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## RETURN DIRECTIVE DIALOGUE – REDIAL

### ***REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy First Edition: Articles 7 to 11 of the Return Directive 2008/115***

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**Supervision by Philippe De Bruycker**

REDIAL Research Report 2016/02



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**REDIAL**  
**REturn Directive DIALogue**

**Research Report**

**REDIAL RR 2016/02**

**REDIAL Electronic Journal on  
Judicial Interaction and the EU Return Policy  
First Edition: Articles 7 to 11 of the Return Directive 2008/115**

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## **REDIAL – REturn Directive DIALogue**

The project REDIAL (**REturn Directive DIALogue**) is co-funded by the European Union within the framework of the European Return Fund. REDIAL is implemented by the **Migration Policy Centre** (RSCAS, EUI) in partnership with the **Odysseus Network** (ULB – Université Libre de Bruxelles) and the **Centre for Judicial Cooperation** (EUI).

Its main purpose is to enhance the effective implementation of the Return Directive (2008/115/EC) through judicial cooperation among courts from all EU Member States. The starting premise of the Project is that judicial cooperation contributes not only to cross-fertilization of relevant national and European case-law, but also to an increase in legitimacy of judicial review of return decisions. In order to achieve its objective, the REDIAL team of experts will analyse and compare the judicial implementation of the EU Return Directive in the Member States. REDIAL is expected to become an important instrument to assist national judges and legal practitioners in the application of the Return Directive.

Results of the above activities are available for public consultation through the website of the project: <http://euredial.eu>.

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## I. Presentation

The present Electronic Journal is one of the key products of the Project entitled ‘Return Directive Dialogue’ (REDIAL). The overall aim of the [REDIAL Project](#) is to facilitate horizontal judicial dialogue among judges of the Member States, who are involved in return procedures.<sup>1</sup> The starting premise of the Project is that informed horizontal and vertical judicial interactions lead to an effective implementation of the Return Directive, while ensuring at the same time respect of the European fundamental rights as consecrated by the EU Charter of Fundamental Rights.

The **REDIAL Project** develops a toolkit including: a [Database](#) comprising national, EU and ECHR landmark judgments on the interpretation and application of the Return Directive that offers an efficient tool to search in all the cases that have been collected (not least than 341 at this stage); [national reports](#) analyzing the added value of national judgments on the Return Directive; [European synthesis reports](#), one for each of the Chapters II-IV of the Return Directive offering an analysis of the legal provisions of the Return Directive, CJEU relevant judgments and case law of Member States; an [annotated Directive](#) including for each provision the references to the case law of the Court of Justice.

From a methodological point of view, the project relies upon close collaboration between judges and academics from the EU Member States. At the national level, judges are in charge of the selection of landmark judgments on the Return Directive, while academics are responsible for synthesizing their added value in a national report. The jurisprudence is collected in three stages following the structure of the Return Directive. The **first package** covers the provisions of *Chapter II* of the Return Directive (Articles 7 to 11) dealing successively with voluntary departure, removal and postponement of removal, return and removal of unaccompanied minors, and entry bans. The **second package** will focus on *Chapter III* of the Return Directive (Articles 12-14) about procedural safeguards, while the **third package** will address *Chapter IV* (Article 15 -18) on detention for the purpose of removal.

The project is developed by the [Migration Policy Centre \(MPC\)](#) and the [Centre for Judicial Cooperation \(CJC\)](#) of the European University Institute (EUI) together with the [Academic Network for Legal Studies on Immigration and Asylum in Europe known as the ‘Odysseus Network’](#) coordinated by the Université Libre de Bruxelles. The MPC is in charge of its scientific coordination, while the Odysseus Network provides national expertise and its network of contacts throughout the EU, including with judges.

The present issue of the REDIAL Journal is the first one of the three that will be published in the course of 2016 dealing successively with Chapter II, III and IV of the Return Directive. It covers Chapter II related to the termination of illegal stay.

The Electronic Journal is structured in three main parts. The first part starts by offering a concise summary of the relevant preliminary rulings delivered by the Court of Justice of the European Union (CJEU). The follow-up national judgments that are rarely available are provided because they show how the preliminary ruling is implemented at the national level and help to evaluate the impact of the preliminary reference on national jurisprudence. The second part continues with a comparative presentation of landmark national judgments originating from 19 Member States. This section illustrates the essential role of national courts for the clarification of the scope and meaning of Articles 7-11 of the Return Directive. The third part is devoted to an analysis of the various modes of judicial interactions that have developed between the European and national judges but also between national judges from different Member States in a kind of transnational judicial dialogue.

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<sup>1</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ L 348/98, 24.12.2008 (hereinafter Return Directive).

The REDIAL Journal should be of interest for national and European judges specialised in migration law, but also for national administrations in charge of return procedures, NGOs defending third country nationals, specialized lawyers and finally the European Commission and the Court of Justice in charge of controlling the implementation of the Return Directive that remains a key instrument of the immigration policy in a context where balancing the effectiveness of the Return Directive and the rights of third country nationals becomes more and more a daily challenge.

## II. Landmark European Case-Law Related to the Termination of Illegal Stay (Chapter II Of The Return Directive)

In the five years since its adoption, the Return Directive has been the subject of an increasing number of preliminary references addressed by national courts to the Court of Justice of the European Union (CJEU), mostly (but not only) as regards its provisions on the detention of irregular migrants. Lately, the CJEU has been asked to clarify other key concepts, such as those related to the termination of illegal stay: the mandatory nature of voluntary departure, when none of the exceptions provided in Article 7(3) and (4) apply (*Zaizoune*); the definition of the concept of ‘risk to public policy’ as a grounds for refusing voluntary departure (*Z.Zh. and O.*); the different types of removal measures within the remit of Article 8 (*El Dridi, Achughbabian, Sagor, Mbaye*), as well as the practical implications of administrative entry bans within the context of the return procedures (*Filev and Osmani* and *Skerdjan Celaj*).

- **C-38/14, *Zaizoune*, CJEU Judgment of 23 April 2015**

**National court requesting a preliminary ruling:** *Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco* (Spain, High Court of the Basque Country)

**Factual context:** proceedings brought against Mr *Zaizoune*, relating to his illegal stay on Spanish territory. Under national legislation, as interpreted by the Spanish Courts, illegally staying third-country nationals may be punished in Spain only by a fine, in the absence of any additional aggravating factors, instead of removal from national territory.

**Legal provision at issue:** Article 8(1) read in conjunction with Article 6(1) RD

**Questions addressed by the national court:** ‘In the light of the principles of sincere cooperation and the effectiveness of directives, must Articles 4(2), 4(3) and 6(1) of Directive 2008/115 be interpreted as meaning that they preclude legislation such as the national legislation at issue in the main proceedings and the case-law which interprets it, pursuant to which the illegal stay of a foreign national [on the national territory] may be punishable just by a financial penalty, which, moreover, may not be imposed concurrently with the penalty of removal?’

**Conclusion:** Once it has been established that a stay is illegal, the national authorities must, pursuant to Article 6(1) – without prejudice to the exceptions laid down by Article 6(2) to (5) thereof – adopt a return decision. In cases where the third-country national has not complied with the obligation to return, Article 8(1) of Directive 2008/115 requires Member States, in order to ensure the effectiveness of return procedures, to take all measures necessary to carry out the removal of the person concerned. This has to be fulfilled as quickly as possible.

It follows that national legislation such as that at issue in the main proceedings does not meet the clear requirements of Articles 6(1) and 8(1) of Directive 2008/115.

Member States’ right to derogate, pursuant to Article 4(2) and (3) of Directive 2008/115, from the standards and procedures set out by that directive, cannot affect that conclusion.

**CJEU Judgment:** [Fourth Chamber, 23 April 2015](#)

**REDIAL Blog:** [GORTAZAR ROTAECHE C. J., FERRÉ TRAD, N., A fine or removal? The impact of the ECJ's Zaizoune Judgment on the Spanish Doctrine, 19 June 2015](#)

**Follow-up national decision:** On 8 July 2015, the High Court of the Basque Country interpreted the Court's finding in Zaizoune as not preventing Spanish authorities from relying on Article 6 paragraphs 2 to 5, with a view to granting the third country-national permission or a right to stay in specific circumstances. In any other cases, a return/expulsion decision must be issued, without the possibility of replacing it with an economic sanction; at least in the absence of aggravating factors. The High Court thus rejected the appeal lodged by the administrative authority of Gipuzkoa ([Tribunal Superior de Justicia, Sala de lo Contencioso, 195/2013, STSJ PV 2102/2015](#))

- **C-554/13, Zh. and O, CJEU Judgment of 11 June 2015**

**National court requesting a preliminary ruling:** *Raad Van State* (Netherlands, Council of State)

**Factual context:** Mr. Zh, third-country national, was given a custodial sentence of two months for being in possession of a false travel document on the basis of the Dutch Criminal Code. After a month and half he was issued a removal order and placed immediately in pre-removal detention. The complaints introduced by Zh. were rejected by both the administration and first instance court on the basis that the offence committed justified the denial of a voluntary departure period.

