

Irregular migrants: Can humane treatment be balanced against efficient removal?

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Of all the groups of migrants in the European Union, irregular migrants are the least welcome. The EU has adopted a panoply of measures to deter, detect and remove them. To keep them out, it has visa requirements and border controls, as well as laws on carrier sanctions and penalties for smugglers and traffickers. If they make it to the territory of a Member State, employers are prohibited from hiring them. Once detected, they must be expelled as soon as possible, and possibly detained on their way out. Many Member States have criminalised their entry and stay, and the EU bribes, cajoles and threatens non-EU states to make sure they are taken back. Once out, they usually face an entry ban, which is intended to make sure that they ever come back in. [footnotes for all]

Yet despite all this, the Union's policy on irregular migrants shows significant flashes of humanity almost despite itself. This in part due to the approach of the Court of Justice of the European Union (CJEU) to interpreting the EU's Returns Directive – the main set of rules governing irregular migrants' status on the Member States' territory.

The Returns Directive dates back to 2008;¹ it took three years of difficult negotiations to agree.² It was immediately widely criticised by NGOs and third States.³ The deadline to apply the Directive was Christmas Eve 2010.⁴ In 2014, the EU Commission reported on the implementation of the Directive by the Member States.⁵ The Directive has been a fertile source of references to the CJEU, which has delivered over a dozen judgments on the Directive.⁶ Several more cases are pending.⁷

¹ Dir 2008/115 ([2008] OJ L 348/98).

² See D Acosta, 'The Good, the Bad, and the Ugly in EU Migration Law', 11 EJML (2009) 19, and the Statewatch analysis of June 2008: <<http://www.statewatch.org/news/2008/jun/eu-analysis-returns-directive-june-2008-final.pdf>>.

³ See Acosta, *ibid*, and A Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', 11 EJML (2009) 1.

⁴ Art 20(1), Dir 2008/115; there was an extra year to apply the rules on legal aid. All the references in this paper are to the Returns Directive, unless otherwise indicated.

⁵ COM (2014) 199, 28 March 2014.

⁶ Cases: C-357/09 PPU *Kadzoev* [2009] ECR I-11189; C-61/11 PPU *El Dridi* [2011] ECR I-3015; C-329/11 *Achughbabian* [2011] ECR I-12695; C-430/11 *Sagor* ECLI:EU:C:2012:777; C-522/11 *Mbaye* ECLI:EU:C:2013:190; C-534/11 *Arslan* ECLI:EU:C:2013:343; C-383/13 PPU *G and R* ECLI:EU:C:2013:533; C-297/12 *Filev and Osmani* ECLI:EU:C:2013:569; C-146/14 PPU *Mahdi* ECLI:EU:C:2014:1320; C-189/13 *Da Silva* ECLI:EU:C:2014:2043; C-473/13 and C-514/13 *Bouzalmate and Bero* ECLI:EU:C:2014:2095; C-474/13 *Pham* ECLI:EU:C:2014:2096; C-166/13 *Mukarubega* ECLI:EU:C:2014:2336; C-249/13 *Boudjlida* ECLI:EU:C:2014:2431;

Summary of the Returns Directive⁸

The Directive applies to all third-country nationals 'staying illegally' in a Member State,⁹ which is defined as a person who *either* 'does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code' *or* who does not or no longer fulfils 'other conditions for entry, stay or residence in that Member State'.¹⁰ However, Member States may decide (optionally) not to apply the Returns Directive to persons who: a) were refused entry in accordance with the Schengen borders code, or who were 'apprehended or intercepted in connection with' irregular crossing of an external border and who were not later allowed to stay in that Member State; or b) 'are subject to a 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'.¹¹ But even if they apply the first of these exceptions (irregular entry), Member States must apply certain rules in the Directive,¹² as well as the principle of non-refoulement.¹³ Furthermore, the Directive does not apply to persons with EU free movement rights.¹⁴

The EU and Member States can have more favourable provisions for irregular migrants in agreement with third States or legislation. However, any more favourable rules set out in national legislation must be 'compatible' with the Directive.¹⁵ When implementing the Directive, Member States 'shall take due account of' the best interests of the child, family life, and the state of health of the persons concerned, and respect the principle of non-refoulement.¹⁶

The core of the Directive is an obligation for Member States to issue a 'return decision' to every third-country national staying illegally on their territory.¹⁷ However, this rule is

C-562/13 *Abdida* ECLI:EU:C:2014:2453; C-38/14 *Zaizoune* ECLI:EU:C:2015:260; and C-554/13 *Zh and O* ECLI:EU:C:2015:377.

