequently reached a different conclusion.

769 The Court did not apply Article 19(2) of the Charter and held that if a third-country national could not be returned to his or her countries of origin for extreme health reasons such as to warrant protection under Article 3 ECHR, do not warrant formal subsidiary protection status under the Qualification Directive.

770 It has thus duly been commented that the Return Directive ended up providing more protection than the Qualification Directive in a ‘health case’, which is somewhat ironic as the purpose of the latter, unlike the Return Directive, is to provide protection to the ones in need (emphasis added). However, analysing the outcomes of the judgments more closely, it appears that in M’Bodj the Court was actually willing to recognise


769 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12. The EU has adopted a more recent recast Qualification Directive but since the relevant provisions for this case remained the same in the recast version the Court applied the Qualification Directive of 2004.

770 ECJ C-542/13 Mohamed M’Bodj, judgment of 18 December 2014, not yet published

771 Paragraphs 44-46 of *M’Bodj* judgment

health concerns as a potential ground for prohibiting return but simply refused that
the non-refoulement should further provide a status, i.e. the right to subsidiary
protection under Qualification Directive. Concurrently, in Abdida the Court
concluded as well that medical grounds can provide for sufficient grounds to
prohibit return, however, in the case of Abdida, the Court interpreted these
grounds appropriate to postpone the return (emphasis added) and did not indicate
that postponement of the return should further provide for permanent subsidiary
or any other form of protection. That matter was still left for the discretion of the
Member State to decide. In short, the most interesting point comparing the two
judgments is the consequence of the application of the non-refoulement principle. It
can be argued that the Court in Abdida, established a new form of ‘alternative
protection’ noting that the state of health has to be given due regard in expulsion
decisions, but it remains to be seen as to how far this form of protection actually
reaches and what will be the exact consequences of the non-return for an irregular
third-country national, as of now it is only clear that it brings along the suspensive
effect of a return decision and a preliminary guarantee of some elementary social
rights.

Albeit, the M’Bodj case concerns asylum seekers and it serves as an excellent
element to demonstrate the significant role of the Charter in the ECJ’s
jurisprudence. More specifically, it indicates clearly how the application of the
Charter provisions in immigration cases can produce different results and
especially ensure necessary fundamental rights safeguards in compliance with
general principles of EU law. However, the different results in the two
aforementioned cases are also an indication of the inconsistencies of the Court’s
jurisprudence and demonstrate the precariousness of fundamental rights
protection in the hands of the Court of Justice. If the secondary EU legislation itself
contains broad references to fundamental rights leaving its application to the
discretion of Member State relying on their adherence to their obligations arising
from international human rights treaties, it may not be sufficient to ensure human
rights protection to appropriate standards in the light of the ECHR and the ECtHR’s
jurisprudence.
4. Detention for the purpose of removal

Immigration detention is a form of a loss of liberty, the right to which is held as a core fundamental right and is concurrently enshrined in all the main international and regional human rights treaties. Immigration detention in general, refers to administratively authorised or judicially sanctioned detention of migrants either upon seeking entry to a territory or pending expulsion, removal or return from a territory. It is to be distinguished from criminal- and security-based forms of detention, which refer respectively to detention or other restrictions of liberty of non-nationals on the grounds of having committed a criminal offence or for national security or terrorism related reasons. It goes without saying that deprivation of liberty, even for the purpose of removal, should require the strongest possible justifications and be subject to strict scrutiny and legal safeguards, in particular the test of proportionality, in order to determine whether state actions which derogate from or limit the application of specific human rights are justifiable from a rights perspective.

Consequently, detention was one of the most controversial provisions in the Return Directive and not only subject to lengthy debates during the negotiation of the Directive, in both political and technical terms, but also the cause for a severe criticism after the adoption of the Return Directive. This, together with Article 7 that regulates voluntary departure, has been the Achilles heel of the entire Directive. Several human rights organisations were troubled by the stipulated maximum length of detention period that was believed to be excessive and allegedly would result in inhumane treatment of irregularly staying third-country nationals, contrary to fundamental rights standards established in the ECHR and the subsequent jurisprudence of the Court of Human Rights. Many organisations opposed Article

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773 See, for example, Articles 9 and 10 of the ICCPR, Article 37(d) of the CRC, Article 5 of the ECHR, Articles 6 and 7 of the ACHPR, Article 7 of the ACHR. See also EXCOM Conclusion no. 44 (XXXVII), the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988) and the UN Standard Minimum Rules for the Treatment of Prisoners (1955)


15 of the detention of migrants for a maximum of 18 months pending their removal, arguing that this is an excessive period to enforce a removal order\textsuperscript{776}. Moreover, the concerns expressed by the NGOs were fuelled by the fact that detention provisions have been subject to the biggest amount of preliminary references sent to the Court of Justice for interpretation. The vast number of references can be seen as an indication of the controversy of the detention provision or the very least, it demonstrates the ambiguous and unclear nature of the said provisions, which is disconcerting considering the impact their implementation has on the situation and the rights of irregular migrants. However, with the help of the Court of Justice the Directive has provided general fundamental rights safeguards opposite to the initial fears of the critics.