Mr. O, staying in the Netherlands after the expiration of his short stay visa, was arrested and detained on suspicion of domestic abuse. According to Dutch law, any suspicion confirmed by the chief of police or any conviction in connection with an act punishable as a criminal offence in national law is considered to be a risk to public policy.

Both Zh and O were deported after lodging appeals before the Council of State, and thus before the preliminary references was addressed to the CJEU.

**Legal provision at issue:** Article 7(4) RD

**Questions addressed by the national court:** the Council of State wanted to know how to interpret the concept of 'risk to public policy' provided by Article 7(4) RD. In particular, whether 'public policy' should have the same meaning as the 'public policy' to which the EU Citizens' and Family Reunification Directives refer, or whether it should be interpreted more broadly, "with the consequence that the mere suspicion that a third-country national has committed an act punishable as a criminal offence under national law may be sufficient to establish that that third-country national poses a 'risk to public policy'". (para. 34)

**Conclusion:** Article 7(4) RD must be interpreted as precluding a national practice whereby a third-country national, who is staying illegally within the territory of a Member State, is deemed to pose a risk to public policy within the meaning of that provision on the sole grounds that that national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law. (para. 50) '[...] other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision. Any matter which relates to the reliability of the suspicion that the third-country national concerned committed the alleged criminal offence, as the case may be, is also relevant to that assessment.' The assessment of the concept of 'risk to public policy' within the meaning of Article 7(4) of RD must be made on a case-by-case basis, and presupposes 'the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.' (para. 60)

The CJEU did not establish whether the TCNs did or did not pose a threat to public policy, since the

determination of whether they posed a risk to the public policy of the Member States fell on the referring court. However the Court highlighted certain facts which are of particular relevance for the determination of risk in these cases. Namely, the fact that Mr. Zh. was in the process of leaving the Kingdom of the Netherlands when he was arrested. While, in the case of Mr O. the fact that he did not possess any documentation substantiating the accusation of abuse made against him. ‘This fact can give indications on the credibility of the suspicion that he committed the alleged act.’ (para. 64)

**CJEU Judgment:** [Third Chamber, 11 June 2015](#)

**REDIAL Blog:** [G. CORNELISSE, Zh. and O.: EU law and the ‘Constitutionalisation’ of the Exercise of Migration Control, 17 July 2015](#)

**Follow-up national decision:** The Council of State started its judgment by reiterating the requirements established by the CJEU. These are that the individual examination and principle of proportionality requires Member State not to rely on a general practice or a presumption to establish that there is a risk to public policy without taking into proper account the personal conduct of the third-country national and the danger that his or her conduct poses to public order. It pointed out that the Secretary of State must include all factual and legal elements, concerning the alien in relation to a past criminal offense, including the nature and seriousness of the offense, including his or her conduct since the commission thereof. **The aforementioned factual and legal elements should not necessarily be limited to the data reviewed by the criminal courts. The removal order should thus substantiate all factual and legal grounds that led to the conclusion that there was a threat to public policy.**

The Council of States noted that the TCNs were not heard prior to the imposition of the return decision. An obligation, which was incumbent on the administrative body on the basis of the judgment of the Court in C-349/07, *Sopropé*, and the EU law general principle of defence. However, the removal order was not automatically annulled based on the violation of the right to be heard. According to the judgment of the Court in C-383/13 PPU, *M. G. and N. R.*, the national court may order the annulment of removal, only if it considers, with regard to all the factual and legal circumstances of the case, that this violation has actually deprived the TCN of the opportunity to defend himself in such a way that the administrative decision could have had a different outcome. The Council held that the State had sufficiently convincing reasons that the alien is a real and present danger to public order due to the nature (drug related offence), the length (eight years) of the offence and the postponement of the third country-national’s departure for unsustainable reasons. Additionally, the appellants had no social or family ties with the Netherlands. This led to the conclusion that the appellants had not been deprived of the principle of defence in order to defend themselves in such a way that the decision could have had a different outcome. The Council also rejected the second grounds of appeal of Mr O, namely that the travel ban constitutes an interference with his family life under Article 8 ECHR. It did so as the appellant did not substantiate his claim that there was a family life with his alleged wife. (the full judgment is available at [Raad Van State, 201407197/1/V3. 20 November 2015](#) NL only)

- **C-61/11, *El Dridi*, CJEU Judgment of 28 April 2011**

**National court requesting a preliminary ruling:** *Corte d’Appello di Trento* (Italy, Court of Appeal of Trento)

**Factual context:** proceedings brought against Mr. *El Dridi*, who was sentenced to one year’s imprisonment for having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Chief of Police (*Questore*).

**Legal provision at issue:** Article 15 and 16 read in conjunction with Article 8(1) and (4) RD

**Questions addressed by the national court:** in the light of the principle of sincere cooperation and

proportionality, do Articles 15 and 16 of Directive 2008/115 preclude: the possibility that criminal penalties (here a prison sentence of up to 4 years) may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?

**Conclusion:** Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, on the sole grounds that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was given and the period granted in that order had expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects. Indeed, such a penalty, due *inter alia* to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that Directive.

**CJEU Judgment:** [First Chamber, 28 April 2011](#)

**Follow-up national decision:** Following this CJEU's finding, the Italian judge disregarded the national norm, which contradicted the Return Directive in the pending case. In appeal, the Court ruled against the conviction provided by former Article 14, 5-ter of the Consolidated Immigration Act as well as the execution of the expulsion order issued on the basis of the said provision. The Italian Supreme Court of Cassation cancelled the various pending lawsuits that were deemed to have an 'inexistent legal basis' – and therefore solved the uncertainties of interpretation that existed in Italy at that time. See *inter alia* (v. *inter alia*, Cass., I sess. crim., [sent. n. 22105/2011](#); Cass., IV sess. civ., [ord. n. 18481/2011](#)).

- **C-329/11, *Achughbabian*, CJEU Judgment of 6 December 2011**

**National court requesting a preliminary ruling:** *Cour d'Appel de Paris* (France, Court of Appeal of Paris)

**Factual context:** dispute between Mr *Achughbabian* and the Prefect of Val-de-Marne concerning Mr *Achughbabian*'s illegal stay on French territory. Being suspected of having committed and continuing to commit the offence set out in Article L. 621-1 of *Ceseda* (*i.e.* having entered or residing in France without complying with the provisions of Articles L. 211-1 and L. 311-1 and/or remaining in France beyond the period authorised by a previous visa) Mr *Achughbabian* was placed in police custody.

**Questions addressed by the national court:** Taking into account its scope, does Directive 2008/115/EC preclude national legislation, such as Article L.621-1 of the French Code on the entry and stay of foreign nationals and on the right to asylum, which provides for the imposition of a sentence of imprisonment on a third-country national on the sole grounds of his illegal entry or residence in national territory?

**Legal provision at issue:** Article 8 RD

**Conclusion:** As a principle, Directive 2008/115 does not preclude national legislation which classifies an illegal stay by a third-country national as an offence and provides for penal sanctions. These might include a term of imprisonment, to prevent such a stay. Nor does it forbid the detention of a third-country national in order to determine whether or not his or her stay is legal. Nevertheless, during the procedure provided for by the Directive, the imposition and enforcement of a sentence of imprisonment appears more problematic as it is likely to 'delay the removal' and infringe the requirements of effectiveness referred to, for example, in recital 4 of Directive 2008/115.

Criminal sentences 'do not contribute to the carrying through of the removal which that procedure is intended to achieve, namely, the physical transportation of the person concerned out of the Member State concerned. Such a sentence does not therefore constitute a 'measure' or a 'coercive measure'

within the meaning of Article 8 of Directive 2008/115.’ The Directive does not preclude as such criminal penalties for illegal stays, in so far as that legislation permits the imprisonment of a third-country national who, ‘though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention.’

This finding does not apply to imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified grounds for non-return.

**CJEU Judgment:** [Grand Chamber, 6 December 2011](#)

**Follow-up national decision:** While the CJEU’s decision was expected to bring out the general misinterpretation and reluctance of the French courts *vis-à-vis El Dridi*, it led rather to diverging interpretations from the judges with regard to the conformity of Article L.621-1 CESEDA with EU law. On 7 and 8 December 2011, the Court of Appeal of Paris issued two contradictory decisions, one confirming the regularity of the prison sentence in reference to the CJEU’s decision (CA Paris, B 11/04993); the other disregarding the French provision in favour of the Court’s case-law and ordering the immediate release of the foreigner based on his unlawful detention (CA Paris, B 11 04971).

See e.g. <http://combatsdroitshomme.blog.lemonde.fr/2011/12/08/memes-causes-meme-cacophonie-judiciaire-les-suites-dachughbhabian-cjue-6-decembre-2011/> (only in FR).

- **C-430/11, *Sagor*, CJEU Judgment of 6 December 2012**

**National court requesting a preliminary ruling:** *Tribunale di Rovigo* (Italy, Tribunal of Rovigo)

**Factual context:** proceedings brought against Mr *Sagor* concerning his illegal stay in Italy. In 2010, Mr *Sagor* was summoned before the Tribunale di Rovigo (District Court, Rovigo) for illegal entry or stay, as referred to in Italian legislation. That Court found that illegal stay had been duly proven. This offence is according to the Law punishable by a ‘fine of between EUR 5 000 and EUR 10 000’, which can be replaced by an order for expulsion or home detention.