⁷ Cases: C-290/14 *Celaj* (opinion of 28 April 2015) and C-47/15 *Affum*.

⁸ This paper is partially adapted from the discussion of the Directive in the fourth edition of *EU Justice and Home Affairs Law* (OUP, forthcoming).

⁹ Art 2(1).

¹⁰ Art 3(2). The Schengen Borders Code is set out in Reg 562/2006 ([2006] OJ L 105/1).

¹¹ Art 2(2), referring in part to Art 13 of the Borders Code (*ibid*).

¹² Art 4(4). The provisions concerned are '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).'

¹³ Art 5, discussed further below.

¹⁴ Art 2(3). See also the definition of 'third-country national' in Art 3(1).

¹⁵ Art 4.

¹⁶ Art 5.

¹⁷ Art 6(1). Art 3(3) defines 'return': it can be either to a country of origin or transit, or to another third country which the person concerned chooses to return to and in which that person will be admitted. There is no definition of 'third countries'. For the definition of 'return decision', see Art 3(4).

‘without prejudice’ to a number of exceptions. First of all, a third-country national who holds a residence permit or other authorization to stay in a second Member State ‘shall be required to go’ back there instead; he or she would only be subject to a return decision in cases of non-compliance with the obligation to return to the second Member State or for reasons of ‘public policy or national security’.¹⁸ Next, a third-country national ‘may’ instead be sent to another Member State pursuant to a pre-existing bilateral deal, but in that case the second Member State ‘shall’ then issue a return decision to the person concerned.¹⁹

Next, Member States have a very wide discretion to regularize stays of irregular migrants, ‘at any moment...for compassionate, humanitarian or other reasons’.²⁰ In that case, no return decision shall be issued, but if a return decision has already been issued, Member States have the option of merely suspending the decision, rather than withdrawing it, for the duration of the authorized stay. Furthermore, Member States ‘shall consider refraining from issuing a return decision’ to persons whose applications for renewal of a permit to stay are pending, until that pending procedure is finished.²¹ As for the procedure, a return decision can be issued as a single act along with a decision terminating legal stay, a removal decision or an entry ban, subject to the relevant safeguards in the Directive and other EU and national rules.²²

As a general rule, irregular migrants must have the opportunity of voluntary departure. The basic principle is that a return decision must allow for a possible voluntary departure within a period of between 7 and 30 days, although the persons concerned are free to leave earlier.²³ Also, this rule is subject to exceptions. On the one hand, Member States ‘shall, where necessary, extend the period for voluntary departure for an appropriate period’ in ‘individual case[s]’, on grounds ‘such as’ family and social links, the length of stay, or children’s school attendance.²⁴ On the other hand, if there is a risk of absconding,²⁵ if an application for legal stay has been dismissed as ‘manifestly unfounded’ or fraudulent, or if ‘the person concerned poses a risk to public policy, public security or national security’, Member States may refrain from permitting voluntary departure or grant a period shorter

¹⁸ Art 6(2).

¹⁹ Art 6(3).

²⁰ Art 6(4).

²¹ Art 6(5).

²² Art 6(6); see also Art 8(3). For the definition of ‘removal’ and ‘entry ban’, see Art 3(5) and (6).

²³ Art 7(1).

²⁴ Art 7(2).