4.1. Main principles of detention: ‘lawful’, ‘non-arbitrary’ and ‘habeas corpus’

4.1.1 ‘Detention must be ‘lawful’ and ‘non-arbitrary’

For the purpose of the Return Directive, the respective legal framework is Article 6 of the Charter\textsuperscript{777}, which corresponds to Article 5 ECHR\textsuperscript{778}, which according to Article 52(3) of the Charter means that Article 6 must be read in consistency with Article 5 ECHR and the jurisprudence of ECtHR on Article 5 ECHR. Furthermore, the Twenty Guidelines on Forced Return issued by the Council of Europe should also be kept in mind in application of detention provisions under the Return Directive. As the ECJ

\begin{footnotesize}
\textsuperscript{776} “Against the outrageous Directive!”; full text of speech given by Yasha Maccanico (Statewatch) at the hearing with NGOs organised by the GUE group, European Parliament, Strasbourg on 12 December 2007

\textsuperscript{777} Article 6 of Charter states: ‘Everyone has the right to liberty and security of person.’

\textsuperscript{778} Article 5(1) ECHR states: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’
\end{footnotesize}
has not yet provided any interpretation of Article 5 ECHR, either as part of the
general principles of EU law, nor through the Charter, the extensive Article 5 ECHR
case law of the Strasbourg Court will remain the principal source of guidance on the
meaning of Article 6 of the Charter and consequently Article 15 of the Return
Directive.

The main requirement of Article 5 ECHR is that detention must be both, lawful and
non-arbitrary. This means that detention must be in accordance with a procedure
prescribed by law in compliance with both national and European Union law and
the rules governing detention must enable the detainee to understand the
basis for detention, the conditions upon its prolongation and provide predictable
guidelines as to its exercise. In principle, however, ‘lawfulness’ criteria entails
that detention is only legal in so far as it is executed under one of the derogations
listed exhaustively in Article 5(1) ECHR.

Regarding the principle of ‘non-arbitrary’, the Human Rights Committee has stated
that arbitrary actions can either be those which contravene existing laws, or
those which are prima facie legal, but are in fact inappropriate, unjust,
unpredictable and consequently arbitrary. Furthermore, it has been held that
detention must not only be lawful but it must also not have been imposed on
grounds of administrative expediency, and must further satisfy the requirements of
necessity and proportionality. Essentially, the principles of reasonableness,
necessity and proportionality require that States consider whether there are other

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779 ECtHR Bazorkina v Russia, judgment of 27 July 2006, 46 EHRR 261
780 ECtHR Benham v UK, judgment of 10 June 1996, EHRR 293 and Riad & Idias v Belgium, judgment of 31 January 2012
781 ECtHR MSS v. Belgium and Greece, judgment of 21 January 2011, 53 EHRR 2 where the ECtHR held that at least in relation to Article 3 ECHR a breach of a Directive can contribute to create a liability. Also see Mendizabal v France, judgment of 17 January 2006 where the Article 8 ECHR involved also EU right of residence of a Spanish national.
782 ECtHR Baranowski v Poland, judgment of 28 March 2000; Amaur v France, judgment of 25 June 1996, 22 EHRR 533
less intrusive ways to achieve their objectives without interfering with the right to liberty and security of person; and decisions to detain should be adopted only on case-by-case basis taking into account individual circumstances and be subject to judicial review.

The European jurisprudence of immigration detention demonstrates some differences regarding the requirements set by the Human Rights Committee. Article 5 (1) (f) ECHR allows detention of a person to prevent an unauthorised entry into the country, or of a person for the purpose of deportation or extradition. Albeit, deprivation of liberty being subject to a rigorous test of proportionality, the Strasbourg Court has discarded the ‘necessity’ requirement in immigration cases, holding that detention need not be necessary and proportionate, such as to prevent a risk of absconding, to secure the deportation or extradition of a detainee. The only requirement is that the individual would face deportation and as long as deportation proceedings are in progress and prosecuted with ‘due diligence’.

However, the Strasbourg Court is insistent that States demonstrate that deportation must be a realistic prospect. Provided that these criteria are fulfilled, detention can be prolonged for long periods of time. The reasons for discarding the proportionality test in immigration detention cases is that sovereign States have the right to control their borders and that aliens without permission to remain do not have the same general right to liberty as citizens. Instead, the Court has applied

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788 The ‘necessity’ requirement was discarded by the ECtHR in the case of Saadi v Italy holding that a full test of necessity and proportionality of the decision to detain asylum seekers is not required under the first limb of Article 5(1) (f). See ECtHR Saadi v. Italy, judgment of 28 February 2008. The decision and its implications have been critiqued. See for example V. Moreno-Lax (2011), ‘Beyond Saadi v UK: Why the “Unnecessary” Detention of Asylum Seekers is Inadmissible under EU law’ in Human Rights and International Legal Discourse, Volume 2, pp 166-206 and G. Cornelisse (2011), ‘A new articulation of human rights, or why the European Court of Human Rights should think beyond Westphalian sovereignty’ in M-B. Dembour and T. Kelly (eds), Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Routledge, pp 99-119
789 ECtHR Chahal v. UK, judgment of 15 November 1996, 23 EHRR 413, para 112
790 ECtHR Chahal v. UK, judgment of 15 November 1996, 23 EHRR 413, para 113
791 See for example ECtHR A and others v UK, Grand Chamber judgment of 19 February 2009, 49 EHRR 29; Mikolenko v Estonia, judgment of 8 October 1999
792 ECtHR Chahal v. UK, judgment of 15 November 1996, 23 EHRR 413

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the test of arbitrariness to Article 5 (1) (f). Immigration cases are also held to be complex requiring fact-specific examination of each case by the authorities to process the proceedings with ‘due diligence’. Thus, the extensively prolonged periods of immigration detention are justified under the effectiveness principle of Article 5. However, as soon as there exists no likelihood of removal within a foreseeable period, the detention becomes unjustified and thus unlawful.