**Legal provision at issue:** Article 8(1) and (4) RD

**Questions addressed by the national court:** in the light of the principles of sincere cooperation and effectiveness, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115 preclude the possibility that a third-country national who is considered by the Member State to be illegally staying there may be liable to a fine for which home detention is substituted by way of criminal law sanction, solely as a consequence of that person’s illegal entry and stay? What is the impact of Articles 2, 15 and 16 RD on the possibility for Member States to enact legislation which provides that a third-country national who is considered to be illegally staying there, may be liable to a fine for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction?

**Conclusion:** The Court had already had the occasion to state that common standards and procedures established by Directive 2008/115 would be undermined if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure. Such a step would risk delaying the removal. However, legislation, which provides for a criminal prosecution which can lead to a fine which may be substituted by an expulsion order, has markedly different effects from the above-mentioned legislation providing for a criminal prosecution. The possibility that that criminal

prosecution may lead to a fine was considered as not impeding the return procedure established by Directive 2008/115.

As for a fine for which a home detention order may be substituted, Directive 2008/115 precludes Member State legislation which allows illegal stays by third-country nationals to be penalised by means of a home detention order, unless there is a guarantee that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State becomes possible.

**CJEU Judgment:** [First Chamber, 6 December 2012](#)

**Follow-up national decision:** On the basis of that ruling, the Tribunal of Monza (17/12/12) found that, in the present criminal case, Art. 10-bis of Legislative Decree 286/1998 combined with Articles 53 and 55 of Legislative Decree 274/2000 did not comply with Directive 2008/115/EC, since the current sanctions system in Italy hinders, in practice, the return procedure and the effective return policy of irregular migrants. The Judge called, therefore, for the obligation to disregard domestic law in conflict with EU law, because the sole fact that they stayed illegally on the Italian territory could not be legally seen as a crime.

See further <http://www.altrodiritto.unifi.it/ricerche/migranti/genovese/cap2.htm#195> (IT only)

- **C-522/11, *Mbaye*, CJEU Judgment of 21 March 2013**

**National court requesting a preliminary ruling:** *Giudice di pace di Lecce* (Italy, Justice of the Peace of Lecce)

**Factual context:** proceedings brought against Mr *Mbaye* concerning his illegal stay in Italy. This case, among others, has been referred to the CJEU concerning the imprisonment of third-country nationals in return procedures for the crime of irregular entry or stay.

**Legal provision at issue:** Article 2(2)(b) and 8 RD

**Questions addressed by the national court:** Does the Directive 2008/115 preclude the application of the present legislation – Article 10bis of legislative Decree 286/1998 – punishing irregular entry and stay by immediate expulsion? Additionally, are penal sanctions for the irregular presence of a third-country national on the territory, admissible in the meaning of the Return Directive, regardless of a fully achieved return procedure established by the said directive?

**Conclusion:** The Directive 2008/115 does not preclude the legislation of a Member State, such as that at issue in the main proceedings, sanctioning the illegal residence of third-country nationals by a fine which can be replaced by expulsion. However, this replacement is only used when the applicant's situation corresponds to one of those referred to in Article 7, paragraph 4, of this Directive.

**CJEU Judgment:** [\(Third Chamber\) of 21 March 2013, FR](#) (and IT version)

**Follow-up national decision:** The Sagor jurisprudence is here confirmed by the CJEU and followed by Highest Italian Courts: the Return Directive does not preclude either the criminalization of irregular immigration, or the possibility of conducting criminal trials against the TCN, if these might lead to pecuniary penalties. This might be replaced by the punishment of 'immediate expulsion', provided that the act of expulsion remains within the limits of Art. 7, par. 4, Directive. On 19 April 2010, the referring Judge also asked the Constitutional Court whether Article 10bis of Legislative Decree 286/98 was compatible with the Italian Constitution (<http://www.personaedanno.it/aspetti-penali/g-d-p-lecce-19-aprile-2010-est-c-rochira-il-reato-di-clandestinita-in-odore-di-incostituzionalita-s-c> IT only).

The Constitutional Court confirmed that the provision concerned was not invalid and does not prevent Italian authorities from imposing criminal sentences on immigrants irregularly entering and/or staying in Italy (e.g. [Corte Costituzionale, judgment 250/2010, 05 July 2010](#))

- **C-297/12, *Filev & Osmani*, CJEU Judgment of 19 September 2013**

**National court requesting a preliminary ruling:** *Amtsgericht Laufen* (Germany)

**Factual context:** criminal proceedings brought against Mr *Filev* and *Osmani*, nationals, respectively, of the former Yugoslav Republic of Macedonia and of the Republic of Serbia, following their entry into Germany more than five years after their expulsion from that country, in breach of entry bans of unlimited duration which were coupled with the expulsion orders made against them.

**Legal provision at issue:** Article 11(2) RD

**Questions addressed by the national court:** In short, the referring court asked the CJEU whether criminal sanctions imposed for the breach of an unlimited entry ban are precluded by Article 11(2) of Directive 2008/115/EC, which requires that ‘the length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.’

**Conclusion:** First, Directive 2008/115/EC precludes a provision of national law, such as in the present case, which makes the limitation of the length of an entry ban subject to the making by the relevant third-country national of an application seeking to obtain the benefits of such a limit.

Second, Article 11(2) RD precludes the breach of an entry and a residence ban in the territory of a Member State, which was handed down more than five years before the date either of the re-entry into that territory of the third-country national concerned or of the entry into force of the national legislation implementing that directive, from giving rise to a criminal sanction, unless that national constitutes a serious threat to public order, public security or national security.

**CJEU Judgment:** [\(Fourth Chamber\) of 19 September 2013](#)

**Follow-up national decision:** Already before the CJEU’s decision, the Italian Court of Cassation disregarded Art. 13, co. 13 of Legislative Decree 286/1998 which notably provided for time-limits of entry bans of up to ten years, which clearly contradicted the Directive’s provisions (Cass., I sess. crim., sent. n. 8181/2011; Cass., I sess. crim., [sent. n. 12220/2012](#); Cass., I sess. crim., sent. n. 14276/2012; Cass. I sess. crim. sent. n. 94/2012).

- **C-290/14, *Skerdjan Celaj*, CJEU Judgment of 1 October 2015**

**Request for a preliminary ruling:** *Tribunale di Firenze* (Italy, Tribunal of Florence)

**Factual context:** Mr *Celaj*, an Albanian national, was arrested by the Italian authorities for entering Italian territory in breach of a three year entry ban established within a previous return procedure.

**Legal provision at issue:** Article 11(1) RD

**Questions addressed by the national court:** the national court wanted to know whether national criminal legislation sanctioning re-entry to Italian territory in breach of previous entry ban could be considered a criminal offence and so be automatically sanctioned with a criminal penalty of imprisonment of up to four years (*in casu*, eight months), when it has not been the subject of coercive measures established within the remit of the removal procedure (Article 8 RD). The irregular TCN would be removed only after detention had been executed. According to the defence lawyer and the Tribunal of Firenze, the relevant criminal legal provision (Art. 13 (13) D.l.vo 1998 n. 286) would be contrary to the *effet utile* of the Return Directive that aims to ensure an effective return of irregular TCNs.

**Conclusion:** The AG sided with the referring court in finding that the Return Directive is applicable to the facts of the case, since an irregular stay was at issue, irrespective of previous re-entry, and that automatic detention does not serve the objective of the Return Directive. The CJEU, though, took a different view. The CJEU held that the Return Directive does not preclude Member States from adopting legislation which lays down criminal law sanctions for the unlawful re-entry of a third-country national. (para. 25) Therefore, illegally staying third-country nationals for whom the application of the return procedure resulted in their being returned and who then re-enter the territory of a Member State in breach of an entry ban are not covered by the Return Directive. Nevertheless, the imposition of a criminal law sanction, such as that at issue in the main proceedings, **is admissible only on the condition that the entry ban issued against that national complies with Article 11 of that Directive, a matter which is for the referring court to determine.** (para. 31)

‘The imposition of such a criminal law sanction is moreover subject to full observance both of fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and, as the case may be, of the Geneva Convention, in particular Article 31(1) thereof.’ (para. 32)

**CJEU Judgment:** [\(Fourth Chamber\) of 1 October 2015](#)

**REDIAL Blog:** [DI PASCALE A., RENAUDIÈRE G., AG’s Opinion in Celaj: Lost in ‘Crimmigration’?, 22 June 2015](#)

**Follow-up national decision:** Following the preliminary ruling, the Tribunal of Firenze approved the criminal sanction of eight months established by the Prefect of Firenze. The referring court closely followed the preliminary reference of the CJEU, although it disagreed with the interpretation given by the Court of Justice. This is evident from the reasoning and explanations provided in the addressed preliminary reference.