²⁵ For the definition of ‘risk of absconding’, see Art 3(7): 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’.

than seven days.²⁶ Member States may impose obligations upon individuals during the period allowed for voluntary departure, to avoid the risk of absconding.²⁷

If an irregular migrant does not leave once the period for voluntary departure has expired, or if no such period has been granted, Member States are required in principle to remove them.²⁸ A removal cannot be carried out while the period for voluntary departure has not yet expired, unless that period has been curtailed pursuant to the Directive.²⁹ Any coercive measures must be used as a 'last resort', and must be 'proportional', 'not exceed reasonable force', and be in accordance with human rights and the dignity and physical integrity of the person concerned.³⁰ When removing persons by air, Member States 'shall take into account' the common guidelines on security provisions for joint removals, attached to an earlier Council Decision on joint flights.³¹ In all cases, Member States 'shall provide for an effective forced-return monitoring system'.³²

Member States are obliged to postpone removal where it would violate the principle of non-refoulement, or where a suspensive effect of removal has been granted by a court (see below).³³ Member States *may* postpone removal in other specific cases,³⁴ and 'shall in particular take into account' the health of the person concerned or technical difficulties.

The return or removal of unaccompanied minors is subject to specific safeguards.³⁵ Before they are issued with a return decision, there must be assistance from bodies other than the return authorities, 'with due consideration being given to the best interests of the child'.³⁶ National authorities 'shall be satisfied that [the child] will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return' before a return is carried out.³⁷

Next, the Directive sets out rules on entry bans.³⁸ An entry ban *must* be issued where a return decision was issued without a period for voluntary departure being granted, or where an obligation for return was not complied with.³⁹ In other cases, an entry ban *may* be

²⁶ Art 7(4).

²⁷ Art 7(3).

²⁸ Art 8(1). On the definition of 'removal', see Art 3(5).

²⁹ Art 8(2).

³⁰ Art 8(4).

³¹ Art 8(5), referring to [2004] OJ L 261/28.

³² Art 8(6).

³³ Art 9(1).

³⁴ Art 9(2).

³⁵ There is no definition of 'unaccompanied minors' (or 'minors') in the Directive. For the definition in other measures, see, for instance, Art 2(f) of the family reunion Dir (Dir 2003/86, [2003] OJ L 251/12).

³⁶ Art 10(1). See the discussion of this concept above.

³⁷ Art 10(2).

³⁸ Art 3(6) defines an 'entry ban' as a decision which applies to *all* the participating Member States. See also recital 18 in the preamble.

³⁹ Art 11(1).

issued.⁴⁰ The length of the entry ban must be based on ‘all relevant circumstances of the individual case’ and ‘shall not in principle exceed five years’, although longer bans are possible in cases of ‘serious threat to public policy, public health or national security’.⁴¹

Member States ‘shall consider withdrawing or suspending’ an entry ban if the person concerned can demonstrate that he or she in fact left in compliance with a return decision.⁴² They must not apply an entry ban to victims of trafficking in persons who have been granted a residence permit pursuant to Directive 2004/81, which concerns the immigration status of such victims,⁴³ but this is ‘without prejudice’ to the obligation to issue an entry ban where an obligation to return was not complied with, and also subject to an exception on grounds of public policy, public security, or national security.⁴⁴ Member States may refrain from issuing, or withdraw or suspend, an entry ban ‘in individual cases for humanitarian reasons’, and ‘may withdraw or suspend’ a ban ‘in individual cases or certain categories of cases for other reasons’.⁴⁵ Also, if a Member State intends to issue a residence permit to a person who is subject to an entry ban issued by another Member State, the first Member State should first of all consult with the Member State that issued the entry ban according to the rules set out in the Schengen Convention.⁴⁶

Procedural safeguards for irregular migrants are set out in Chapter III of the Directive. Return decisions, removal decisions, and decisions on entry bans must be issued in writing and contain reasons in fact and law as well as information on remedies, although the obligation to give factual reasons can be limited by national law, ‘in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.’⁴⁷ Member States must translate the main elements of the decision upon request, including information on the available legal remedies, in a language which the person concerns understands or can be presumed to understand.⁴⁸ As an exception, Member States can instead supply this information by using a standard form, rather than translating a decision, where persons have entered irregularly and have not subsequently obtained authorization to stay.⁴⁹

Irregular migrants must have an ‘effective remedy’ to appeal or review all types of decisions related to return before some sort of independent and impartial body, which could be (but

⁴⁰ Ibid.