4.1.2 Judicial review and the right to be heard

Article 5(2) ECHR stipulates everyone’s right to be told promptly in simple, non-technical language the reasons of his or her arrest. The obligation is imposed so that a person may then seek to challenge their detention under Article 5(4). Consequently, despite the paragraph 2 of Article 5 ECHR referring to the ‘reasons of arrest’ it can be applied also to immigration detention cases as, by principle, everyone whose liberty has been restricted has the basic right of habeas corpus to have a court review those elements that are essential to the detention being ‘lawful’. The right is also enshrined in Articles 6 and 13 ECHR and concurrently Article 47 of the Charter that establishes the right to an effective remedy and to a fair trial. Despite being stipulated in both, the Convention and the Charter, the protection in Union law is more extensive, as it guarantees the right to an effective remedy before a court and as such is confirmed a general principle of EU law.

Furthermore, with regard to Article 47(3) of the Charter containing the obligation to provide legal aid to those lacking sufficient resources to ensure effective access to justice, it should be read in accordance with the case-law of the European Court of Human Rights.

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794 See for example ECtHR Chahal v. UK, judgment of 15 November 1996, 23 EHRR 413; Kolompar v Belgium, judgment of 24 September 1992, 16 EHRR 197
795 ECtHR Mikolenko v Estonia, judgment of 8 October 1999
796 D. Wilsher (2014), op cit., 793, p 148
798 ECtHR Airey v Turkey, judgment of 9 October 1979, Series A, Volume 32
4.2. Detention provisions in the Return Directive: is arbitrariness prevented?

4.2.1 Pre-removal detention

Detention provisions are codified in Articles 15 and 16 in the Return Directive. According to these provisions detention may only be applied in order to prepare return and/or carry out the removal process, if no other sufficient but less coercive measures can be applied in the concrete case, in particular, when there is a risk of absconding, or when the third-country national concerned hampers or avoids the preparation of return or the removal process. Any detention shall be maintained for as long a short a period as possible, and only maintained as long as removal arrangements are in progress and executed with due diligence. Moreover, detention shall be maintained for as long a period as these conditions are fulfilled and the reasonable prospect of removal still exists. If these or other conditions are no longer fulfilled, detention ceases to be justified and the person concerned must be released immediately. Member States must set a maximum period of detention, which may not exceed 6 months. In cases where, regardless all reasonable efforts, the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned, or delays in obtaining the necessary documentation from third countries, detention may be extended to a further 12 months in accordance with national laws. Furthermore, according to Article 16(1) of the Return Directive, detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners. Other provisions regarding the conditions and legal safeguards in detention of irregular third-country nationals can be found in Articles 16(2)-(5), Articles 17 and 18 of the Directive. For the purpose of this study, the discussion on compatibility of detention provisions with human rights standards will
focus mainly on the provisions enshrined in Article 15 and 16(1) of the Return Directive.

In terms of the interpretation and application guidelines, the preamble of the Return Directive makes references to general principles of EU law, in particular to the principle of proportionality. Recital 16 of the preamble requires Member States to use detention solely for the purpose of removal should and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient. Additionally, Recital 13 reminds to use any coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Recital 17 stipulates that third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

4.2.2 Prevention of arbitrariness

Immigration detention, in order to be considered lawful and non-arbitrary\textsuperscript{804}\ must satisfy the following criteria: it needs to be executed for the purpose of removal; conform to the procedural and substantive requirements laid down by national and EU law\textsuperscript{805}; the place and conditions of detention must be appropriate to the ground

\textsuperscript{804} The UN Human Rights Committee (HRC) has issued several comments that clarify the prohibition against arbitrary detention or deprivation of liberty. For example see HRC, A. v. Australia, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997. For a detailed discussion on the principles of lawful and non-arbitrary detention see for example B. Lyon (2014), ‘Detention of migrants: Harsher policies, increasing international law protection’ in V. Chetail and C. Baulo (eds), Research Handbook on International Law and Migration, Edward Elgar, UK USA, pp 181-184 and G.Cornelisse (2010), Immigration Detention and Human Rights: Rethinking Territorial Sovereignty, Leiden, Martinus Nijhoff Publishers, p 252-256

\textsuperscript{805} Note that the ECtHR identified situations in which immigration detention is justified, creating a more permissive framework than the ICCPR requirements. Given this difference, the European authorities are bound to apply the ICCPR instead. See B. Lyon (2014), ‘Detention of migrants: Harsher policies, increasing international law protection’ in V. Chetail and C. Baulo (eds), Research Handbook on International Law and Migration, Edward Elgar, UK USA, p 183
of detention; be executed with ‘due diligence’ and there must be a reasonable prospect of removal; lawfulness of detention must be subject to judicial review\textsuperscript{806}.

From the initial outset, it can be argued that the Return Directive sets higher standards than the ones established in the jurisprudence of the ECtHR. In particular, interpreting Article 15 literally in conjunction with Recitals 13 and 16 of the preamble, it can be argued that the main constraint applying detention provisions under Return Directive is thus the principle of proportionality as Article 15(1) sets out, that the detention of irregular third-country nationals is only lawful if three conditions, i.e. the purpose of removal, impossibility to apply other sufficient but less coercive measures first and pertaining reasonable prospect of removal, are met. Moreover, it follows from the wording, ‘Member States may only keep in detention’, (emphasis added) that the list of conditions provided in Article 15(1) is exhaustive and thus Member States are not allowed to include other reasons to detain irregularly staying third-country national, such as public security or public order\textsuperscript{807}. Security considerations and the (legitimate) objective to protect society should be addressed by other pieces of legislation\textsuperscript{808}.