(for a full account of the addressed preliminary reference, see

<http://www.penalecontemporaneo.it/upload/1403269765Rinvio%20pregiudiziale%20alla%20Corte%20Europea.pdf> only in IT)

### III. Landmark National Case-Law Related to the Termination of Illegal Stay (Chapter II Of The Return Directive)

#### Article 7 (1) RD: Voluntary Departure (principle)

According to the Return Directive, the expulsion of an irregular migrant has to follow the strict return procedure provided for by the Directive. The return must be enforced first by granting voluntary departure to the foreigner, between seven and 30 days (extendable under certain conditions). The Member States have to give priority to voluntary departure of TCNs against removal or other forced/coercive return measures. The voluntary departure period is usually provided in the return decision or the removal order (for those Member States with a one-step procedure), and it thus constitutes a first step in the return procedure.

- *The Mandatory Nature of Voluntary Return*

Although the Return Directive has been in force since 2011, certain jurisdictions have not transposed the specific procedure and terminology introduced by the RD. For instance, in Spain, there is no return decision as such. Instead, every denial of residence permit includes the demand that the TCN departs within fifteen days. A TCN identified for the first time as staying irregularly in the country, with no other negative circumstances being identified, is not issued with a return decision but, rather, a financial sanction. This practice has been reviewed by the **Spanish** Supreme Court, which found these provisions to be incompatible with the RD ([judgment of 13 March 2013 \(STS 988/2013\)](#)). It consequently required national courts to follow the EU return procedure. This strictly requires the Member States to sanction the TCNs illegally present in the country with a return decision, and gives preference to the voluntary departure measure as a first step before any coercive enforcement of removal. The solution reached by the Spanish Supreme Court was later endorsed by the CJEU in the *Zaizoune* judgment.

The only margin of discretion permitted to the Member States over the TCN's right to voluntary departure is to make that right subject to an individual application by the TCN instead of *ex officio* consideration of granting this measure. If the Member States use this option, they have to conform to certain procedural safeguards, including the translation of the administrative decision on voluntary departure. Italy is one of the Member States that has taken advantage of this option, and national courts have reviewed whether the administration has complied with procedural safeguards while exercising this permitted margin of manoeuvre. The *Corte di Cassazione* (**Italian** Supreme Court) assessed whether national authorities can use a widely-spoken language, instead of the TCN's mother tongue, for the translation of the administrative decision on voluntary departure. The common practice in Italy would be the use of multilingual information sheets for the translation of the return decision including for voluntary departure. The Corte di Cassazione recalled the principle it established in relation to the removal order: if it is 'impossible' to translate the removal order in a given language then it is legitimate to use one of the most widely spoken languages (*e.g.* English, French, etc.) ([Corte di Cassazione, decision no. 1809/2014](#)).

In spite of the clear legislative requirement to consider voluntary departure as the first measure in ensuring the enforcement of the obligation to return of the irregular TCN, confirmed also by the CJEU's jurisprudentially developed requirements for 'gradualism' and 'voluntariness' in the return procedure, national courts were initially reluctant to consider the refusal of voluntary departure as a criterion of legality for the return (expulsion) decision. For instance, until recently the **Italian** Corte di Cassazione considered it irrelevant that a term for voluntary departure had not been granted. It was affirmed that the rules on the granting of a term for voluntary departure do not affect the legality of the expulsion order itself, which must be assessed only in the light of the fact that the legal requirements are met. These legal requirements referred only to breaches of the norms on entry and stay and the

circumstance of representing a social danger. While voluntary departure was considered to be part of the execution of the expulsion, and thus could not play a role in the evaluation of legality of the decision of expulsion. (**Corte di Cassazione**, [10243/2012](#) and [15185/2012](#)). Following the judgment of the **Corte di Cassazione** ([437/2014](#)), the level of protection of access to courts for TCNs has increased. The Refusal to grant voluntary departure has been admitted as a point of appeal, as has the period for VD, as well as other aspects of this measure in any challenge against the return decision. In conclusion, it seems that the conferral of voluntary departure is increasingly considered by Italian courts, as a pre-requisite for the assessment of the return decision's legality. ([Italian Report](#), p. 7)

- *Starting Point of the Voluntary Departure Period*

The starting point of the voluntary departure period is not established *expressis verbis* in the Return Directive. On this issue, the Administrative Court of Appeal of Paris (**France**) clarified that if the TCN is subject to criminal sanctions, the VD period can start only after the fulfilment of those sanctions. (**CAA Paris**, [22/03/2013](#), no. [12PA03710](#), see more in the [French Report](#)). The *Voivodeship* Administrative Court in Warsaw (**Poland**) stated that the VD period starts to run from the moment the expulsion decision becomes final. That is after the final judgment was delivered in appeal, or after the expiry of the appeal period, which itself is considered to run from the date of receipt of the return decision. Therefore, the Polish Court stressed that the decision on expulsion cannot lead to immediate removal. ([Wojewódzki Sąd Administracyjny w Warszawie, IV SA/Wa 2918/12 – WSA, 25/03/2013](#))

## Article 7 (2): Extension of the Voluntary Departure Period

According to Article 7(2) RD, Member States have an obligation to extend the period for VD beyond the 30 days maximum period when certain 'specific circumstances of the individual case' are met. The paragraph sets out a non-exhaustive list of three such circumstances, namely: the length of stay; children attending school; and other family and social links. The RD allows the Member States to extend this list of prolongation grounds to other situations related to the 'specific circumstances of the individual case'. Conditions related to the vulnerability of the TCN (*e.g.* medical situations, or family situations) have usually been considered by national courts to be legitimate additional grounds justifying the prolongation of the VD period. The **Austrian High Administrative Court** ([2012/21/0072, 16.5.2013](#)) clarified the scope of the 'specific circumstances of the individual case', as including also 'circumstances in the target country' and not only those in the Member State(s). The Court stated that circumstances in Austria play a role but also 'circumstances in the country of origin'. For instance, the fact that the TCNs concerned were not able to return to their country of origin in winter, because there was no place there to live with (adequate) heating was taken into account; as was the fact that their son was born in Austria and that he was not registered in Byelorussia. The VD period was subsequently extended. This particular interpretation of the concept of the 'specific circumstances of the individual case' given by the Austrian High Administrative Court was endorsed also by the Commission in its Return Handbook. This indicates that the term '**where necessary**' refers to circumstances both in the sphere of the returnee and in the sphere of the returning State. ([Return Handbook](#), p. 36.)

The pregnancy of a TCN's wife is commonly taken into consideration by national courts among family and social circumstance (*e.g.* **Austria**, **Belgium**, and **France**). On the other hand, ongoing divorce procedures are not considered a valid reason ([CAA Nantes, 26/02/2015](#)). Organising travel documentation is taken into consideration in a few jurisdictions, however on a case-by-case basis, and not generally. When considering the legitimacy of the grounds invoked for VD prolongation, certain national courts pay attention to the issue of whether the application submitted by the TCN is abusive or not. For instance, according to the **Higher Administrative Court of Northrhine-Westfalia** ([Germany, 18 B 779/15, 23.07.2015](#)), the request for prolongation needs to be assessed, whether it is truly aiming at arranging the return, or whether it rather aims to legalise the claimant's stay (*e.g.* return of the wife/partner with children).

One of the main problems concerning the extension of the VD period is that, unlike the first paragraph of Article 7, the second paragraph does not set out a fixed timeframe for the extension of the VD period. This thus leaves a considerable margin of discretion to the Member States on establishing the extension period. National courts approved prolongation periods ranging from one year in cases of TCNs with children attending school, to the period covering pregnancy plus eight weeks after birth (**Federal Administrative Court, G307 2013610-1, 24.2.2015**, see the [Austrian Report](#)), to a suitable period for post-surgery recuperation (**Austrian Federal Administrative Court, W196 2015947-1, 28.1.2015**).

### **Article 7 (3): Obligations pending Voluntary Departure**

Article 7(3) RD provides for certain obligations which should minimize the risk of irregular TCNs absconding during the voluntary departure period. These obligations include: 1) regular reporting to the authorities; 2) the deposit of an adequate financial guarantee; and/or 3) submission of documents or the obligation to stay at a certain place. They can be imposed only for ‘avoiding the risk of absconding’. Requiring certain obligations to be fulfilled by the TCN concerned is an alternative to the more stringent decision to shorten the VD period to less than seven days or even immediately removing the TCN. According to the CJEU, this gradualism in establishing the appropriate return measure should be followed by national authorities and courts when a risk of absconding is identified. (*El Dridi*, para. 41)

A positive evolution in the application of the principle of gradualism can be seen in certain national jurisdictions. For instance, national courts scrutinise the failure of the administrative authorities to adequately consider the possibility of imposing one or multiple obligations as an alternative prior to a coercive removal order. The lack of adequate reasons given by the authorities to refuse a period for VD, with attached obligations prior to giving a removal order, has been interpreted by national courts as a legitimate ground for quashing the administrative order for removal (**Czech Republic, France**). Furthermore, national courts reject general statements, such as, ‘there is no integration in Austrian society or legal order’, as legitimate grounds proving a risk of absconding (see **Federal Administrative Court, G307 2009115-1/2E, 28.7.2014**, see the [Austrian Report](#)).

