

# Case note: the Achughbabian case. Impact of the return directive on national criminal legislation

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## SUMMARY

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## 1

### INTRODUCTION

The Achughbabian case<sup>1</sup> has given the Court of Justice of the EU (ECJ) yet another opportunity to interpret the so-called “return directive”<sup>2</sup>, after its decisions in the *Kadzoev* and *El Dridi*<sup>3</sup> cases. The directive – adopted, following the co-decision procedure (now ordinary legislative procedure), after long and complex negotiations between the European Parliament and the Council<sup>4</sup> – aims at establishing common standards and procedures for returning irregularly staying third-country nationals, with a view at establishing an effective return policy.

The case arose from a reference for a preliminary ruling issued by the Court of Appeals in Paris concerning the admissibility of national legislation which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence<sup>5</sup>. The reference called upon the ECJ to take into examination the relationship of the return directive with the domestic criminal legislations of EU member states, which had already been the object of the *El Dridi* case.

In the final judgment, the Court has restated the basic principle, expressly recognized in the *El Dridi* decision, according to which the return directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence (para. 28 of the judgment<sup>6</sup>). However, this initial statement has not prevented the Court from clarifying a number of issues, leading to conclusions which seem partly to clash with the said principle. The judgment may thus appear to be a missed opportunity to clarify the correct interpretation of the directive and its impact on national criminal law, since it lacks clarity and internal coherence. Yet, a second reading reveals that its contradictions are, for the most, merely ostensible.

1. Case ECJ, *Achughbabian*, C-329/11, 6 December 2011, not yet published. The reference for a preliminary ruling was subjected to an accelerated procedure in accordance with Art. 104a of the Rules of Procedure of the Court; the referring judge's request that the case be dealt with following the urgent preliminary ruling procedure provided for in Article 104b was rejected.

2. Directive 2008/115/CE 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, OJEU L 348/98, 24 December 2008.

3. Cases ECJ *Kadzoev*, C-357/09 PPU, 30 November 2009, OJ C 24, 30 January 2010, p. 17; *El Dridi*, C-61/11 PPU, 28 April 2011, not yet published.

4. On the negotiations which led to the adoption of the directive, see D. ACOSTA, *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly?* 11 *European Journal of Migration and Law*, 2009, p. 19 ff. For an in-depth analysis of the directive, see A. BALDACCINI, *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive*, 11 *European Journal of Migration and Law*, 2009, p. 1 ff.; M. SCHIEFFER, Directive 2008/115/EC, in *EU Immigration and Asylum Law – a commentary*. K. HAILBRONNEN (Ed.), 2009, Beck, München, pp. 1489 ff.

5. Reference for a preliminary ruling from the Cour d'Appel de Paris (France) lodged on 29 June 2011, *Alexandre Achughbabian v. Préfet du Val-de-Marne*.

6. Unless otherwise specified, citations to paragraphs are to the judgment in the *Achughbabian* case and citations to articles are to the return directive.

The judgment under examination has not solved the issue of the applicability of the *garde à vue* (police custody) for persons suspected of having committed the crime of irregular entry or stay in the national territory – nor could it be expected to do so, since the existing dispute on the interpretation and application of this rule is based mostly on the interpretation of domestic legislation. The Court has, however, given an answer to the question referred by the national judge, coming to a conclusion that will affect not only the French immigration legislation, but also the laws of all EU member States that provide for the criminalization of irregular immigrants merely based on their irregular presence on the national territory – such as, for instance, Italy and Germany<sup>7</sup>.

Moreover, some of the statements of the Court, although not directly relevant to its conclusions, appear to be very significant for the interpretation of the Italian legislation on immigration. Indeed, as will be shown below, the Court has taken this opportunity to clarify the meaning of Article 2(2)(b) of the directive, expressly rejecting the interpretation that the Italian Government adopted first in 2009 (at the time of the introduction of the crime of irregular entry and stay – Art. 10 *bis* of the immigration law<sup>8</sup>) and again in 2011 (when it “implemented” the return directive<sup>9</sup>). The judgment therefore seems to have potentially very broad consequences on the Italian immigration law.

## 2

### THE ISSUES AT STAKE

Before moving to examine the ECJ’s judgment, it seems necessary to recall the main issues which still appeared problematic even after the two previous decisions on the return directive.