However, the wording at the end of the first indent of Article 15(1), ‘in particular when’ with the reference to risk of absconding and lack of cooperation on behalf of the third-country national concerned, seems to apply that Member States are free to detain irregularly staying third-country nationals for other reasons than those listed in the Return Directive as long as detention is carried out for the purpose of removal and there is a reasonable prospect of removal. The wording, as seen above was thus contradicting in terms and further exacerbated by the fact that the Directive did not define ‘lack of cooperation on behalf of the third-country national

\textsuperscript{807} K. Hailbronner (2010), op cit., 71, p 1542; D. Acosta (2011), op cit., 417, p 15; Later this was confirmed by the ECJ in the case of C-357/09 PPU Kadoev, judgment of 30 November 2009, ECR I-11189, para 70
\textsuperscript{808} K. Hailbronner (2010), op cit., 71, p 1542. Now also confirmed by the Commission, see European Commission, COM(2015) 6250 final, pp 78-79
concerned’ and as was seen on the previous pages\textsuperscript{809}, the definition of the ‘risk of absconding’ turned out to be ambiguous. It has been argued that such an implicit wording allows States to resort to pre-removal detention in other circumstances and accordingly impose incarceration in an arbitrary manner\textsuperscript{810}.

Based on a narrow interpretation of the wording in Article 15(1) of the Return Directive, it could have been argued that the Return Directive opened the possibility for unsystematic interpretation of the grounds for lawful detention, that could have led to inconsistent application of the Directive and arbitrary detention practices in the EU Member States.

However, based on the jurisprudence of the ECJ on immigration detention in Return Directive, the Commission has now provided for a clarification regarding the wording of Article 15(1). In particular, the Commission has stated that even though the wording of the Return Directive is phrased as an indicative listing ("in particular"), these two concrete case constellations cover the main case scenarios encountered in practice that appear, such as to justify detention in order to prepare the return and/or to carry out the removal process\textsuperscript{811}.

Furthermore, the Commission stresses the importance to apply Article 15(1) in conjunction with Recital 6 of the preamble, the requirement of individual assessment of each detention case in light of the principle of proportionality to assess the availability of less coercive measures. In particular, the Commission has clarified that a refusal of entry at the border, the existence of a SIS record, lack of documentation, lack of residence, absence of cooperation do not per se, necessarily justify a detention measure but need to be taken into account when assessing whether there is a risk of absconding and a resulting need for detention\textsuperscript{812}.

Regardless of the situation, Article 15(1) implies that detention under the Return Directive is lawful only in so far as there are no other less coercive measures available to be applied effectively in a specific case and only if detention is carried

\textsuperscript{809} See section 2.2.2 of this chapter
\textsuperscript{811} European Commission, COM(2015) 6250 final, p 78
\textsuperscript{812} Ibid
out as a preparation for the removal process and for as long as there is a reasonable prospect of removal but not longer than six months, with the possibility to extend it to a further twelve months.

4.2.3 Speedy judicial review

The Directive does provide for judicial review of immigration detention. Regarding procedural guarantees and judicial review, the Directive derives from ECHR requirements where *lex specialis* is being provided for in article 5(4)\(^813\), thus the reasons for maintaining a person in temporary custody must be regularly reviewed by a judicial authority\(^814\). Member States must provide for speedy judicial review of the lawfulness of detention, or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review.

The Directive remains ambiguous as to what exactly constitutes a speedy judicial review. Hence, relying on Recital 24 of the preamble, the said provision needs to be interpreted and applied in the light of the Charter and respectively ECHR and the jurisprudence of the Strasbourg Court. In the case-law of the ECtHR, the Court has taken a view that the number of days taken by proceedings is obviously relevant, but not necessarily a decisive element and the question whether Article 5(4) is complied with, has to be determined in the light of the circumstances of each case\(^815\). The Court has further outlined that the existence of the remedy under Article 5(4) must be sufficiently certain not only in theory but also in practice, implying that there must be a genuine possibility of challenging the detention\(^816\). Thus, it can be argued that as long as the third-country national detained for the purpose of removal has been guaranteed access to a court within a reasonable time period, the Directive ultimately ensures speedy judicial review and is in compliance with fundamental rights safeguards.

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\(^{813}\) Article 5(4), ECHR '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’

\(^{814}\) Article 15(2), Return Directive

\(^{815}\) ECtHR 22 May 2008, *Sadyakov v. Bulgaria*, No 75157/01, para 31

\(^{816}\) ECtHR 22 May 2008, *Sadyakov v. Bulgaria*, No 75157/01, para 34
Additionally, it has been argued that because the Directive legitimises six month periods of detention, which may be extended for a further 12 months, must be seen as a retrograde step in human rights terms\textsuperscript{817}. It can be disconcerting that such lengthy periods of detention for the purpose of administrative incarceration are being promoted and accepted as standards which conform to human rights norms\textsuperscript{818}. However, it should be noted that the Court of Justice has held that detention is only justified in so far as there is a reasonable prospect of removal and solely for the purpose of removal. Unlimited detention is not allowed under the Directive and once maximum duration of detention under Articles 15(5)-(6) has been reached, the person concerned must be released immediately and cannot continue to be held in detention on other grounds not listed \textit{expressis verbis} in Article 15(1) of the Return Directive\textsuperscript{819}.