⁴¹ Art 11(2).

⁴² Art 11(3), first sub-paragraph.

⁴³ [2004] OJ L 261/19.

⁴⁴ Art 11(3), second sub-paragraph.

⁴⁵ Art 11(3), third and fourth sub-paragraphs.

⁴⁶ Art 11(4), referring to Art 25 of the Convention.

⁴⁷ Art 12(1).

⁴⁸ Art 12(2).

⁴⁹ Art 12(3).

need not be) a judicial or administrative body.⁵⁰ This entity must have the power to review the decisions related to return, including the power to suspend those decisions temporarily, unless such a power already exists in national law (ie because the legal challenge automatically suspends application of the decision concerned).⁵¹ The person concerned must also be able to obtain 'legal advice, representation and, where necessary, linguistic assistance'.⁵² As for legal aid, this must be available subject to the same limitations provided for in the asylum procedures directive.⁵³

If an irregular migrant was given the chance to depart voluntarily, or if the implementation of a removal decision was postponed, there are safeguards.⁵⁴ The migrants must be given written confirmation of their position, and Member States must 'ensure that the following principles are taken into account as far as possible', except where persons are in detention: family unity; emergency health care and essential treatment of illness; minors' access to basic education; and 'special needs of vulnerable persons are taken into account'.⁵⁵

Finally, the Directive addresses the controversial issue of immigration detention.⁵⁶ Persons subject to return procedures 'may only' be detained 'in order to prepare return and/or to carry out the removal process in particular when' there is a risk of absconding or if the person concerned 'avoids or hampers' the return or removal process. Detention is only justified while removal arrangements 'are in process and executed with due diligence'. It can be ordered by administrative or judicial authorities, and must be 'ordered in writing with reasons in fact and law'. If the detention was ordered by administrative authorities, there must be some form of 'speedy' judicial review. There must be regular reviews of detention, either automatically or at the request of the person concerned. If there is no 'reasonable prospect of removal' or the conditions for detention no longer exist, the person concerned must be released immediately. Conversely, detention shall be maintained as long as the conditions exist; this shall not exceed six months, except where national law permits a further period of up to one extra year because the removal operation is likely to last longer, due to lack of cooperation by the person concerned or delays in obtaining documentation.

The rules on detention conditions address in turn: the place of detention (special facilities for migrants 'as a rule', separation from ordinary prisoners if detained in prison); the right to contact legal representatives, family members and consular authorities; the situation of vulnerable persons; the possibility for independent bodies to visit detention facilities; and

⁵⁰ Art 13(1).

⁵¹ Art 13(2).

⁵² Art 13(3).

⁵³ Art 13(4).

⁵⁴ Art 14.

⁵⁵ The definition of 'vulnerable persons' is set out in Art 3(9).

⁵⁶ Art 15.

information to be given to migrants.⁵⁷ There are more detailed rules on the detention of minors and families,⁵⁸ although Member States may derogate from certain aspects of the rules concerning speedy judicial review and detention conditions in ‘exceptional’ situations.⁵⁹

Case law

Broadly speaking, the CJEU case law on this Directive has tried to balance humane treatment of irregular migrants with the underlying objective of removing the irregular migrants as soon as possible. There are obvious contradictions in these two approaches, however, and so in some cases the CJEU has had to choose squarely between one or the other, or has only been able to reconcile them up to a point.

One example of choosing efficiency over humanity is the Court’s ruling in *Zaizoune*,⁶⁰ the first judgment clarifying Member States’ powers to set ‘more favourable conditions’ if they are ‘compatible’ with the Directive. Irregular migrants would obviously benefit if Member States simply tolerated their residence, rather than attempted to expel them (and potentially use detention and coercion to this end). In practice, Spain did not expel all irregular migrants, but chose to fine some of them instead. However, the CJEU ruled that this went beyond Member States’ power of discretion to set more favourable conditions for irregular migrants, since it contradicted the basic objective of securing removal, contradicted the rules in the Directive obliging Member States to issue a return order and carry out a removal, and would ‘thwart’ common standards and ‘delay’ return.