One first, fundamental question concerns the objectives pursued through the directive. This issue is not, as it may seem, merely theoretical: 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<sup>10</sup>. 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, it had been 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<sup>11</sup>. However, this theory (which was, and in part still is, prevalent in Italy) seems not to be fully supported by the text of the directive: indeed, even in its preamble (recital 2) respect for fundamental rights is considered as a subordinate objective – or even an obstacle – in the achievement of the final purpose of the directive – the immigrant’s expulsion. Thus, while the directive’s sole objective and purpose seems to be the establishment of an effective return policy (see in particular recital 20), the common procedures it sets are limited by the need to ensure respect for the immigrants fundamental rights and dignity<sup>12</sup>. Nevertheless, the Court had not explicitly solved this issue in its judgment in the *El Dridi* case, although the question had been framed in terms of fundamental rights; indeed, the ECJ has appeared to be quite reluctant to deal with the role of fundamental rights in the return procedure.

A second problematic issue is that of identifying the exact moments in which the

7. See Art. 10 *bis* of the Italian immigration law (Testo Unico Immigrazione); § 95 of the German immigration law (Aufenthaltsgesetz).

8. So-called Testo Unico Immigrazione (Immigration Code), Legislative decree 286/1998, as amended in 2009, by law n. 94 [hereinafter TUImm].

9. See law decree 89/2011, as transposed into law 129/2011.

10. See ECJ, *El Dridi*, cit., para. 55.

11. See, e.g., F. VIGANÒ, L. MASERA, *Inottemperanza dello straniero all’ordine di allontanamento e “direttiva rimpatri” UE: scenari prossimi venturi per il giudice italiano*, in *Cass. pen.*, 2010, 1410; A. NATALE, *La direttiva 2008/115/CE e i reati previsti dall’art. 14, D. Lgs. n. 286/98*, in *Diritto Penale Contemporaneo*.

12. Numerous international organizations working in the field of human rights have strongly criticized the directive for its lack of attention to fundamental rights. See e.g. *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, at <http://www.unhcr.org/refworld/pdfid/4856322c.pdf>; Ten experts of the UN Human Rights Council, *UN press release*, 18 July 2008, at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/227C3A187C0BDB81C125748A0037A405?opendocument>; Save the Children, *Letter to the Members of the European Parliament*, 11 June 2008, available from [http://www.savethechildren.net/separated\\_children/publications/reports/](http://www.savethechildren.net/separated_children/publications/reports/).

return procedure begins and ends. With regard to its commencement, while the directive explicitly recognizes that the initial apprehension by law-enforcement authorities is regulated by national legislation (preamble, recital 17), it also provides that States “shall issue a return decision to any third-country national staying illegally on their territory” (Art. 6). In its judgment in the *El Dridi* case, the Court had seemed to suggest that national criminal legislation applying *before* the commencement of the return procedure (i.e., before issuance of a return decision) would not comply with the directive<sup>13</sup>; however, the issue had not been explicitly dealt with<sup>14</sup>. On the other end, the question of the end of the return procedure had also remained unresolved, even after the *Kadzoev*<sup>15</sup> decision. The issue is particularly problematic whenever the procedure fails to ensure expulsion of the immigrant: the question is whether States are allowed to criminalize those immigrants they were unable to expel, and if so, under what circumstances. The present judgment, while not particularly clear on this point, seems to suggest one possible solution to this matter.

A third problematic issue was that regarding the scope of application of Art. 2(2) (b) of the directive, which allows States to exclude from the scope of application of the directive 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. Indeed, the Italian government had adopted a questionable interpretation of this provision when implementing the directive. The decision in the *Achughbabian* case has finally clarified this issue: the Court’s interpretation leaves no doubts as to the correct scope of application of the provision, and national legislation will, again, need to be amended in order to ensure real (not merely formal) compliance with the directive.

### 3

#### THE REFERENCE FOR A PRELIMINARY RULING

The case under consideration arises from a conflict among the French judges on the interpretation and consequences of the ECJ’s decision in the *El Dridi* case. Indeed, while the Italian judges had questioned the compatibility of the national expulsion procedure with the return directive as soon as the deadline to transpose the latter had expired, the French magistrates have only fully realized the consequences of its adoption after the Court’s judgment. In the *El Dridi* judgment, the Court had clarified that criminal provisions providing for a custodial sentence for irregular immigrants merely based on their non-compliance with a return decision are not compatible with the system designed by the directive, since they delay the enforcement of such decision. The French judges, however, split on the applicability of the same principle to criminal provisions providing for the detention of irregular immigrants *before* issuance of a return decision – such as, in particular, Art. L. 621-1 of the French immigration law (CESEDA), which criminalizes irregular entry and presence *per se*, providing for a custodial sentence<sup>16</sup>. The issue arose, in particular, in a number of cases in which the liberty and custody judges (*juges des libertés et de la détention*) were requested to confirm the validity and to extend

13. See R. RAFFAELLI, *Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case*, in *Eur. J. Migration and Law*, 2011, 467 ss.