\textbf{4.3. Impact of the Charter and the principle of proportionality}

In the light of the ECtHR jurisprudence on requirements set on immigration detention, it is disconcerting to see that the Strasbourg Court has in certain aspects lowered the standards in the assessment of detention arbitrariness. By discarding the necessity and proportionality requirements, the Court’s jurisprudence seems to fall short in providing legal certainty and a clear review of detention cases for the purpose of removal. The disconcerting aspect lies in the fact that the EU Charter of Fundamental Rights must be interpreted in the light of the ECHR and the jurisprudence of the Strasbourg Court. This raises questions regarding implementation of the Return Directive and whether regard shall be taken of the precarious standards endorsed by the ECtHR by both, Member States as well as the Court of Justice.


\textsuperscript{818} UN High Commissioner for Human Rights Pillay Navanethem cited the EU Return Directive as excessive, especially if obstacles to removal are beyond the immigrant’s control, for example if their home country fails to provide the necessary documentation. ... It is very much feared that EU states may resort to detention excessively and make it the rule rather than the exception. See, P. Navanethem, ‘Immigrants among millions unlawfully detained’, 2 October 2008, cited in The Equal Rights Trust Study, \textit{Unravelling Anomaly Detention, Discrimination and the Protection Needs of Stateless Persons}, London, July 2010, pp 103-104

\textsuperscript{819} Paragraphs 60 and 71 of Kadzoev judgment
However, constructively, it is important to analyse whether implementation of the Return Directive in matters of pre-removal detention can be remedied by application of the principle of proportionality and the interpretation of the Charter in light of general principles of EU law. In fact, as was shown in the previous chapter, the Court of Justice has developed a significant jurisprudence regarding detention of irregularly staying third-country nationals and has not, thus far, collided with the line of reasoning of the Strasbourg Court on Article 5(1) (f) and the lack of principle of necessity.

Overall, the Directive provisions fell short in providing sufficient legal safeguards to constrain detention of irregular third-country nationals solely for the purpose of removal. Albeit, impliedly providing higher standards of application of detention, the provisions did not provide sufficiently precise definitions or clarifications as to the grounds of detention, prolonged period of detention or the guarantee of a speedy judicial review to challenge the detention. Many of these important details were left for the Member States to implement and apply with a generic ‘in conformity with fundamental rights standards and general principles of EU law’ requirement. Consequently, this raised concerns as to the Directive potentially allowing arbitrary detention or at least promoting detention not as a last resort but as a legitimate and favourable means to control irregular immigration. Whilst some of these concerns were eased by the Commission in the Return Handbook, a majority of them were subject to application issues and consequently were referred to the Court of Justice to resolve. Moreover, the Research Handbook with more specific guidelines was published in 2015, whereas the Directive was due to be transposed by the end of 2010.

Overall, the application of the Charter remained modest in the ECJ rulings. As was also seen in the previous chapter, the Court, notwithstanding provided some essential fundamental rights safeguards, did so focussing on the text of the Return Directive rather than the Charter. In the cases of Kadzoev and El Dridi the Court, however, engaged with the jurisprudence of the ECtHR providing important constraints on arbitrariness of detention under Article 15(1). The Court ruled in a specific manner that Return Directive provides for a lawful detention only for the
purpose of removal and for as long as there is a reasonable prospect of removal. The message that detention was to be regarded as unlawful in the absence of a reasonable prospect of removal was strong in the ECJ judgments coinciding with the relevant ECTHR ruling in Mikolenko v Estonia.

However, the Court’s jurisprudence and the line of argument indicate that the Return Directive can provide higher standards than the ones established in the case law of the Strasbourg Court. In particular, the ECJ has consistently applied the principle of necessity and proportionality, thus installing a clear prohibition of unlimited detention under the Return Directive. Kadzoev, Achughbabian, El Dridi and Mahdi are all positive examples how the Court, with the help of general principles of EU law, used the Return Directive to limit disconcerting domestic practices that not only allowed for the excessive detention periods without the reasonable prospect of removal but criminalised irregular third-country nationals entirely. Moreover, the Kadzoev and Sagor rulings provided for an alternative remedy for asylum applicants, excluding the permissibility of their detention from the scope of the Return Directive and imposed a requirement not to detain a person whose application for asylum was still processed by authorities. The ECJ reminded in that detention of asylum seekers is prohibited under international and EU law of asylum. Other positive developments concerned with the case law on detention conditions in the cases of Bero and Bouzalmante, as well as Pham. The ECJ successfully relied on the Strasbourg Court’s experience assessing the legality of detention conditions and made a more defined nexus between the implementation of the Return Directive and fundamental rights protection.

In such ways, the ECJ has demonstrated that it engages with the Strasbourg jurisprudence as to the duration of detention, however, it applies immigration detention provisions in conformity of general principles of EU law. The ECJ case law made clear that even though it follows the principles established and confirmed by the Strasbourg Court, the prevalence in interpretation and application of the EU directive belongs in the system of EU law, especially if that system has set higher standards of legal safeguards. Essentially, by that, the Court affirmed the substance of Article 52(3) of the Charter.
Consequently, the ECJ confirmed that an eighteen-month time limit is the maximum outer limit, which is not justified in all cases\textsuperscript{820}. However, it needs to be noted that this does not abolish the fact that the maximum duration of detention for the purpose of removal still remains rather excessive and questions the Directive’s ability to provide for sufficient legal safeguards in compliance with fundamental rights standards. Moreover, considering that the ECtHR, notwithstanding discarding the ‘necessity’ and ‘proportionality’ requirements, still manifests itself in the requirement of ‘reasonable time’ for the duration to prevent the non-arbitrariness of detention. Consequently, it can be argued that allowing an eighteen months long pre-removal detention, runs a severe risk of detention being considered arbitrary under the Return Directive.