### **Article 7 (4): Shortening or Refusing Voluntary Departure Period**

Pursuant to Article 7(4) RD, Member States may, under certain circumstances, grant a period shorter than seven days or refuse to grant a period for voluntary departure. The specific circumstances when Member States may derogate from the general obligation of granting a VD period are exhaustively set out by that provision: if there is a risk of absconding, if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the TCN concerned poses a risk to public policy, public security or national security. The RD does not, however, provide an exhaustive definition of these circumstances, such as the situations that would qualify to demonstrate these risks. The RD limits itself to providing general indications that the Member States have to respect when they implement EU law. The national transposition measures, on the other hand, have significantly expanded the notion of the ‘risk of absconding’ as well as the ‘risk to public policy’.

It seems that the majority of the national cases related to voluntary departure deal with the issue of the legitimacy and/or the proportionality of the administrative refusal to grant VD on the basis of the grounds of ‘risk of absconding’, ‘risk to public policy’ or ‘abusive applications for the legalisation of the TCNs stay in the Member State(s)’.

- *Risk of Absconding*

The ‘risk of absconding’ is in general understood, for return procedures, to have the meaning that the migrant will seek to obstruct his/her return if set free, mainly by disappearing.

**Bulgaria** and the **Czech Republic** did not transpose the ‘risk of absconding’ as a ground for justifying refusal of VD. In light of this legislative gap, the **Czech Supreme Court** has recently sent a preliminary request to the CJEU seeking to obtain an answer on how to interpret the national legislation to ensure conformity with the relevant EU law ([CJEU, C-528/15, Al Chodor e.a.](#)).

When no objective criteria are set by national legislation (**Bulgaria, the Czech Republic, Greece, and Hungary**), they are usually set by the administration and the judiciary follows them closely. However, as CJEU jurisprudence requires respect of the principle of gradualism and proportionality in choosing the appropriate return related measure and individual assessment of the facts of each return case, national courts have increasingly extended their scope of review over administration decisions establishing the risk of absconding. There seems to be an ascending jurisprudential trend whereby courts no longer accept as justified the automatic finding of a risk of absconding by the administration (see, in particular, the **Austrian, Czech and French courts**). Furthermore, national courts pay closer attention to the principle of proportionality when deciding the consequences of finding a risk of absconding: these include, establishing VD with attached obligations; limiting the VD period; refusing VD; and adopting a removal order, or detention (in particular, **Austria, Bulgaria, and Czech Republic**, see *inter alia*, [Judgement of the SAC of 30 September 2014, No. 9 Azs 192/2014](#), § 22).

The following is a non-exhaustive list of situations that are commonly considered by the national authorities, including national courts, as falling within the scope of the ‘risk of absconding’: false information on identity document; providing false information; refusing to communicate; having forged, falsified or used another name for a residence permit or an ID or travel document; use of false or misleading information or false or falsified documents when applying for a residence permit or recourse to fraud or other illegal means to obtain the right to stay; no documents proving accommodation where s/he can be easily found; no effective or permanent place of residence; showing a lack of cooperation in the return procedures; non-compliance with voluntary departure; violation of the obligations imposed with the aim of avoiding the risk of absconding during the voluntary departure period; previous absconding; non-compliance with an alternative measure to detention; clear unwillingness to comply with the imposed measure; statements made indicate the likelihood of absconding; and violation of an entry ban. This is a long list of possible situations that are taken to justify a ‘risk of absconding’. Therefore the list of circumstances justifying refusal of VD is quite long. National courts seem to gradually challenge this wide definition of the ‘risk of absconding’ and particularly the lack of concrete and individual assessments of the cases by the administrative authorities.

The automatic consideration of these circumstances as proof of to prove a risk of absconding has been increasingly rejected by national courts (**TA Lille, 22 Jul. 2011, No. 1104137**; [CAA Bordeaux, April 3 2012, No. 11CX02996](#); [Dutch Council of State, 10 July 2014, 201309038/1/V1](#)). The French judge considered that the administrative authorities are obliged to carry out an individual assessment of the particular circumstances of the case in light of his obligation to ensure respect of the principle of proportionality between the proposed measures and the pursued objective, especially when coercive measures are proposed. ([CAA Paris, 1 ch., May 310, 2013, No. 12PA03323](#)) Other national courts also reject general statements deprived of concrete factual references to individual situations (‘there is no integration in Austrian society or legal order’) justifying the existence of a risk of absconding. (**Federal Administrative Court, G307 2009115-1/2E, 28.7.2014**, see the [Austrian Report](#)).

The Council for Aliens’ Law Litigation of **Belgium** (CALL) is closely scrutinising the circumstances of the case, finding different results depending on the concrete circumstances of the case. For instance, in one case the absence of an official address in Belgium was considered sufficient proof of a risk of absconding, justifying a refusal to grant a voluntary departure. ([CALL, 97 083, 13.02.2013](#)) In a different case, CALL took a different decision. It suspended the order to leave the territory and ordered the Aliens Office to take into consideration the fact that the applicant lived with his wife and two children, who reside legally in Belgium, and that this spoke against a risk of absconding, unlike the previous case. A family seems to be widely considered as a guarantee that there is no risk of absconding. For instance, the Administrative Court of Appeal of Nantes found that the

fact that a TCN had not lawfully entered **French** territory and had failed to obtain a residence permit was not sufficient evidence to establish a risk of absconding, and a refusal of VD. The fact that the TCN concerned had been married to a French national with whom she continued to live, during which time she lost her passport, but aimed to regularise her stay in France, was sufficient evidence for the Court. It judged that the administration committed a manifest error of assessment. It consequently annulled the decision and decided to confer VD with residence assigned at the place where she was staying with her husband ([CAA Nantes, 31 May 2012, 11NT03061](#)).

However, a family is not always considered a guarantee against a TCN absconding. The fact that an alien had already withdrawn from the implementation of two removal orders and that he had opposed return during hearing by police forces was considered important. It overrode the fact that the applicant had a permanent address and his children enrolled in a school (**CAA Paris, 1 ch., May 31, 2013, No. 12PA03883**). The risk of a TCN absconding is presumed also in cases where, the alien evaded a previous deportation, in spite of mitigating circumstances such as wedding plans and good social conducts, proven by his involvement in voluntary activities (**CAA Paris, November 14, 2013, No. 13PA00122**, see [French report](#)). If the TCN has counterfeited, forged or procured under a different name than his or her own residence permit(s) or identity or travel documents, national courts would usually presume a risk of absconding, justifying refusal of VD, even if there are other mitigating circumstances.

There seems to be a lack of uniform interpretation of the effects attached to the objective criteria justifying the establishment of a ‘risk of absconding’. It is interesting to note that lack of passport or residence permit is considered by several Member States as grounds justifying the risk of absconding on the part of a TCN. However, while in certain Member States this situation alone is commonly considered to be enough to establish certain obligations during the VD period (**Netherlands**), in other Member States it was considered sufficient by the administration and courts to justify detention (!). In the case of *Re. Rita Kumah*, a **Cypriot** court found ‘that detention is necessary for as long as there is a risk of absconding and there is a risk of absconding in this case because the applicant did not have a passport or a residence permit’ ([Re the application of Rita Kumah, Supreme Court, Civil application No. 198/2013, 29 November 2013](#), see also the [Cypriot Report](#), p. 6).

- *Risk to Public Policy*

The RD does not provide a definition, even a general definition of the risk to public policy as it does in the case of the risk of absconding. In a judgment delivered by the CJEU on 11 June 2015, the Court clarified the meaning of the ‘*risk to public policy*’ (*Z. Zh. and O.*, C-554/13, see *Part I for more information*). Member States are precluded from relying on general practices or assumptions in order to determine the existence of such a risk. Instead they are required to assess, on a case-by-case basis, whether the personal conduct of a given TCN poses a genuine, present and sufficiently serious threat for fundamental social interests, in addition to the perturbation of the social order which any infringement of the law involves (see paras. 50 and 60). Suspicion that the TCN has committed a criminal offence or even an established criminal offence cannot ‘justify findings that that (TCN) poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.’ (para. 60) Other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and any matter which relates to the reliability of the suspicion that the TCN committed a criminal offence is also relevant for a case-by-case assessment, which needs to be carried out. (para. 65).

Grounds such as criminal convictions or suspicion of criminal conviction were, previous to the *Z. Zh. And O.* judgment, commonly considered as falling under the ‘risk of absconding’ and could automatically lead to refusal of VD (e.g. **Cyprus, Belgium, Spain, Germany** – [Administrative Court of Augsburg, Au 6 K 12.667, 16-01-2013](#)). For instance, the Immigration Appeals Board of **Malta (IAB, judgment of 25.03.2013)** held that the criminal punishment of imprisonment for one year gives legitimate grounds for refusing VD and ordering removal.

