With the support of the Erasmus+ Programme of the European Union

EU Mobility and Migration Law Course

Academic Year 2019-2020

Detention of illegally staying Third Country Nationals with a pending return decision*

Lucas Ramon Ciutat

ABSTRACT:
This Factsheet provides an overview of the present European and Italian legal frameworks in the field of administrative detention of illegally staying third country nationals with pending return decisions. Being detention the most coercive tool which Member States can resort to in order to successfully expel the person concerned, a particular emphasis will be given to the conditions and limitations imposed at both supranational and national level. As for the former, the analysis focuses on Directive 2008/115/EC in conjunction with the relevant case law of the CJEU. At national level, the relevant provisions of Italian law and the functioning of the administrative prisons, the "Centri di Permanenza per i Rimpatri" (CPRs), are briefly explained.

KEYWORDS: Detention – Migrants – Directive 2008/115/EC - Italy- Centri Permanenza Rimpatri (CPR)

1. INTRODUCTION

European Member States, in order to successfully return illegally staying third-country nationals (hereinafter "TCNs") with a pending return decision, can resort, as an *extrema ratio*, to forms of detention. These measures constitute a major interference with personal liberty, therefore they must respect the safeguards which have been established to prevent unlawful detention.

The first part of the paper will give an overview of the EU legal framework: at present, the main act regarding detention of third country nationals subject to return procedures is the Directive 2008/115/EC (hereinafter "Return Directive" or "RD") on "common standards and procedures in Member States for returning illegally staying third-country nationals". In 2017, the European

* This *factsheet* was drafted by the students of the EU Mobility and Migration Law course of the Law Department of the University of Turin (A.Y. 2019-2020), with the support of the Erasmus+ Programme of the European Union, in the framework of the Jean Monnet Module "EU Mobility and Migration Law" (2019-2022), www.eumomi.unito.it. The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the Author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Commission adopted the "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks.
In 2018, the European Commission proposed a recast of the Return Directive (hereinafter "proposed RDR") aimed at increasing the rate of expulsion and voluntary returns of irregular migrants; its new, stricter provisions and its critical issues will be outlined.
The second part will analyse three cases brought before the Court of Justice of the European Union (hereinafter CJEU); the judgments analysed (Case *El Dridi*, Case *Kadzoev*, Case *Mahdi*) have shed light on some relevant substantial and procedural aspects of detention, such as its scope, its maximum length and its extension.
Lastly, Part IV and V will focus on the Italian legislative framework on the expulsion of illegal TCNs and on their detention in administrative centers. A particular attention will be given to the problematic transposition of the Return Directive into national legislation in 2011, and to the functioning of the administrative detention facilities.

2. THE EU LEGAL FRAMEWORK

Chapter IV of the Return Directive, named "Detention for the purpose of removal", is the main reference point concerning detention of illegally staying third country nationals.
The Member States face a double obligation whenever they want to resort to detention measures. Firstly, they can restrict personal liberty only in so far as it is "the only way to make sure that the return process can be prepared and the removal process can be carried out, unless other sufficient but less coercive measures can be applied effectively " (Return Directive: Article 15 (1); principle of necessity); secondly, they face the obligation to carry out an individual assessment, to ensure that the detention measure lasts "for as short as possible", and that the removal arrangements are duly and rapidly executed (principle of proportionality). Thirdly, detention for the purpose of removal can be applied only on two grounds, where:

a) "there is a risk of absconding", or
b) "the TCN … avoids or hampers the removal process".

In the proposed "Return Recast", a third ground has been added at Art. 18 (1, c): *"*the third-country national poses a risk to public policy, public security or national security". On the contrary, both the "Return Handbook" and the case law of the European Court of Justice (Case C-375/09, *Kadzoev*,

para. 70) clearly state that Member States shall not in any case use immigration detention on grounds of public order and public security.

In order to establish whether one of these two grounds subsist, an individual assessment must be carried out by the competent administrative or judicial authorities. The most commonly invoked reason for pre-removal detention is the risk of absconding; the concept of "risk of absconding" is described in Art. 3 (7) of the Return Directive as "the existence of reasons in an individual case which are based on objective criteria defined by (national) law*"*. As stated by the CJEU, in the absence of such criteria set in legally binding provisions of general application detention must be declared unlawful (Case C-528/15, *Al Chodor*, para. 47).