However, it is also evident from the ECJ’s case law that the Court’s interpretation may not be the best means of ensuring legal safeguards. First, the Court of Justice is dependent on domestic courts referring the questions under preliminary reference for interpretation. Second, the ECJ is confined within the questions asked. Third, the ECJ is not bound by the principle of \textit{stare decisis} meaning that the Court is not obliged to follow the reasoning in its previous case law. The third element was evident in the case of Celaj in which the ECJ held that imposing a custodial sentence for a breach of entry ban does not undermine successful return and is therefore allowed. The Court ruled against the AG’s opinion that precluded carceral sanction for a breach of immigration law which may essentially impede the removal and objective of the Directive.

Moreover, carceral punishment as a measure of criminal law carries in itself a connotation of, and is being accordingly applied as, a consequence of a violation of a (legislative) rule. The person incarceration has committed a crime, i.e. the act that is in breach of rules has already happened. Whereas, immigration detention has been declared an administrative measure and should be applied accordingly. The connotation being that immigration detention operates as a measure to carry out certain immigration management procedures. In most circumstances, as also seen in the case law of ECJ that was discussed in the previous chapter, detention is being

\textsuperscript{820} C. Costello (2016), op cit., 131, p 311
used as a resort to carry out a successful removal of a third-country national in an irregular situation and is applied as a consequence if the person concerned has not been compliant with a previous administrative measure, such as a return decision or an entry ban, or failed to cooperate with authorities. In these cases, detention has been used to safeguard the removal process in compliance with the Return Directive and ECJ’s jurisprudence. Despite the Court’s stance that immigration detention is not something that should be invoked lightly but rather should be a measure subject to strict scrutiny and detailed deliberation, the practice has also demonstrated that Member States tend to use detention as a sanction applying it in the circumstances in which the third-country national concerned has not yet committed any rule violations except being in an illegal situation. The Court’s central “distinction” argument in the Celaj ruling, however, suggests immigration detention not as an administrative but a punitive measure that is being applied in order to prevent any rule violations.

Furthermore, it was disconcerting to see the Court ignoring the breach of defence rights to prolong detention because of the lack of cooperation in G. and R. Even though it is somewhat understandable that the breach of defence rights should not result automatically in abolishment of detention altogether, the Court’s unwillingness to touch upon an important legal safeguard demonstrates limitations of the Return Directive and the application of EU law in general.

In conclusion, the Court is yet to interpret detention provisions within the realm of the Charter and hence the impact of the latter can, as of now only be indirect and subject to a certain degree of speculation. The amount of cases referred to the Court of Justice gives evidence of a thriving practice of pre-removal detention in the EU Member States. Yet, the ECJ’s strong stance to align with the Strasbourg Court’s standards when appropriate, whilst demonstrating strict adherence to the principle of proportionality and necessity, is certainly a positive development. It shows that EU law, despite several shortcomings in the legislative framework, is capable to set higher human rights standards than the ones established in international human rights framework. However, this capacity is still largely owed to the boldness of the Court of Justice rather than the solid work of legislators.
Conclusions

The Chapter set out to examine whether and to what extent the Return Directive is capable of upholding fundamental rights safeguards. The purpose of the analysis was not only to weigh the Return Directive’s compliance with the fundamental rights but to examine whether the human rights protection can be, or has been, strengthened within the application of the Charter and general principles of EU law.

The Return Directive, when it was adopted, was depicted as a Directive of shame and thus received a vast amount of criticism from academics as well as NGOs. Having analysed the Directive’s provisions it appeared that in certain aspects, the Directive did fall short to provide necessary legal safeguards. However, mostly it was not due to the lack of human rights references in the Directive but because of the ambiguity of the wording of several provisions. For instance, provisions regarding the risk of absconding, or the ones regulating pre-removal detention did not provide the most detailed wording and because of that were subject to interpretation struggles by the Member States. The latter was indicated by the amount of questions referred to the Court of Justice under preliminary references.

Furthermore, it appeared from the chapter that relevant legal safeguards pertinent to a lawful return procedure were often established by the Court of Justice and not the legislators. The Court, assisted by the Charter of Fundamental Rights and application of general principles of EU law, has provided for some interim and more permanent solutions to pertaining shortcomings deriving from the ambiguities and vagueness of the Directive and has taken the protection of fundamental rights to a whole new level. For instance, the Court’s jurisprudence and the line of argument indicate that the Return Directive can provide higher standards than the ones established in the case law of the Strasbourg Court. In particular in the cases of Kadzoev, Achughbabian, El Dridi and Mahdi, the ECJ has consistently applied the principle of necessity and proportionality, thus installing a clear prohibition of unlimited detention under Return Directive. The Court, with the help of general principles of EU law, used the Return Directive to limit disconcerting domestic practices that not only allowed for the excessive detention periods without the
reasonable prospect of removal, but criminalised irregular third-country nationals entirely. Other positive developments concerned with the case law on detention conditions in the cases of Bero and Bouzalmante, as well as Pham. The ECJ successfully relied on the Strasbourg Court’s experience assessing the legality of detention conditions and made a more defined nexus between the implementation of the Return Directive and fundamental rights protection.