**Bulgaria** as well as the **Czech Republic** did not include the risk of absconding among the legitimate grounds for shortening or refusing to confer VD. They refer, however, to the risk to public policy as grounds for refusing the VD period. The Bulgarian Law on Foreign Nationals, Article 39b (4), reads that a period for voluntary departure shall not be granted when the foreign national ‘poses a threat to the national security or the public order’. Therefore, national courts have had to review whether certain facts considered by other national courts as falling under the ‘risk of absconding’ justify the existence of a ‘risk to public policy’. In the case of *Salar Zangenhe*, the **Bulgarian Supreme Administrative Court** ([decision of 10 January 2011, 5673/2010](#)) considered the lack of valid documents as sufficient proof to establish a risk to public policy. *In casu*, Mr. Zangenhe had just entered Bulgaria irregularly and had no personal identification documents. At the interview, he stated that his ultimate goal was to reach the United Kingdom. In view of this fact, the Court found that a period for voluntary compliance in the return order was pointless and therefore, in this specific case, not granting a period for voluntary departure was not a ‘substantial’ violation of the law. However, there was no evident proof of the TCN refusal to return as in the *Zangenhe* case ([Hossam Eldin, judgment of the same court, 07 March 2012, 6339/2011](#)). In other cases, the same Court held that the absence of valid identification documents cannot justify the refusal to grant VD, but at most the attachment of obligations to be fulfilled pending voluntary departure.

- *Application for a legal stay has been dismissed as manifestly unfounded or fraudulent*

A third ground provided by Article 7(4) RD as justifying the shortening or refusal of VD consists of the dismissal of the application submitted by a third country-national as manifestly unfounded or fraudulent. The effect of abusive applications, on the return procedure, has been assessed by the **Dutch Council of State** ([in a judgment of 12.04.2012, 201102602/1/V2](#)). The applicant was rejected the renewed asylum application in an accelerated procedure and by this same administrative decision he was forced to return without any period of voluntary departure. On appeal to the judgment of the District Court in The Hague, the Council of State was asked to review the conformity of the administrative decision with Article 7 RD. The applicant argued that Dutch legislation allowing the rejection of a residence permit for a certain time, such as the rejection of an asylum application in an accelerated procedure, without allowing for a period between 7 and 30 days of voluntary departure, is contrary to Article 7 of the RD which requires the Member States to grant a VD period, except in certain precise circumstances which do not apply in the case at hand. The Ministry argued that the decision to reject the residence permit for a certain period of time and order expulsion immediately was justified on the basis of Article 28(2) of the Asylum Procedure Directive 2005/85 and Article 7(4) RD which mentions as grounds for VD refusal the ‘application for a legal stay has been dismissed as manifestly unfounded or fraudulent’. The Council of State first highlighted that at the time of the administrative decision – 26.02.2011, Netherlands had not implemented Article 7 of the RD. The Council held that the applicant can nevertheless rely directly on Article 7 RD since, on the basis of the *Becker* judgment of the CJEU, individuals are able to rely directly on provisions of EU Directives, after the period of implementation has expired when they are ‘unconditional and sufficiently precise’. Thus Article 7(1) and (4) RD were held to be directly effective by the Council of State. Secondly the Council rejected the argument that the Ministry had been justified in refusing VD on the basis of Article 28(2) AP Directive and Article 7(4) RD, since, the legislator had chosen not to implement Article 28, par 2 of the Asylum Procedures Directive (2005/85) in Dutch legislation. Therefore, according to CJEU jurisprudence ([judgement of 21 October 2010, C-227/09, Accardo, ECLI:EU:C:2010:624, paragraphs 46 en 47](#)) the derogating provisions in question cannot be relied on directly by the authorities against individuals, for the purpose of denying TCNs a period for voluntary departure. The Council of State quashed the first instance court’s judgment and annulled the administrative decision of 26 January 2011 on grounds that it contained a return decision, which lacking a VD period, was contrary to Article 7 of the RD.

## Article 8 RD – Removal

- ‘Criminalisation’ of Irregular Stay

Although Article 8 RD only refers to administrative measures (coercive or not) contributing to the ‘carrying through of the removal which the return procedure is intended to achieve’, it does not preclude Member States from laying down penal sanctions for infringements of migration rules or from defining, in domestic law, which types of infringements are ‘criminalised’.<sup>2</sup>

In **Slovenia**, the Supreme Court reminded that punishment procedures for illegal stay are neither related nor inter-connected to the removal process. Whether or not an applicant is found guilty of illegally staying in the Republic of Slovenia is not relevant as a pre-condition or a requirement for the issuance of a removal decision from the Administrative Court. ([Supreme Court of the Republic of Slovenia, X Ips 413/2012 \(02/2014\)](#)).

With regard to financial penalties, it is striking to note that from 2005 to 2013, the **Spanish** Supreme and High Courts applied, as an administrative practice, the imposition of criminal sanctions, either a fine *or* an expulsion, to migrants staying in Spain irregularly, depending on the existence of aggravating circumstances (most of them taken from Spanish case law). Negative factors, leading to ‘expulsion’ instead of financial penalties included: the lack of documentation of the TCN, previous criminal detentions, non-compliance with a previous return decision etc.

After the CJEU rendered its decision in *Zaizoune*, as requested by the High Court of the Autonomous Community of the Basque Country ([High Court of Justice of the Autonomous Community of the Basque Country, 2014/C 93/32 \(2013\)](#)), the ‘*doctrine of the fine*’ changed as follows: a fine can no longer be imposed as a criminal sentence to be used as an alternative to removal, in the absence of aggravating circumstances. However, as a way to continue to ‘circumvent’ removal in specific circumstances, administrative Spanish High Courts rely either on Articles 5 and 6 RD to prevent the enforcement of removal when the principle of *non-refoulement* and the best interest of the child are at stake ([Tribunal Superior de Murcia, Sala de lo Contencioso-Administrativo, STSJ 791/2015 \(09/2015\)](#)) – or reduce the length of entry-bans, from 3 to 2 years ([Tribunal Superior de Justicia de Castilla y León, Valladolid, Sala de lo Contencioso-Administrativo, STSJ 967/2015 \(2015\)](#)) or to 1 year, in a case where the TCN was only ‘guilty’ of performing a non-authorized activity ([Tribunal Superior de Justicia de Castilla y León, Valladolid, Sala de lo Contencioso-Administrativo, STSJ 966/2015 \(2015\)](#)).

With regard to prison sentences, several national Courts adapted their case-law (usually in line with changes in the practice and/or the legislation) in order to better comply with the Return Directive and its objective of effectiveness. In **France**, the Court of Cassation officially endorsed, with its Advisory Opinion, the abolishment of the former practice of police custody during the course or before the engagement of the return procedure ([Advisory opinion from the Court of Cassation, 9002 \(06/2012\)](#)). The **Czech** Supreme Court stated, however, that *suspended* prison sentences were admissible since a previous return decision (here accompanied by a two-year entry ban) had failed in forcing a foreign national to leave the territory. Indeed, from the Court’s point of view, the fact that the prison sentence was suspended was likely to persuade the TCN not to stay illegally in the Czech Republic, while allowing him to comply with the return decision by leaving the country at short notice. ([Nejvyšší soud \(Supreme Court\), 7 Tdo 500/2014 \(05/2014\)](#)).

Finally, with regard to moment that criminal imprisonment can be resorted to, Member States interpret differently the concept of a return procedure ‘achieved’ or ‘applied’: see, for example, the

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<sup>2</sup> Seeking to ensure the proper implementation of the Return Directive while complying with Member States’ competencies, the Court of Justice has been several times called upon to clarify the scope of EU Law applying to ‘irregular’ third-country nationals subject to criminal proceedings.

CJEU in *Achughbabian*. Whereas the **Dutch** Council of State establishes, in a landmark case, the conditions to be met before resorting to criminal sentences ([Hoge Raad der Nederlanden, 11/0307 \(05/2013\)](#)) namely *when all the steps of the return procedure have been applied* ([Supreme Court, 12/05522 \(12/2013\)](#)), the **Czech** Supreme Court seems to suggest that imprisonment becomes admissible when the TCN fails to comply with the return decision and the subsequent administrative measures taken against him (yet without specifying which ones) ([Nejvyšší soud \(Supreme Court\), 7 Tdo 500/2014 \(05/2014\)](#)).<sup>3</sup>

- *Coercive Nature of the Removal*

Although not explicitly stated in Article 8 RD, the question as to whether the removal corresponds to a ‘forced’ return, implying coercion from the States’ authorities, has been raised by different national High Courts. This was notably addressed and answered affirmatively by the **Dutch** Council of State, in a landmark case, July 2009 ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 200902298-1-V3 \(07/2009\)](#)). The Council of State also pointed out that as soon as the return is made on a ‘voluntary basis’, which is the case for escorted departures by IOM, there is no coercive removal so that administrative detention is excluded. ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201401757/1/V3 \(04/2014\)](#)). Similarly, before forcibly returning someone to a third-country destination, the Administrative Court of Hamburg in **Germany** stressed that preference should be given to voluntary ‘departure’ to another EU Member State, from which a valid residence permit has been issued, in accordance with Article 6(2) RD. ([Administrative Court of Hamburg, 17 K 1758/14 \(01/2015\)](#)).