The Court emphasized that none of the exceptions to the basic rule requiring removal applied in this case; so Member States still retain the power to regularise an irregular migrant’s status at any time, and can always use this route to improve their status formally if they wish to. Since the main focus of the Court’s judgment in *Zaizoune* (consistently with much of the other case law on the Directive, for instance as regards custodial penalties delaying removal) concerns the effective issue and enforcement of a return order, presumably the ‘compatibility’ rule applies only in that particular context, not to the other aspects of the Directive.

Another important batch of cases concerns criminalisation of irregular migration. If irregular migration is a crime punishable in practice by a custodial sentence, that means that the safeguards relating to the grounds for and conditions (detention standards, judicial review, time limits) of immigration detention in the Directive are avoided altogether. Alternatively it

⁵⁷ Art 16.

⁵⁸ Art 17.

⁵⁹ Art 18.

⁶⁰ N. 6 above.

is possible that the immigration detention will be imposed on top of (ie before or after) the custodial penalties, lengthening the overall period of detention for the mere entry or stay into a territory without authorisation.

However, the possibility of imposing custodial penalties as a criminal sanction for irregular migration has been all but abolished by the CJEU, in a remarkable series of judgments that are not based on the wording of the Directive, but on the EU law principle of effectiveness. In part, this case law concerns the scope of the Directive. Given that it does apply to irregular migrants whose expulsion is the consequence of a criminal penalty, are all irregular migrants who have breached national criminal law by committing ‘immigration offences’ exempt from it?

The CJEU began to answer this question in *El Dridi*,⁶¹ stating that the removal order issued to the irregular migrant in that case had been issued separately from the criminal offence of irregular entry, and so the criminal law exception from the scope of the Directive did not apply.⁶² Secondly, and more broadly, it ruled in *Achughbabian* that the criminal law exclusion did not apply to any cases where a criminal penalty was imposed only for irregular entry.⁶³ Logically this reasoning equally applies to cases where a criminal penalty is imposed for irregular stay or breach of an entry ban, and the CJEU has been asked to confirm this interpretation in *Celaj*.⁶⁴

So irregular migrants who have committed ‘immigration offences’ fall within the scope of the Directive. The Court of Justice has taken the further step since the *El Dridi* judgment of asserting that imposing a custodial penalty for a criminal offence of breaching immigration law undermines the effectiveness of the Directive, since it delays in practice the execution of the removal of the individual concerned. In the Court’s view, the Directive establishes a system of gradually increasing sanctions upon the individuals concerned, giving them first an opportunity for voluntary departure in principle (more on that below) with immigration detention only as a last resort. A custodial penalty for a criminal offence would delay that process.

However, the subsequent *Achughbabian* judgment clarified that irregular migrants could be detained for a brief period when initially questioned by the police, and possibly subjected to a form of custodial sentence for irregular migration if the expulsion process did not work out.⁶⁵ More precisely, the Directive ‘does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by [the] directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for

⁶¹ N. 6 above.

⁶² This was reaffirmed in the order in *Mbaye* (ibid).

⁶³ Ibid. This was also reaffirmed in the order in *Mbaye* (ibid).

⁶⁴ The Advocate-General’s opinion in this pending case (n 7 above) supports this interpretation.

⁶⁵ N. 6 above.

non-return'. The latest word from the Court on this point (*Sagor*) clarifies that criminal sanctions for irregular migration can be imposed in the form of fines, but not (following the logic of the prior judgments) home detention, since that would delay the implementation of the process of removal.⁶⁶

So custodial penalties (or home detention) for irregular migration before or instead of the immigration detention provided for by that Directive are ruled out. Such penalties are only admitted after the return process has been applied, if there is no 'justified ground for non-return'. The latter concept has not yet been clarified by the Court, but it suggests that if there is a justified ground for postponement of the return, as set out in the Directive, custodial penalties still cannot be applied. While the overall thrust of the Directive remains, according to this case law, the guarantee of removal of the individual concerned, the rulings make it less likely that the irregular migrant will be detained at all (due to the preference for voluntary departure) and ensure that he or she will not normally be kept in prisons, along with other key detention standards.