Since the identification of the said risk is a decisive element, the "Return Handbook" sets an open list of criteria helpful to determine whether there might be a risk of absconding. These may be transposed into national laws, namely:

a) Lack of documentation, residence or address,
b) Past non-compliance with a return decision, or explicit expression of non-compliance with future return measures,
c) The commission of a criminal offense, or an on-going investigation on one,
d) Lack of financial resources,
e) Illegal entry into the EU.

These criteria represent mere elements in the overall assessment of each individual situation; in practice, that is not the case. Several academics and NGOs have pointed out that "citing the risk of absconding has become part of an automated and standardised process by administrative authorities" (see Moraru, Geraldine. 2017, p.30; Basilien Gainche, 2017).

In addition to that, the proposed Return Directive Recast sets out a long list of criteria which Member States would have to use to determine whether there is or there is not a risk of absconding. As stated in the preamble (11) RDR, this has the aim of ensuring "clearer and more effective rules for … detaining a third-country national", thus creating an "Union-wide objective criteria" system. RDR's Article 6 (1) and (2) provide for sixteen "risk of absconding criteria", a noticeably longer list than the one previously proposed in the 2017's Return Handbook.

As observed in the substitute impact assessment of the RDR by the European Parliamentary Research Archive, "the fundamental right to liberty is likely to be affected by the long list of criteria indicating a risk of absconding, coupled with the broad nature of some of them and the recourse to

rebuttable presumptions (Article 6), as well as the related increase in the grounds of detention (Article 18) (Eisele Katharina, 2019, pp. 12)".

Going back to the Return Directive, Article 15 (2) and (3) set the procedure that judicial and administrative authorities must follow. To begin, "detention shall be ordered in writing with reasons being given in fact and in law" (2); in the case it has been ordered by an administrative authority, there has to be a "speedy judicial review" and the TCN must have the possibility to appeal such decision (2 a, b); detention shall be reviewed "at reasonable intervals of time" either on application of the detainee or *ex officio* by a judicial authority (3).

Paragraphs 4 to 6 establish the rules on the duration of detention: firstly, whenever "a reasonable prospect of removal no longer exists … the person shall be released immediately" (4); secondly, the maximum length of detention is of six months, which can be prolonged a further twelve months in case of a "lack of cooperation by the TCN concerned" or "delays in obtaining the documentation from third countries", for a total of eighteen months. Member States cannot derogate in any way from this maximum time limit.

The 2018 proposed Return Directive Recast modifies these provisions: whilst keeping the maximum period at 18 months, it sets 3 months as a minimum period of detention where the removal procedure cannot be enforced immediately (Article 18 (5)). As stated in preamble (29) of the RDR, this modification has been deemed as necessary because "maximum detention periods in some Member States are not sufficient to ensure the implementation of return".

RD's Article 16 lays down the conditions of detention: the general rule is that "detention shall take place in specialised facilities", but in exceptional circumstances, where a Member State cannot provide for such facility and it is "obliged to resort to (regular) prison, the TCN shall be kept separated from ordinary prisoners". As stated by the CJEU in the case *Thi Ly Pham* (C-474/13, para. 21-22), the requirement to separate TCNs with a pending return decision from ordinary inmates is a mandatory obligation that cannot in any case be waived by the returnee, even by agreement with the authorities.

Whilst detained, TCNs shall be allowed to establish contact "with legal representative, family members, … international and non-governmental organizations" and diplomatic authorities (2 to 4).

Article 17 RD pays particular regard to the detention of minors and families. As to the former group, "the best interest of the child shall be a primary consideration in the context of detention": minors shall "as far as possible" be provided with facilities that take in due consideration their age,

and they should get access to education (3 to 5). Families “shall be provided with separate accommodation guaranteeing adequate privacy” (2).

In exceptional situations, such as “an unforeseen heavy burden on the capacity of the detention facilities of a MS or on its administrative or judicial staff” (Article 18), Member States may derogate from certain aspects of the rules concerning speedy judicial review and detention conditions (Moraru, Geraldine, 2017, p. 8). Whenever a Member State resorts to such “exceptional measures, it shall (promptly) inform the Commission” (2).