- *Proportionality Assessment*

In accordance to Article 8(4) RD, read in conjunction with Recitals 13 and 16, any ‘coercive’ action or measure taken during the course of the return procedure ‘should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued’. In **Germany** the very decision to remove has to be proportionate and must admit exceptions depending on the circumstances of the case. For instance, if required by the TCN’s strong family ties, removal – here accompanied by an entry-ban – can be replaced by a softer option such as a new-time limit for voluntary departure ([Verwaltungsgericht Hamburg \(Administrative Court of Hamburg\), 15 E 2900/13 \(07/2013\)](#)). With regard to the modalities of its enforcement, the **Bulgarian** Supreme Administrative Court interprets the principle of proportionality more broadly, as preventing authorities from forcibly removing a TCN against whom an order has been issued more than five years earlier. This does not need to take into account either potential changes in the TCN’s situation, nor the existence of legal grounds as of the date of serving. ([Върховен административен съд \(The Supreme Administrative Court court\), 3366/2011 \(06/2012\)](#)).

Finally, even if enforced, related measures aimed at carrying out the removal of a third-country national, who resists removal, must also be proportionate. According to the **Dutch** Council of State, when handcuffs are not required or necessary in the removal process (*e.g.* police cars already provided with cells), ‘security’ measures like this cannot be justified ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201102621/1/V3 \(03/2012\)](#)). *A posteriori*, the **Austrian** Administrative Court considers that the enforcement of the return decision (Ndlr. removal is not a distinct decision from the former in Austria) is specifically subject to a distinct judicial review. This implies an assessment of its proportionality. In this respect, a return decision can be considered as

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<sup>3</sup> Such controversy has, nevertheless, been solved by the ECJ in its recent judgment *Celaj* for re-entry in breach of pending entry bans, not precluding in principle the possibility that Member States adopt legislation which lays down criminal law sanctions, including imprisonment, in such particular circumstances (See section 1.a. and 2).

lawful, while a subsequent removal is not. ([Verwaltungsgerichtshof \(High Administrative Court\), 2010/21/0056 \(10/2011\)](#)).

- *Necessity of Pre-removal Measures*

The principle according to which measures used by competent authorities in the course of the removal process have to be ‘necessary to enforce the return decision’ – as provided for by Article 8(1) RD and the corresponding CJEU case-law seems to be generally agreed upon by Member States’ judicial authorities. In **Germany**, administrative detention has been declared illegal by the Federal Court of Justice because it was not used as a pre-removal measure (*i.e.* to secure physical deportation), but, rather, to prepare the expulsion order (*i.e.* the return decision). Yet the expulsion order is covered by a different paragraph of the legal provision ([Bundesgerichtshof \(Federal Court of Justice\), V ZB 92/12 \(07/2013\)](#)). Interestingly, the **Dutch** Council of State also distinguishes *real actions* (likely to lead to the TCN’s deportation) from *administrative actions* (necessary to go through the return/removal process but not in itself ending in deportation). Both kinds of actions are, therefore, seen as necessary steps. However, if a TCN has been detained (on the basis of Article 15 RD), administrative authorities must act with due diligence and take at least one real action within the first days of the person’s detention in order to comply with EU and national law. This is to be appreciated by national courts. ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 200901758/1/V3 \(04/2009\)](#)).

#### Article 9(2) RD: Postponement of Removal

Some circumstances are likely, pursuant to Article 9(2) RD, to postpone removal without yet affecting the lawfulness of the return decision. In the vast majority of States, postponing or delaying the TCN’s removal, for example, for medical reasons or health concerns, does not render the initial decision unlawful ([NL, Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201404098/1/V2 \(12/2014\)](#)). On the contrary, it only prevents competent authorities from removing the third-country national, not necessarily implying a right to stay or toleration on the territory. This is notably the case in the Netherlands for TCNs subject to ‘heavy’ entry bans. ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201300216/1/V3](#)). However, after a certain period of time, the reasonable prospect of removal, required for the removal to be lawful, might disappear. This was the case in **France** for a woman, who was six months pregnant, and whose return had been postponed ([Tribunal administrative de Lille, France, 1404924\(2014\)](#)).

#### Article 10(2) RD: Removal of Unaccompanied Minors

Little case law has been provided by the Member States surveyed, relevant to the removal of unaccompanied minors (UM). In **Italy**, for instance, the main concern related to UM regards age assessment and its consequences for the application of the return procedure. But according to Italian domestic law, no expulsion of UM takes place ([Giudice di Pace di Bologna – Justice of the Peace of Bologna, n. 40821/2013 \(06/2013\)](#)).

Even before the Return Directive’s implementation, **Belgian** courts had developed a quite elaborate case-law on the removal of UM, mainly relying on the principles of good administration and manifest error of appreciation, in order to invalidate the removal when there were not enough ‘adequate guarantees’ in the country of reception. ([See for instance Council for Aliens’ Law Litigation, 91 896 \(11/2012\)](#)). Although not explicitly provided for by the Directive, deportation is suspended *de facto* until the immigration authorities have ensured ‘the concrete fact that a member of the minor’s family or another authorized person or institution will receive the minor’. It thus implies that if a removal decision is issued, the unaccompanied minor also has the possibility to challenge it before the

Courts and to claim a follow-up protection order from the government. ([Bundesverwaltungsgericht \(German Federal Administrative Court\), 10 C 13.12 \(06/2013\)](#)).

### Article 11 RD: Entry Ban

Article 11(1) RD requires the administration to apply entry bans if the obligation to return has not been complied with (a rather objective criteria) or if ‘no period for voluntary departure has been granted’.<sup>4</sup> This means that the administration must *automatically* issue an entry ban when it refuses to give the third-country national the possibility of leaving the country voluntarily. In this regard, the **Dutch** Council of State goes further, as it considers that the administration can impose an entry ban, *even if* it leaves the third-country national the possibility of departing voluntarily ([NL, Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201302843/1/V3](#)).

The second indent of Article 11(1) indicates that the administration has, for the rest, the possibility but not the duty of applying entry bans.

- *Link with a Return Decision*

The **Belgian** Council for Aliens Law Litigation insists that the entry ban differs from the return decision and must, therefore, be the object of a separate motivation<sup>5</sup> ([BE, Raad voor Vreemdelingenbetwistingen \(Council for Alien Law Litigation\), 128.272, 27 August 2014](#)). The illegality of the entry ban does not necessarily entail the illegality of the return decision.

- *Nature of Entry Bans*

The French Constitutional Court has elucidated the ‘nature’ of entry bans. This court clearly decided it is an administrative measure (*‘mesure de police’*) and not a criminal sanction. This issue has not been the object of case law in other Member States and does not seem to be controversial ([Conseil Constitutionnel, decision n° 2011-631 DC 09/2011](#)).

- *Type of Entry Bans*

Article 11 of the Return Directive distinguishes between mandatory and optional entry bans. Interestingly, the **Netherlands** made another distinction between what is called in administrative practice ‘heavy’ and ‘light’ entry bans. A heavy entry ban relates to the ‘dangerousness’ of the TCN, while light entry bans are all the other entry bans taken for another reason. This distinction is interesting because it has consequence for the power of the administration. ([Dutch Council of State, 201307320/1/V2, 25 June 2014](#)).

- *Starting Point and Length of Entry Bans*

Article 11, paragraph 2 of the Return Directive foresees that ‘the length of the entry ban shall not *in principle* exceed five years’. It continues by saying that ‘It may however exceed five years if the third-country national represents a *serious* threat to public policy, public security or national security’.

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<sup>4</sup> This refers to Article 7 (4) foreseeing that the administration may refrain from granting a period for voluntary departure or shorten it in three cases: risk of absconding; manifestly unfounded or fraudulent application for a legal stay; as well as risk to public policy, public security or national security. See [European Synthesis Report on Article 7 to 11 RD](#), December 2015.

<sup>5</sup> [BE, Raad voor Vreemdelingenbetwistingen \(Council for Alien Law Litigation\), 128.272, 27 August 2014](#).

Some technical issues have been clarified by the Courts: first of all, the Federal Administrative Court of **Germany** considered that the entry ban must be taken and its length determined simultaneously with the expulsion decision (meaning a return decision issued for criminal reasons). (See for instance [Bundesverwaltungsgericht \(Federal Administrative Court\), BVerwG 1 C 9.12, July 2013](#)). Following Article 11 of the Return Directive, the entry ban should accompany the return decision. The Supreme Administrative Court of the **Czech Republic** considered that, in absence of a specification, the starting point for the entry ban is the date of the legal force of the return decision and not the date of the removal decision. ([Rozšířený senát Nejvyššího správního soudu, Grand Chamber of the Supreme Administrative Court, Zhao H. v. Ministry of Interior, 1 As 106/2010 \(01/2012\)](#)).

As regards the length of the entry ban, the Voivodship Administrative Court in **Warsaw** ([IV SA/Wa 2918/12 – WSA \(25/03/2013\)](#)) held that Article 11(2) RD and the principle of reformation *in peius* principle prohibit the administration from changing the length of the entry ban in appeal from a six months period to a one month period following a national legislative amendment. The Court agreed with the first administrative authority, which had applied the more favourable provisions of Directive 2008/115/EC in place of national legislation. Pursuant to Article 11 paragraph 2 of the Directive, and taking into account all the relevant circumstances of the present case, the six-month ban was considered sufficient. It was an adequate sanction for the offence committed by the TCN, who did not pose a threat to public policy, public security or national security.