14. Indeed, the French Ministry for Justice had issued an administrative decision in which it had explained that Art. 15 and 16 of the directive were inapplicable to the crime of irregular stay set out by Art. L. 621-1 CESEDA, since the latter applies regardless of issuance of a return decision. See *Circulaire du 12 mai 2011 relative à la portée de l’arrêt de la Cour de justice européenne (CJUE) du 28 avril 2011 portant sur l’interprétation des articles 15 et 16 de la directive 2008/115/CE, dite « directive retour »*, in [http://www.gisti.org/IMG/pdf/circ\\_2011-05-12.pdf](http://www.gisti.org/IMG/pdf/circ_2011-05-12.pdf), p. 4.

15. Mr. Kadzoev could not be expelled since his only identifying documents had been issued by the Chechen Republic of Ichkeria, which the Russian Federation did not recognize as validly issued and as proving his Russian nationality.

16. Art. L. 621-1, *Code de l’entrée et du séjour des étrangers et du droit d’asile* (c.d. CESEDA), provides that « L’étranger qui a pénétré ou séjourné en France sans se conformer aux dispositions des articles L. 211-1 et L. 311-1 ou qui s’est maintenu en France au-delà de la durée autorisée par son visa sera puni d’un emprisonnement d’un an et d’une amende de 3 750 Euros. La juridiction pourra, en outre, interdire à l’étranger condamné, pendant une durée qui ne peut excéder trois ans, de pénétrer ou de séjourner en France. L’interdiction du territoire emporte de plein droit reconduite du condamné à la frontière, le cas échéant à l’expiration de la peine d’emprisonnement ».

administrative detention beyond 48 hours; in such cases, the question arose whether irregular immigrants could be subjected to police custody (*garde à vue*). Indeed, such a custodial measure may only be applied to persons who are reasonably suspected of committing or attempting to commit an offence punishable by imprisonment (Art. 62-2, code of criminal procedure); the applicability of such a punishment in the course of the return procedure, however, seemed to have been ruled out by the *El Dridi* judgment, at least once a return order has been adopted. Thus, a number of French judges refused to confirm the validity of the *garde à vue* and to extend it, arguing that the offence on which it was based was no longer punishable by imprisonment, since detention would have delayed the return procedure and therefore clashed with the objectives of the directive<sup>17</sup>. Other judges, however, had followed the interpretation which had been adopted by the Ministry for Justice, deeming that the criminalization of irregular entry and stay was not incompatible with the return directive since Art. L. 621-1 CESEDA applied regardless of the adoption of a return decision, and thus even before the commencement of a return procedure subjected to the directive<sup>18</sup>. According to this latter interpretation – which was supported, during the trial at the ECJ, by the French, German and Estonian governments – the return directive would not prevent the imposition of a term of imprisonment to irregular immigrants before their removal; consequently, member States would be allowed to delay the application of the return directive merely by postponing the adoption of a return decision.

The *Achughbabian* case arose in such a situation; the Court of Appeals in Paris had been requested to confirm a decision extending police custody but was unsure whether such a measure was allowed under the directive. The Court therefore referred the case to the ECJ, asking the following question:

Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L. 621-1 of [Ceseda], which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in national territory?

## 4

### THE JUDGMENT OF THE ECJ IN THE ACHUGHBABIAN CASE

The judgment under consideration begins by explicitly stating that the return directive does not preclude national legislation that criminalizes irregular stay and provides for a term of imprisonment for such an offence (para. 32), nor detention of third-country nationals with a view to determining whether or not their stay is lawful (para. 29). Such clear statements seem to crush the hopes of those who expected the Court to stand up for the fundamental rights and freedoms of irregular immigrants; however, the conclusions of the judgment are much more nuanced than this.