3. THE MAIN CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU, through the preliminary ruling mechanism, has been asked to interpret the meaning of the provisions of the Return Directive at issue. On the one hand, the CJEU has shed light on several procedural aspects of detention, posing limits and conditions to the application of detention measures of some Member States. At contrary, as it will be discussed *infra*, the Court is still to take a clear stance on some relevant matters, such as the “limbo situation” of non-removable migrants.

3.1 Detention only as a “last resort” tool

In *El Dridi* (Case C-61/11), one of the aspects that the CJEU has highlighted is the obligation to impose detention exclusively as a measure of last resort. As stated in the judgment, the Return Directive obliges Member States to take all necessary measures in order to successfully enforce return decisions; however, the RD foresees “a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility”. Therefore, detention should be applied only in cases where it is absolutely necessary in order to enforce the return decision.

3.2 Maximum length of detention as a mandatory rule

In *Kadzoev* (case C-357/09 PPU) the CJEU affirmed that whenever the maximum period of detention (18 months) laid down in Article 15 (5) and (6) RD has been reached, regardless of whether there is a “reasonable prospect of removal” or not, “the person concerned must in any event be released immediately" (paras. 60 to 62). Moreover, “the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC” (para.70); the mere fact that a paperless TCN does not have means of subsistence or a registered domicile cannot in any case be the sole ground for detention: an in-depth assessment of his/her personal circumstances must be duly carried out.

3.3 Extension of detention and the "limbo" territory of non-removable migrants

In its judgment *Mahdi* (case C-146/14 PPU), the CJEU ruled on some relevant procedural aspects for the extension of detention of TCNs with a pending removal decision. Firstly, the CJEU ruled that, after the expiry of the maximum period allowed under Article 15 (5) (6 months), any prolongation of the detention must be issued in written form including reasons in fact and in law by a judicial authority (para. 44), in order to re-assess whether the substantive conditions of the specific case are still valid (para. 61). Secondly, the CJEU interpreted the concept of "lack of cooperation by the TCN" referred to in Article 15 (6). To this respect, there must be a direct causal relation between his/her conduct and the fact that the operation of removal has been prolonged (para. 85). The mere fact that the detainee did not succeed in obtaining the needed documents cannot automatically imply he/she did not cooperate (Moraru, Geraldine, 2017, p. 24).

Thus, what happens where after the expiry of the maximum detention period there is still no reasonable prospect of removal? This is the so-called situation of the "limbo" of non-removable migrants. The CJEU did not take a clear stance on the matter: it stated that "the purpose of the (Return) directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision" (para. 87); it suggested then that Member States may (but they may as well not) at any time grant "autonomous residence permits … to TCNs staying illegally on their territory" (para. 88). As it will be shown *infra*, a large percentage of return decisions is finally not enforced, which entails the creation of a class of non-citizens who will neither be expelled nor regularized (Peers, 2016; pp. 515-516).

4. ADMINISTRATIVE DETENTION OF THIRD-COUNTRY NATIONALS IN ITALY

The first detention centers for illegally staying TCNs awaiting to be expulsed were instituted with the Immigration Act "Turco Napolitano" (Law 40/1998) under the name of "Centers of Temporary Permanence"; they were subsequently renamed as "C.I.E." (Center for Identification and Expulsion) by the "Bossi Fini Act" (Law 189/2002), and at present they are referred to as "C.P.R" (Center for Permanence and Repatriation) pursuant to the "Minniti Orlando Act" (Law 46/2017) (Melting Pot Europa, 2017).

The main legislative act which enables the detention of TCNs in administrative centers, laying down the substantive requirements and conditions for such a fundamental deprivation of freedom, is

the "Aliens Act" of 1998 (*Testo Unico in Materia d'Immigrazione*, D.Lgs. 286/1998); this legislative act has been modified several times, recently by the "Security Decree bis" (*Decreto Sicurezza bis*, D.L. 53/2019).