The importance of the Court's rulings was strengthened, when it was first due for transposition, by its findings that the Directive applied to those already detained as of the initial transposition date (*Kadzoev*).⁶⁷ This judgment also clarified the rules on time limits for detention, holding that there is a 'reasonable prospect of removal', the Court ruled that this criterion for releasing the person concerned is irrelevant where the time limits on detention have in any event expired. Where the criterion does apply, it means that a 'real prospect exists that the removal can be carried out successfully, having regard to' the relevant time limits, and that this prospect 'does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to' those time limits.⁶⁸ The Court also ruled that Member States could not keep a person in immigration detention, once the relevant time limit had expired, merely because the person concerned does not possess valid documents, his conduct is aggressive, and he has no financial support or accommodation. Moreover, the Court has upheld basic standards of judicial review of immigration detention.⁶⁹

A key question about the humane treatment of the persons concerned is what happens during detention. In *Bero and Pham*,⁷⁰ the Court ruled out Member States' arguments that Member States with a federal system could evade the rules requiring immigration detainees to be kept out of prison as a normal rule by arguing that some of the federal entities did not have immigration detention centres. If necessary, the sub-federal administrations have to cooperate to ensure that the rules are properly applied. The Court also ruled out in *Pham*

⁶⁶ Ibid.

⁶⁷ Ibid. See also *Filev and Osmani* (ibid) as regards the temporal scope of the Directive's rules on entry bans.

⁶⁸ Paras 65 and 66 of the judgment, ibid.

⁶⁹ The Court has also been asked to confirm whether the principles apply to irregular migrants in transit (see *Affum*, pending, n. 7 above).

⁷⁰ N. 6 above.

the possibility that an irregular migrant might waive the protections as regards prisons, rightly considering (as the Advocate-General had argued) that a detainee had little genuine autonomy to resist pressure for such a waiver from the national administration.

These judgments do not apply to asylum-seekers unless their asylum application has definitively failed. In light of the references to immigration detention issues in the EU's asylum legislation, and the preamble to the Returns Directive which states that in accordance with the EU's asylum procedures Directive,⁷¹ a third-country national asylum-seeker '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'.⁷² So the CJEU decided that asylum-seekers fall outside the scope of the Directive.⁷³ Subsequently, the Court elaborated in *Arslan* that the same rule applied even if the migrant applied for asylum while already detained, given that the EU's asylum procedures Directive had special rules dealing with asylum applicants in that position.⁷⁴

Moreover, the Court has made it harder for irregular migrants to be detained in the first place, by means of its judgments on the scope of the obligation to grant voluntary departure. This obligation implicitly determines not only whether the migrant will be detained, and necessarily determines whether his or her removal will be coerced. If no voluntary departure is granted, then in principle the migrant must be subject to an entry ban, and does not have access to minimum standards of treatment. First of all, the Court has confirmed that the grounds for refusing such an opportunity, limiting the period, or imposing obligations during that period are exhaustive.⁷⁵

Secondly, the Court has ruled that the purpose of the voluntary departure period is to secure the fundamental rights of the migrant, and it follows that the exceptions from the rule have to be interpreted strictly (*Zh and O*). Two of these exceptions have been clarified by the CJEU: the risk of absconding (in *Mahdi*)⁷⁶ and the public policy exception (in *Zh and O*). In *Mahdi*, the Court ruled that any assessment of the risk of absconding has to be decided on a case-by-case basis, based on objective criteria. It breaches the Directive to detain someone on that basis purely because they do not have identity documents, without considering whether a less coercive measure could be applied.

⁷¹ Art 7 of Dir 2005/85, [2005] OJ L 326/13.

⁷² Recital 9 in the preamble.

⁷³ *Kadzoev*, n 6 above.

⁷⁴ *Ibid.* The Court also referred to the plans to adopt more detailed rules on detention in the second-phase asylum legislation, which has since been adopted (for instance, Arts 8-11, Directive 2013/33, [2013] OJ L 180/96).