Firstly, the Court has clarified the chronological order in which the different stages of the return procedure must take place, thus addressing the question of its commencement. According to the Luxembourg judges, while recital 17 of the Preamble allows national authorities to apprehend third-country nationals in order to identify them and to establish whether their stay is regular, their arrest may only last for a brief, though reasonable, period of time, during which the competent authorities are required to act with diligence. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the directive and without prejudice to the exceptions laid down by the latter, adopt a return decision (para. 31). The Court has thus explicitly rejected the argument according to which States would be able to delay the application of the return directive by postponing the adoption of the return decision to *after* the

17. See, e.g., Cour d'Appel de Douai, *Ordonnance*, 6 May 2011; Cour d'Appel de Toulouse, *Ordonnance*, 9 May 2011; Cour d'Appel de Nîmes, *Ordonnance*, 6 May 2011, available at <http://www.actuel-avocat.fr/droit-justice-cabinet/index.html>.

18. See Cour d'Appel d'Aix en Provence, *Ordonnance*, 16 May 2011; Cour d'Appel de Paris, *Ordonnance*, 7 May 2011, available at <http://www.actuel-avocat.fr/droit-justice-cabinet/index.html>. Also see the *Circulaire* of the Ministry for Justice, *supra*.

irregular immigrant has served a custodial sentence (para. 44 and 45). The ECJ's position on this point is extremely clear: the obligation – imposed on the Member States by Art. 8 – to carry out the removal must be fulfilled as soon as possible (para. 45).

A comparison between the reasons on which the Court grounded its decision and those that had been put forward by the Advocate General seems particularly interesting on this point, since it underlines the reluctance of the Court to deal with the issue of the role of fundamental rights in the return directive. The Advocate General had argued, on the one hand, that the directive does not leave any discretion to the Member States as to whether, and at what time, to adopt a return decision, and, on the other hand, that “[to] the obligation to take a return decision there corresponds a correlative right of a third-country national illegally staying in the territory of a Member State to such conduct by the State. It follows that Directive 2008/115 recognises every third-country national illegally staying in the territory of a Member State as having the right to expect that the Member State concerned will take a return decision whereby the return procedure is initiated, with the aim of bringing the illegal stay to an end and in the context of which the individual liberty of the person concerned can be limited only in order to prepare his return and/or to carry out his removal on condition that other sufficient but less coercive measures cannot be effectively applied”<sup>19</sup>. On the contrary, the Court has decided not to follow this reasoning – which would have implied an express recognition of the role of the immigrants’ right to liberty in the context of the directive – and has focused on the duties of the member States towards the Union. The treatment of irregular immigrants is therefore not considered as an issue of fundamental rights, but as one of effectiveness of the return directive. The Court’s reasoning, however, appears to be legally better founded, given the basis and the text of the directive, as well as politically less sensitive, given the reluctance of States to implement and give full effect to the directive<sup>20</sup>. Yet, this does not necessarily mean that the consequences of the ECJ’s judgment are necessarily less far-reaching than if it had followed the opposite approach.

Indeed, while the Court has expressly declared that criminal provisions punishing irregular immigrants are not incompatible with the directive, it has subjected them to a number of limitations and conditions, with the effect of severely limiting their possible scope of application. Thus, such criminal provisions may be applied neither *before* (para. 44 f.) nor *during* (*El Dridi* judgment) 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 him in order to identify him, acting with due diligence; if his stay appears to be irregular, they shall issue a return decision, thus opening the return procedure. Moreover, while the *El Dridi* judgment had made reference exclusively to criminal provisions providing for a custodial sentence to be applied in the course of the return procedure (which interrupted the said procedure), the judgment under consideration is far broader. Indeed, the Court has expressly taken into consideration the interpretation of Art. 2(2)(b): this rule 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. According to the ECJ, Art. 2(2)(b) “clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying” (para. 41). Thus, States may not circumvent the scope of application of the directive by criminalizing irregular immigration – or non-compliance with return orders – and providing for non-custodial sentences (in accordance with the conclusions of the *El Dridi* decision) merely in order

19. See the View of the Advocate General, Jan Mazak, delivered on 26 October 2011, para. 28.

20. On 4 May 2011, the Commission expressed its concerns at the low level of implementation of the directive: see *Communication on migration*, COM(2011) 248, available at [http://ec.europa.eu/commission\\_2010-2014/malmstrom/archive/1\\_EN\\_ACT\\_part1\\_v11.pdf](http://ec.europa.eu/commission_2010-2014/malmstrom/archive/1_EN_ACT_part1_v11.pdf).

to allow for “criminal” expulsion (not subjected to the procedure set out in the directive): expulsions are only to be considered “criminal” if they are a consequence of a crime unrelated to irregular immigration. Thus, the Court has clarified that criminal sanctions may only be adopted once the return procedure is exhausted, if the adoption of coercive measures did not enable the removal of the immigrant to take place (para. 46), and only in so far as there is no “justified ground for non-return” (para. 48). Finally, the imposition of such sanctions “is subject to full compliance with fundamental rights,” and in particular with the rights recognized by the ECHR (para. 49).