On the 16th of December 2008 the European Return Directive (Dir. 115/2008/EC) was adopted, and subsequently all the Member States were expected to transpose said Directive into national laws within a two-year deadline. As of December 2010, Italy had failed to comply with the duty of transposition. Through the 2002's "Bossi-Fini Law" and the 2009's "Security Package" illegal migration was harshly criminalized, making the irregular entry and stay a crime (punished by a sanction ranging from 5.000 to 10.000 euros), extending the maximum period of administrative detention to 180 days and allowing for periods of imprisonment of up to 5 years to TCNs who had not complied with a return order. The turning point came with "an example of supranational legal mobilization: a network of civil society actors, judges, legal scholars and lawyers (that) used the CJEU to achieve a change within the national migration legal framework"; after the deadline for the transposition of the Return Directive had expired, in the span of 4 months an unprecedented number of preliminary rulings were requested by Italian Courts regarding the interpretation of the amended "Aliens Act", specifically of its Article 14 (5) which had enabled the prosecution of TCNs who had not complied with an expulsion order and the possibility to sentence them from 1 to 5 years in prison (Passalacqua, 2016, pp. 1, 4, 5, 6). In particular, in *El Dridi* the CJEU addressed two fundamental points:

a. The vertical direct effect of European Law (para. 44): the Italian Legislators had failed to transpose the Return Directive into national law, therefore at the moment in which the transposition deadline had expired, national judges had to disapply incompatible national provisions and apply the Return Directive.

b. The Return Directive's main objective is to ensure the removal of illegally staying third-country nationals; Member "States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness"(para. 55). Therefore, detaining for a crime exclusively related to the illegal presence in the territory is *per se* disproportionate, and goes against the *ratio* of the Directive, as the TCN concerned will finally end up staying in the territory of the MS (in prison).

On the same day of the *El Dridi* judgment, the Italian Court of Cassation acquitted three undocumented migrants prosecuted under Article 14 (5); shortly after, in June 2011, the Italian Legislator adopted a new law ("D.L. 89/2011 per il recepimento della Direttiva 2008/115/CE") in order to comply with the provisions of the Return Directive (Moraru, Geraldine. 2017, p. 13).

The updated "Aliens Act" sets out the procedures for the expulsion and detention of illegally staying TCNs; in compliance with the Return Directive, it provides a gradation of the measures to be taken in order to enforce the expulsion decision, from the less coercive (voluntary departure) one, to the most coercive (administrative detention). As to the former category, a period ranging from 7 to 30 days can be granted to the TCN to autonomously leave the country, only if (13 (5)) :

a. There are no grounds to believe that the person concerned will abscond, or
b. The application for the residency permit was not rejected because manifestly fraudulent, or
c. The expulsion was not ordered as consequence of a penal sanction, or
d. The person concerned had not disobeyed a previous voluntary departure order.

The risk of absconding must be determined on a case-by-case basis; a strong presumption is outlined whenever the person concerned falls under one or more of the following situations (13 (4-bis)): (i) lack of a passport or of other document, (ii) lack of a registered accommodation, (iii) record of concealed/forged identity.

In these cases, the expulsion "is executed by the "*Questore*" through coercive accompanying to the border" (13 (4)).

Lastly, Article 14 sets the conditions for detention: it can only be applied "whenever there is no possibility of executing the immediate expulsion of the TCN by means of follow-up to the border or direct push back, due to transitional situations that hinder the preparation of the repatriation or the execution of the removal, (thus) the commissioner disposes that the person concerned shall be detained in a C.P.R. for the time strictly necessary (to execute the expulsion decision)" (1). The present maximum length of detention is of 180 days (1 year in the case of asylum protection seekers) (5); "full respect of dignity" and necessary legal assistance must be in every case assured (2).

5. THE CPRs' STATE OF AFFAIRS AND EFFECTIVENESS

Since their opening in 1998, administrative detention centers have been fiercely criticized by non-governmental organizations, human rights organizations, legal scholars and institutional bodies (as for the latter, see for example: " Report on CPRs/CIEs, 2017" by the Commission for the Safeguard and Improvement of Human Rights of the Parliament). The main critical issues are: (i) the procedural standards for expulsion and detention, and (ii) the structural situation of the CPRs.

Regarding procedural standards, three main points raise concerns:

1) The excessive discretion of the Police Authorities, namely the "*Questore*", who has the power to assess the substantive legal requirements for detention and/or expulsion.

2) The role of the judicial authority involved (*"Giudice di Pace"*), who has the fundamental task of validating within 48 hours the decision issued by the "*Questore*" regarding the expulsion or the detention of the person concerned. In the Italian legal system, these judges are endowed with minor powers in penal matters and cannot issue prison sentences, but they have jurisdiction on illegal migrants' detention for the purposes of a return.