⁷⁵ *El Dridi*, para 37, confirmed in *Zh and O* (n. 6 above).

⁷⁶ Paras 65-73 of that judgment. *Mahdi* (*ibid*) concerned the grounds for detention in Art 15, but there is no reason to assume that 'risk of absconding' has a different meaning for the purposes of Art 7.

As for the public policy exception, the CJEU ruled in *Zh and O* that it should be interpreted 'by analogy' with the similar provisions of EU free movement law. It is up to the Member State to 'prove' the risk to public policy, and while Member States 'retain the freedom' to decide on the concept of public policy, they do not have full latitude to determine the concept without any control by the Court. The exception has to be applied on a 'case-by-case basis', to decide if the 'personal conduct' of the migrant 'poses a genuine and present risk to public policy'. This means the suspicion of committing a criminal act, or even a criminal conviction, cannot by itself justify the conclusion that a 'public policy' risk exists.

However, it is possible that the 'public policy' exception could still apply where an appeal against a criminal conviction has not yet been decided, or where there is no conviction, as long as 'other factors' justified the use of that exception. Those other factors include the 'nature and seriousness' of the act and 'the time which has elapsed since it was committed'. So the national court had to consider that in one case, the migrant was actually not trying to stay in the Netherlands without authorisation, but was on his way out (travelling to Canada) when he was stopped. In the other case, the migrant had been accused of domestic abuse, but it was relevant that there was nothing to substantiate that accusation.

The Court's liberal approach to the voluntary departure rules, like its liberal approach to the grounds for and conditions of detention, detention time limits and judicial review and criminalisation of irregular migration, does not exempt migrants from the ultimate obligation to return. Indeed, to some extent, at least as regard the limits on criminalisation of irregular migration, the whole point is to make that underlying obligation more effective. But are there any circumstances where the Directive prevents migrants from being returned at all?

Remarkably, there are. In its *Abdida* judgment,⁷⁷ concerning a terminally ill irregular migrant who needed access to health care, the CJEU confirmed that at least the non-refoulement clause in Article 5 of the Directive prevented the enforcement of a return decision. Moreover, the Court interpreted this provision of the Directive consistently with Article 19(2) of the EU Charter, and in turn interpreted the Charter provision in line with the case law of the European Court of Human Rights. That line of jurisprudence, interpreting the ban on torture or other inhuman or degrading treatment set out in Article 3 ECHR, does not permit migrants to stay in a country to obtain social or medical assistance as a general rule. But as the CJEU points out, the other Court's case law provides that 'a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling'. It should be noted that this rule covers people

⁷⁷ N. 6 above.

who are not entitled to international protection (refugee or subsidiary protection status) under EU asylum legislation.⁷⁸

It remains to be seen how the CJEU will interpret the other grounds which Member States must take account of (best interests of the child, family life, and state of health), although the case law on the effect of similar general provisions in the EU's family reunion Directive suggests *prima facie* that these provisions of the Returns Directive should have a comparable strong legal impact.⁷⁹ These are the only express substantive grounds for objecting to an expulsion set out in the Directive. However, it should not be forgotten that any substantive grounds for resisting expulsion set out in other EU legislation, national legislation, or international treaties will take priority over the Returns Directive anyway.⁸⁰ Finally, it should be noted that the substantive rule is accompanied by a procedural safeguard: the CJEU ruled 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.⁸¹

The CJEU went to rule that the ban on Mr. Abdida's removal had the consequential effect that the remedy against removal *had* to be suspensive, despite the optional wording of the Directive on this point, because otherwise Mr. Abdida could suffer irreparable harm if sent back to his country of origin before his appeal was decided.

Next, the CJEU ruled on his social rights. As we have seen, if irregular migrants are given a time for voluntary departure or their removal is postponed, Member States must 'ensure that the following principles are taken into account as far as possible...': family unity, emergency health care and essential treatment of illness, minors' access to the basic education system and the special needs of vulnerable persons.