In such way, the ECJ has demonstrated that it engages with the Strasbourg jurisprudence as to the duration of detention, however, applies immigration detention provisions in conformity of general principles of EU law. The ECJ case law made clear that even though it follows the principles established and confirmed by the Strasbourg Court, the prevalence in interpretation and application of EU directive belongs in the system of EU law, especially if that system has set higher standards of legal safeguards. Essentially, by that, the Court affirmed the substance of Article 52(3) of the Charter.

Simultaneously, there have been cases in which the Court demonstrated its unwillingness to interpret the Return Directive in the light of the Charter and general principles of EU law. The examples can be found in Zaizoune, Celaj and G. and R. These cases are an indication of the limitations of the Return Directive that cannot without the Court’s will be salvaged by the Charter or general principle of EU law, making the application of the Return Directive not only volatile but also display its shortcomings to uphold the principle of the rule of law and provide legal certainty. In short, the Court is yet to interpret detention provisions within the realm of the Charter and hence the impact of the latter can, as of now, only be indirect and subject to a certain degree of speculation.

In conclusion, it can be argued that notwithstanding the Court’s active interpretation of the Return Directive in conformity with the Charter and the general principles of EU law, leaving the protection of fundamental rights and other legal safeguards for the will of the Court, is not the most secure or effective way to protect the aforementioned fundamental rights and can be seen as hindering the principle of legal certainty. It can only be hoped that the Court of Justice will
continue to play its role as the watchdog of general principles of EU law and ensure the protection of fundamental rights in the return procedures if the Member States feel tempted not to.
Conclusions

1. The Answer to the Research Question

The research question set out in the Introduction asks: can the alleged fundamental rights shortcomings in the Return Directive be salvaged by the application of the Charter and general principle of EU law? In finding the answer to the research question, the thesis examined whether the Return Directive entails any shortcomings to provide sufficient fundamental rights safeguards during the return procedure and whether these shortcomings appeared because of the flawed work of legislators or were caused by the Member States whilst applying the Return Directive.

The research and analysis of the Return Directive demonstrated that in certain aspects the Directive itself fell short to provide necessary legal safeguards. However, these shortcomings were not caused because of the lack of human rights references in the Directive but because of the ambiguity of the wording of several provisions. For instance, the ambiguities were found in the scope of the Return Directive, provisions regarding the risk of absconding or the ones regulating pre-removal detention did not provide the most detailed wording and because of that were subject to struggles of interpretation by the Member States. This was indicated by the amount of questions referred to the Court of Justice under preliminary references.

Moreover, the research demonstrated that in some occasions the application of the Return Directive failed to uphold fundamental rights safeguards. These occasions concerned with domestic practices which criminalise irregular stay. Even though the Return Directive does not itself criminalise irregular immigration, its ability to curb the criminalising domestic practices was not always sufficient or consistent. The evidence for such an argument was found in the analysis of the case law and the questions referred to the Court of Justice regarding the application of the Return Directive.
The analysis that was carried out in the thesis showed two main shortcomings regarding the Return Directive. One is the gaps in law that are entailed in the wording of the Directive provisions and were accordingly caused in the legislative phase mainly because of the institutional dilemmas. The opposing views of the two legislators were largely reconciled with ambiguous wording of the provisions in the main body of the Directive and with the vast amount of facultative clauses leaving the Member States with extensive discretion in implementation of the Return Directive. These gaps in law were not necessarily shortcomings in fundamental rights protection but rather established a fertile ground that may lead to the failure to guarantee fundamental rights for irregular third-country nationals during the return procedure. The second shortcoming concerned the application of the Directive. The gaps in law and the amount of discretionary clauses led to several issues regarding the interpretation and application of the Directive and resulted in the vast amount of questions referred to the Court of Justice under the preliminary ruling procedure. This practice increased the role of the Court of Justice in the application of the Return Directive. Moreover, it can be argued that the common unified implementation of the Return Directive has been possible largely due to the work of the Court. Hence, it can be concluded that the Return Directive does entail shortcomings and that they were caused mainly due to the flawed work of the legislators, leading to the flaws in the implementation phase. As a consequence of the legislative shortcomings, the application of the Directive proved to be a cumbersome process and accordingly hindered the protection of fundamental rights during the return procedure.

Before answering the research question, the role of the Court of Justice needs to be addressed. As it was observed above, the Court has played a pivotal role in the application and interpretation of the Return Directive. Moreover, it can be argued that the amount of cases referred to the Court of Justice within the past seven years is in itself, an indication of the serious shortcomings in the Return Directive, regardless of whether these shortcomings appeared in the legislative or implementation phase of the Directive. Research showed that relevant legal safeguards pertinent to a lawful return procedure in compliance with fundamental
rights principles were often established by the Court of Justice and not the legislators.

The answer to the research question set in the Introduction is yes. The fundamental rights shortcomings in the Return Directive can be salvaged by the application of the Charter and general principle of EU law. There are mainly two possibilities to safeguard fundamental rights protection in the Return Directive.