## 5 CONCLUSIONS

Although the judgment in the *Achughbabian* case has solved some of the issues that had remained open after the *El Dridi* case, it has not clarified the problem at the basis of the reference for a preliminary ruling. Indeed, the French Ministry for Justice has issued a note interpreting the effects of the Court’s decision; according to such an interpretation, while third-country nationals may not be prosecuted for the mere fact of their irregular stay (based on Art. L. 621-1 CESEDA), they may be apprehended and held in police custody for as long as necessary to identify them as irregularly staying on the national territory. What seems particularly interesting is that the *circulaire* deems it possible to continue to apply the *garde à vue* to persons who are suspected of committing the crime of irregular stay, although they may not be prosecuted for the said crime<sup>21</sup>. While some national judges have adopted this interpretation, extending the validity of the *garde à vue* based on the need to identify the immigrant as irregularly staying on the French territory<sup>22</sup>, other judges have (more persuasively) deemed that this form of police custody may no longer be applied to irregular immigrants<sup>23</sup>. Indeed, while the ECJ has not ruled out this possibility, it has however recalled that, according to the preamble of the directive (recital 17), initial apprehension is regulated by national legislation – and the French code of criminal procedure limits application of the *garde à vue* to persons who are suspected of committing an offence punishable by criminal detention. However, this national debate no longer concerns the interpretation and application of the directive, but merely that of national legislation – an issue which the Court of Justice could not be expected to resolve<sup>24</sup>.

The judgment in the *Achughbabian* case seems to have potentially very far-reaching consequences. Firstly, it is clear that States are not allowed to delay the commencement of the return procedure: as soon as a person is identified as an irregular immigrant, a return decision must be issued. Thus, irregularly-staying third-country nationals must first of all be subjected to the procedure set out in the return directive, unless they have also committed crimes unrelated to their immigration status.

Secondly, the interpretation of Art. 2(2)(b) which had been adopted by the Italian government is wrong and deprives the directive of its purpose and binding effect. “Return as a criminal law sanction” only includes return and expulsion which is inflicted as a criminal sanction for the violation of criminal provisions *different from those relating to irregular immigration*. This very simple remark implies that the Italian system of criminal expulsions is not in line with the directive, and will need – again – to be amended. National legislation provides for expulsion as a criminal measure (i.e., not subjected to

21. See Ministère de la Justice et des Libertés, Direction des affaires criminelles et des grâces, direction des affaires civiles et du sceau, *Portée de l’arrêt Achughbabian de la CJUE du 6 décembre 2011 portant sur la compatibilité de l’article L.621-1 du CESEDA avec la directive 2008/115/CE dite directive retour*, p. 3, available at <http://combatsdroitshomme.blog.lemonde.fr/files/2011/12/chancellerie.pdf>

22. See e.g. Court d’Appel de Douai, 8 December 2011 ; Cour d’Appel de Paris, 8 December 2011. Both cited and available in S. Slama, *Mêmes causes, même cacophonie judiciaire (les suites d’Achughbabian – CJUE 6 décembre 2011)*, in <http://combatsdroitshomme.blog.lemonde.fr/2011/12/08/memes-causes-meme-cacophonie-judiciaire-les-suites-dachughbabian-cjue-6-decembre-2011/>.

23. See e.g. Cour d’Appel d’Aix-en-Provence, 8 December 2011 ; Court d’Appel de Nîmes, 14 December 2011, also available *ibidem*.