In the Court's view, Mr. Abdida qualified for this treatment because his removal had to be postponed under the Directive, which requires postponement where suspensive effect of an appeal has been granted. Oddly, the Court did not mention that the Directive also requires postponement where removal would violate the principle of non-refoulement, although this rule was obviously relevant to Mr. Abdida as well. Moreover, the Court ruled that Mr. Abdida's was also entitled to *social assistance*, even though such assistance is not mentioned as a right for those whose removal is postponed at all. Indeed, the preamble to

⁷⁸ Note that in its parallel judgment in Case C-542/13 *M'Bodj* (ECLI:EU:C:2014:2452) the CJEU ruled that granting refugee or subsidiary protection status exceeded Member States' discretion to establish more favourable standards pursuant to EU asylum legislation.

⁷⁹ Case C-540/03 *EP v Council* [2006] ECR I-5759.

⁸⁰ Art 4(1) to (3). As discussed above, any higher national standards must be 'compatible' with the Directive. In light of *Zaizoune*, therefore, it may be questionable whether Member States have any general discretion to allow irregular migrants to stay on grounds not mentioned in Art 5, unless they invoke one of the exceptions set out in Art 6.

⁸¹ N. 6 above.

the Directive states that pending return, the 'basic conditions of subsistence should be defined *according to national legislation*'. But the CJEU ruled that such legislation still had to be 'compatible with the requirements laid down in' the Directive. In this case, the right to the provision of health care would be 'rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs' of the person concerned. However, that right only had to be provided 'as far as possible', on the condition that the person lacked the means to provide for his own needs; and it was up to Member States to 'to determine the form' which the provision of basic needs took.

Finally, the impact of the *Abdida* case should be qualified by comparing it to other cases where irregular migrants are in 'limbo'. There should be fewer such cases in light of *Zaizoune*, since that judgment makes clear that Member States cannot just tolerate an irregular migrant on their territory: they must either issue and then enforce a return decision, or regularise the person concerned. However, there may still be limbo cases in practice, either because Member States do not actually comply with the basic obligation to issue a return decision and attempt to enforce it, or because despite their best efforts, the removal has to be postponed or can never be carried out. The Directive does not set a final end point when a Member State has to give up trying to remove an irregular migrant and give him or her a more formal legal status, as the CJEU confirmed in *Mahdi*. Rather all that must be granted in such cases are the very basic social rights set out for postponement cases (which apply once any detention has ended).

While these rights do not expressly extend to social assistance, we have seen that in *Abdida* the Court will be willing to infer the existence of an implied right to such support, at least as a corollary of health care. Arguably the implied right to social assistance can apply in other cases of postponement, given that social assistance and housing are obviously necessary to avoid the irregular migrant becoming seriously ill in the first place. There will likely be no prospect that the irregular migrant can work legally as an alternative method of earning an income, since a separate Directive requires Member States to prohibit irregular migrants from employment in principle, although Member States do have an option to allow them to work where their removal has been postponed.

Conclusions

As we have seen, the Returns Directive has not, as originally forecast, functioned solely as a mechanism for detaining and removing irregular migrants as harshly as possible. This is largely due to the jurisprudence of the CJEU, which has consistently tried to strike a balance between securing the humanity and individual rights of irregular migrants and ensuring their effective removal. Of course, as noted at the outset, these two principles of interpretation are uneasy bedfellows. In some cases the CJEU gives preference squarely to effective removal: *Zaizoune* sets a ceiling on Member States' compassion toward irregular migrants, unless they are prepared to go as far as to regularise migrants' position formally. But in contrast, there are cases which give clear preference to humanity: *Abdida*, which performs

several feats of legal alchemy by using the Directive as a means to resist removal, and also overrules the clear wording of the Directive as regards the non-suspensive effect of the challenge to expulsion and the lack of access to social assistance.

More frequently, the case law attempts to marry the two principles, for instance by preferring immigration detention to custodial penalties, and by trying to ensure that time in detention is subject to better standards than in prisons. This is only a modest amelioration of the underlying obligation to leave; and in most cases, the CJEU is not willing to do anything to improve the position of those who cannot in practice be removed. Ultimately, there are inevitable limits to any attempt to fit a square peg into a round hole.