3) The data from 2014 to 2019 (Camera dei deputati, 2019; Commission of the Senate, 2017, p. 15) shows that an average of about 50% of the detained TCNs are eventually expelled. As for the other 50%, several factors determine the impossibility to remove them (eg. *non refoulement*, lack of cooperation of their State of origin, complete lack of links with their State of origin, impossibility to determine their identity, etc.). Therefore, once the detention period has expired, these TCNs are in the same situation in which they were before detention: they are free to go without any right to stay. Thus, it is likely that a person is uselessly deprived of his/her liberty for a significant leg of time.

The critical second issue is the structurally deficient situation of the detention centers: as observed by the National Ombudsman for the Rights of Detainees in a report of 2018, in these centers "the lack of facilities to perform any common activity, the shortage in furniture, the material unhygienic conditions of sanitary facilities", "the lack of possibility of relying on the collaboration of external actors such as voluntary associations and social cooperatives", "the shortage of medical and legal staff", "the non-separation between subjects with criminal records and those whose irregularity is only administrative or who are asylum seekers" determine the "risk of degrading conditions even in the exercise of the most elementary and fundamental rights" (Garante Nazionale dei Detenuti, 2018, pp. 4, 6, 7, 9, 12, 14). As displayed by this institutional report and by countless NGOs' complaints,

the “full respect of dignity” within Italian administrative detention centers enshrined in Article 14 (2) of the Italian Aliens Act at present is no more than a dead letter.

BIBLIOGRAPHY

Case law

Court of Justice, judgment of 30 November 2009, case C-375/09 PPU, *Kadzoev*

Court of Justice, judgment of 28 April 2011, case C-61/11 PPU, *El Dridi*

Court of Justice, judgment of 5 June 2014, case C-146/14 PPU, *Mahdi*

Court of Justice, judgment of 17 July 2014, case C-474/13, *Thi Ly Pham v. Stadt Schweinfurt*

Court of Justice, judgment of 15 March 2017, case C-528/15, *Al Chodor*

Academic publications (including specialised blog posts)

ASGI, *Una svolta possibile e necessaria. Dieci punti per una nuova politica del diritto sull'immigrazione*, in *Il Foro Italiano, Vol. 129, No. 9*, 2006.

Basilien Gainche Marie Laure, *The French suite. The effect of Al Chodor on the detention of asylum seekers for the purpose of a Dublin transfer*, in *Asylum Law DataBase*, 2017.
URL: https://www.asylumlawdatabase.eu/en/journal/french-suite-effect-al-chodor-detention-asylum-seekers-purpose-dublin-transfer

Commissione Straordinaria per la Tutela e Promozione dei Diritti Umani, *Rapporto sui CIE in Italia*, Senato della Repubblica, gennaio 2017.
URL:https://www.senato.it/application/xmanager/projects/leg17/file/Cie%20rapporto%20aggiornato%20(2%20gennaio%202017).pdf

Garante Nazionale dei Detenuti, *Report on the thematic visits to the Immigration Removal Centres in Italy*, February-March 2018.

Eisele Katharina, *Substitute Impact Assessment on the proposed Return Directive (recast)*, European Parliamentary Research Service (EPRS), Brussels, 2019.

Moraru Madalina, and Géraldine Renaudiere, *Articles 15 to 18 of the Return Directive 2008/115*, in *REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy Third Edition :*. Florence: EUI, 2017. REDIAL Research Report ; 2017/01.

Passalacqua Virginia, *El Dridi upside down: a case of legal mobilization for undocumented migrants' rights in Italy*, University of Antwerpen, 2016, p.215-225

Peers Steve, *EU Immigration and Asylum Law,* in *EU Justice and Home Affairs Law: Volume I*, Oxford Scholarship Online: August 2016.

Websites

Camera dei deputati, *I centri di permanenza per i rimpatri*, 2019.
URL: https://temi.camera.it/leg18/post/cpr.html

Melting Pot Europa, *Cosa sono i CIE?*
URL:https://www.meltingpot.org/Cosa-sono-i-C-I-E-Centri-di-Identificazione-ed-Espulsione.html#.XiovVchKjIW