First, the obligation to respect fundamental rights and international law when applying and implementing the Directive is incumbent upon Member States, as they are responsible for its implementation and the EU institutions are not involved in its enforcement. Indeed, since States are expected to ensure compliance with EU law, they are not allowed to jeopardise the achievement of the objectives pursued by the Directive, depriving it of its effectiveness. Therefore, it is clear that the compatibility of national legislation with EU law will have to be examined by making reference to the objectives pursued by the latter. With regard to the Return Directive, the ECJ has argued that its aim is not only to establish an effective return policy, but also to ensure full respect for the immigrants’ fundamental rights and dignity.

Second, under international law, conformity or non-conformity with fundamental rights and obligations can only be established by a court ruling on a concrete individual case, taking into account Member State’s transposition measures and enforcement practice. Hence, salvaging fundamental rights protection with the application of the Charter and general principles of EU law can be guaranteed by the Court. The Court, assisted by the Charter of Fundamental Rights and application of general principles of EU law, has provided for some interim and more permanent solutions to pertaining shortcomings deriving from the ambiguities and vagueness of the Directive and has accordingly taken the protection of fundamental rights to a whole new level.

Yet, the research revealed that either of these possibilities does not guarantee protection of fundamental rights in the return procedure. In the jurisprudence

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821 K. Hailbronner (2010), op cit., no 71, pp 1507-1508
concerning the application of the Return Directive, the Member States as well as the ECJ, found themselves caught between two principles, that of protection of fundamental rights of irregular immigrants and securing their effective removal, aiming to strike a fair balance between the two. The fact that these are not such easily reconcilable principles was evident in the amount of questions referred to the Court of Justice by domestic courts, as well as in the inconsistencies in the case law of the ECJ. There are judgments in which the prevalence has been given to achieving the objectives and effectiveness of the Return Directive, as well as there are judgments in which the Court has favoured fundamental rights safeguards over effectiveness of common Union law. The inconsistencies were particularly evident in the case law that concerned application of the Return Directive and the impact it has on domestic practices that criminalise irregular stay. The Court’s jurisprudence has ranged from non-protective to protective and super-protective, as was demonstrated in Chapter 4 of the thesis.

Moreover, it is also evident from the ECJ’s case law, that the Court’s interpretation may not be the best means of ensuring legal safeguards. First, the Court of Justice is dependent on domestic courts referring the questions under preliminary reference for interpretation. Second, the ECJ is confined within the questions asked. Third, the ECJ is not bound by the principle of *stare decisis* meaning that the Court is not obliged to follow the reasoning in its previous case law. All of this will inevitably result in the failure to uphold the principle of legal certainty in the EU.

2. General comments

In 2007, Statewatch expressed deep concerns with respect to the adopted Return Directive: “What is left is legislation which, if implemented, is likely to result in the spread of the worst expulsion practices, emphasising speedy removal over due process and human needs”[^822]. The Directive was widely seen as a highly punitive

measure that offered little protection for irregular migrants. Additionally, it was believed that the final text of the Directive would only encourage the Member States to lower their common standards of return practices. These concerns resulted in the Return Directive to be titled ‘Directive of shame’. As a response to the criticism, the Commission explicitly stated that the Directive is primarily intended to be a return instrument and not a human rights instrument with the primary purpose to provide for an effective return policy and migration management.

In policy terms, the Return Directive is the first horizontal piece of return legislation. It harmonises some essential aspects of the return standards and procedures in Member States and complements some of the already existing instruments that were mentioned in the second chapter of this thesis. However, the Directive falls short in a number of areas that remain yet to be addressed on the Union level.

For instance, the Directive was adopted to establish common standards and procedures across Member States for returning illegally staying third-country nationals with a relevant reference written in Article 1 of the Directive. Yet, it can be argued that because of the vast amount of ‘may’ clauses and wide margin of discretion left for Member States in the implementation phase, the Directive establishes ‘minimum’ rather than ‘common’ standards of return. Furthermore, Article 4 of the Directive explicitly allows the Member States to adopt or maintain more favourable provisions for the persons to whom the Directive applies.

Yet, this thesis has demonstrated that the Directive has not, as originally predicted, functioned solely as a punitive mechanism removing irregular immigrants as harshly as possible. Several of the shortcomings that are present in the Directive can and hopefully will be salvaged by interpreting and applying the Return Directive in conjunction with the Charter and general principles of EU law. Because of the

824 F. Lutz (2010), op cit., 324, p 75
826 Recital 4 of the Return Directive Preamble
827 See for example K. Hailbronner (2010), op cit., 71., p 1509
The evolving jurisprudence of the ECJ the Return Directive has, for instance, revealed itself as a protective mechanism from criminalising practices of Member States.

The Court said explicitly that it is the duty of a Member State to guarantee that the return and removal of irregularly staying third-country nationals would take place in a humane manner safeguarding the fundamental rights of the persons concerned. This statement can have some far reaching effects, as it finally establishes that the Directive, although not a human rights instrument, should still respect and follow the rights of irregular immigrants. Albeit, the Court’s jurisprudence demonstrates some inconsistencies, it has still sent a clear message of the Court’s willingness to interpret and apply the Return Directive in the light of fundamental rights as general principles of EU law. This, in an eventual reading by the Court of the fundamental rights principles will also have to be taken into consideration when the Member States apply the Return Directive in the future.

The law is a dynamic and constantly evolving subject and is accordingly interpreted and applied as a living organism. This is particularly true in the case of EU legislation that is subject to multilevel interpretation and implementation. The Return Directive has been subject to a vast amount of criticism in academic as well as in practical doctrines and the debate regarding its provisions will inevitably pertain. The contribution to knowledge presented in this thesis will hopefully provide an input to that current debate.
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