24. N. CLÉMENT, *Gloubi-bulga judiciaire, made in France*, in <http://combatsdroitshomme.blog.lemonde.fr/2012/01/08/gloubi-boulga-judiciaire-made-in-france-a-propos-de-linterpretation-dachughbabian>

the procedures set out in the European directive) both for immigrants who are convicted of the crime of irregular entry or stay (Art. 10 *bis* TUIImm) and for those who are found guilty of non-compliance with a return decision (Art. 14, para. 5 *ter* and *quater* TUIImm, as amended in 2011 to bring them in line with the return directive). Indeed, both crimes are punishable by a criminal fine, which the competent judge (the justice of the peace) may however substitute with criminal expulsion, in accordance with Art. 16 TUIImm. This convoluted mechanism had been developed precisely with a view of circumventing the return directive by criminalizing certain conducts related to irregular immigration and thus classifying as “criminal” the sanction of expulsion attaching to their commission<sup>25</sup>. In both cases, expulsion follows from a conduct whose criminalization derives exclusively from the immigrants irregular status – which is criminalized *per se* (art. 10 *bis*), or because the immigrant did not comply with the decision ordering his voluntary departure (art. 14). The compatibility of the former provision, as it is now, with the directive is expressly excluded by the *Achughbabian* judgment; but even the latter provision is clearly not in line with the directive, since it punishes violation of an order issued in the course of the return procedure, providing for a penalty which the directive does not foresee and which interrupts the return procedure. However, in the judgment under consideration the Court has clarified that, once the return procedure has begun, it cannot be interrupted through criminal, or pseudo-criminal, sanctions, unless they are based on the commission of an offence unrelated to irregular immigration. This conclusion emerges clearly from the Court’s decision, although it could have been even clearer if the judges had followed the reasoning suggested by the AG and expressly recognized that the directive grants irregular immigrants rights corresponding to the member States’ obligations. However, the same conclusion is also a logic consequence of the principle of effectiveness: if the directive sets out “common standards and procedures” (Art. 1), member States are clearly not allowed to circumvent such rules by criminalizing immigrants who do not comply with one of the stages of the procedure, thus subverting its structure.

Thirdly, the scope of application of criminal sanctions allowed by the directive remains partly unclear. On the one hand, States are surely allowed to criminalize those third-country nationals who, after having been subjected to the return procedure and effectively expelled, re-enter the national territory, in violation of an entry ban (as foreseen by Art. 11) – thus, for instance, the compatibility with the directive of Art. 13, para. 13 and 13 *bis*, of the Italian TUIImm, which criminalizes violations of re-entry bans, cannot be questioned<sup>26</sup>. On the other hand, it is unclear to what extent and under which conditions States may apply criminal sanctions to third-country nationals who could not be expelled. According to the Court, such sanctions may not be applied before the maximum duration of pre-return detention expires, nor if there is a justified ground for non-return (para. 50). The term of “maximum duration of detention”, to which the Court explicitly refers, seems to be the period set out in national legislations adopted in accordance with Art. 15 of the Directive – thus, such period may be considerably shorter than the maximum set out in the directive. The judgment therefore seems to suggest that the return procedure comes to a conclusion either when the third-country national is effectively returned (be it voluntarily or forcibly), or when he may no longer lawfully be detained in the country where he was apprehended. Moreover, while criminal sanctions may be applied to this category of third-country nationals, the Court has further specified that imprisonment is only permitted when there is *no justified ground for non-return*.

This concept is quite vague, since the Court has not defined it. However, it seems

25. As explicitly stated by the former Minister for Home Affairs, On. Roberto Maroni, in a speech held in 2008. The transcript is available at [http://www.camera.it/470?stenog=/\\_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202](http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202).

26. Also see F. VIGANÒ, L. MASERA, *Addio art. 14*, para. 6, in *Diritto Penale Contemporaneo*.

reasonable to conclude that the ECJ meant it to refer not only to those third-country nationals whose expulsion is prohibited by international law (e.g., in accordance with the principle of *non refoulement*), but also to those whose return has proven impossible for reasons outside their control. This broader category includes not only persons whose state of origin does not allow their return (the example of Mr. Kadzoev is enlightening), but also persons whose repatriation is impossible because the member State lacks the means to expel them or because their state of citizenship refuses to issue their documents and thus allow their re-entry. Indeed, any other conclusion would lead to the unacceptable consequence of allowing a member State to punish irregular immigrants after it has proven unable to expel them, criminalizing them because they have not complied with an order that the State was unable to enforce<sup>27</sup>. Thus, penal sanctions may only be applied to those third-country nationals whose expulsion is prevented by their own conduct – e.g., those whose identification proved impossible and who refused to identify themselves.

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27. See A. DI MARTINO, R. RAFFAELLI, cit., p. 30. Also see S. SLAMA, *Suite de l'arrêt Achughbadian: le Garde des Sceaux persiste en se reniant*, in <http://combatsdroitshomme.blog.lemonde.fr/2011/12/13/suite-de-larret-achughbadian-le-garde-des-sceaux-persiste-en-se-reniant/>.