Regarding entry bans for reasons of public policy, public security or national security, a **German** ruling of the Federal Administrative Court of 13 December 2012 is particularly interesting. It considered that ten years was a maximum for entry bans because it constitutes the time horizon for which a prognosis can realistically be made. This, however, does not mean that an entry ban cannot be renewed or that a new entry ban cannot be taken depending on the circumstances. (See for instance [Bundesverwaltungsgericht \(Federal Administrative Court\), BVerwG 1 C 20.11, \(12/2012\)](#)).

- *Consequences of Entry Bans*

The geographical scope of entry bans should be clarified as it is not always clear that whether or not they are valid for the entire Schengen area.

Apart from preventing re-entry in case of border checks, the **Netherlands** and **Italy** consider that re-entry despite a previous entry ban constitutes a criminal offence, beyond simple illegal entry. ([Tribunale di Firenze – Court of Florence, N. 941/2013, \(05/2014\)](#)). The CJEU has considered that such legislation is not contrary to the Return Directive in the Case *Celaj* of 1 October 2015. Nevertheless the CJEU has been very clear in underlining that national courts have to determine whether the issue of the entry ban was carried out in compliance with Article 11 RD, in situations of unlawful re-entry. This particular conclusion of the CJEU challenges the Dutch Council of State approach which does not require that either before the departure of the TCN concerned, or after his re-entry, all the steps of the return procedure as laid down in the RD have been applied (**Dutch Council of State, 4 December 2014, 12/05658**). It remains to be seen whether the Dutch Council of State will change its jurisprudential approach following the *Celaj* Judgment. Will there be an examination of whether the return procedure has been applied and completed before the national judge can condemn the TCN to a prison sentence?

- *Judicial Control of Entry Bans*

Article 11, (2) RD states that ‘the length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case’. This is the usual and general criteria that have to be applied by the administration when it has the power and not the obligation to apply an entry ban. The judge is there to assess how the administration makes use of this discretionary power.

In **France**, this control is made by the administrative judge, checking the motives of the decision in relation to the four criteria, foreseen in French legislation for entry bans. The judge will also control the necessity of the entry ban and in particular the right to private and family life. However, the French judge does not give rules about the adequate length of entry bans contrary to what the **German** judge tried to do (see below). In **Spain**, there is interestingly a case where the judge diminished the length of an entry ban ([Tribunal Superior de Justicia de Castilla y León, Valladolid, Sala de lo Contencioso-Administrativo, Sección 3ª n° 966/2015](#)).

The **German** Federal Administrative Court ruled in February 2012 that there is, for third-country nationals, a right to a comprehensive judicial control of the length of time for an entry ban; and that there is no longer administrative discretion here (**Bundesverwaltungsgericht (Federal Administrative Court) BVerwG, 14 February 2012, 1 C 7.11**).

This provoked the adoption by the German Parliament of a provision confirming the discretionary power of the administration regarding the length of entry bans. This includes the possibility for the administration to connect the duration of entry bans to substantive conditions like a criminal record or its absence. It will not lead to an absence of judicial control for administrative discretion, but to checks made on the basis of rules above German legislation, like constitutional and European Union law, including the principle of proportionality.

The **German** Federal Administrative Court also decided in a judgement of 13 December 2012 that this depends on a two-step reasoning: first, ascertaining the weight of the reasons underlying the expulsion decision; and second, evaluating whether the duration of the entry ban is compatible with the right to private and family life which refers to the traditional balancing exercise, including the principle of proportionality. All circumstances in an individual case must be taken into consideration. ([Bundesverwaltungsgericht \(German Federal Administrative Court\), 1 C 14.12](#)).

**Belgian** case law provides an interesting example with a case where an entry ban was annulled. The administration had not taken the care provided by the applicant to her ill aunt into consideration ([CALL, 26 January 2015, 139.793](#)).

**Austrian** jurisprudence, meanwhile, gave weight to the length of the stay in the country, say, ten years, even if the person only speaks basic German ([High Administrative Court, VwGH 2012/21/0044, 2.10.2012](#)). Criteria used by administrative courts to determine the length of entry bans are: the third-country national trying to prevent the obligation to return; disregard for previous entry bans – leading to subsequent illegal stay; and the reimbursement of expenses for previous removals that are prescribed by **German** law. Case law in **Belgium** illustrates very well the requirement to take the right to family life and private life into consideration: for instance, integration in Belgian society and the schooling of his children ([CALL, 1st August 2013, 107.890](#)). It is interesting to note that the **Dutch** Council of State has ruled that there is no balance of interests to be made by the administration for a ‘light’ entry ban contrary to ‘heavy’ entry bans (see above regarding this distinction) ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201103520/1/V3](#)).

Judicial control in **Cyprus** raises serious concerns. Any third-country national, who is returned for whatever reason, will be put on a ‘stop list’ that is actually an entry ban. This occurs often without time limit but is, in principle, for a maximum of five years. In a recent case of 25 June 2015 involving a Lebanese businessman, the judge ruled, after the applicant had contested the ban, that placing a person on the stop list is not a judicially reviewable act, save if the applicant can rebut the presumption of initial good faith on behalf of the authorities. (*Elie Jamil El Khoury v. Republic*, 5710/2013, (06/2015)).

## IV. Judicial Interaction on the Return Policy: a European and National Perspective

This part aims to discuss the various dimensions of judicial interactions on particular aspects regarding *Chapter II of the Return Directive*. The First Part focuses on a three-dimensional dialogue: 1) between national judges and the CJEU (vertical dialogue); 2) between national judges from the same Member States (horizontal dialogue); and 3) between national judges of different Member States (transnational dialogue). It will also explore the concrete and potential effects of judicial interactions on a systemic level, that is, on: the domestic legal frameworks and jurisprudence of the Member States, as well as on relations between judiciary, administration and legislator. The Second Part focuses on common issues related to the termination of illegal stay, which received different solutions or legal argumentation by national courts in different Member States. The use of transnational interactions might have contributed, in these cases, to ensure the more coherent application of the Return Directive, enhanced fundamental rights protection of the TCNs. They may also have offered national judges a cost-effective inspirational legal source for solving the difficult questions raised before them.

### 1. Instances of Judicial Interaction on the Interpretation and Implementation of the Return Directive

This section discusses first the instances of *direct* judicial interactions (*i.e.* via the mechanism of preliminary reference) and will continue in the second Part with an analysis of the *indirect* judicial interactions (*i.e.* citation/reference to European judgments in the legal reasoning of national judgments).

#### A. Direct Judicial Interactions

The cases herein discussed herald the preliminary reference as a tool strategically used by national courts to remedy problematic legislative implementation of the Return Directive, such as: absence of return decision as the first step in the EU imposed return procedure; absence of a legal definition of the ‘risk of absconding’; legality of the alternative mechanism of fine/house confinement for irregular migrants; and legality of criminalisation of entry in breach of a previous entry ban. These cases are particularly important due to the fact that the legal issues referred to the CJEU are of wider interest than to the referring Member States. Similar legal issues exist also in other Member States. These cases help thus to measure the impact of the preliminary reference also in non-referring domestic jurisdiction. It can be noticed that the preliminary rulings have varying degrees of impact in non-referring Member States, while certain national courts readily suspend the proceedings to await the preliminary ruling of the CJEU in a case which was referred by a foreign national court, and subsequently give it full application in the pending case (**Administrative Court of Thessaloniki, Judgment no. 692/2015, 23/04/2015**), other national courts follow only to a certain extent the guidelines established by the CJEU (**Dutch Supreme Court 4, December 2014, 12/05658**).

#### A.1. Criminalisation of Migration-related Offences

##### **Zaizoune (Spain/CJEU) – an example of vertical and horizontal judicial interaction on the topic of the return decision and removal order**

In **Spain** the jurisprudential ‘doctrine of fine’, developed as an alternative to removal, has stirred jurisprudential disagreement among Spanish courts. Applied since 2005 pursuant to Article 57(1) of the Spanish Immigration Act 4/2000, the practice mainly consisted of imposing fines on illegally staying TCNs, instead of removing them from Spanish territory. ‘Taking into account the principle of proportionality’, authorities could therefore resort to ‘removal’ (*expulsion*) only when there were ‘negative factors’. The conformity of this doctrine with the RD came up before the Spanish Supreme

Court on the occasion of a direct appeal by a number of NGOs, which challenged several provisions of the Royal Decree 557/2011 as being contrary to the RD ([judgment of 13 March 2013 \(STS 988/2013\)](#)). While the so-called doctrine of fine remained unchanged until 2013, the Supreme Court became aware that the transposition of the Return Directive in Spanish Law would indubitably have an impact on the current practice of criminal sanctions and would, therefore, imply future adjustments. It further required national courts to strictly follow the EU return procedure, implying that they would subject TCNs illegally present in the country to a return decision. In a subsequent case, it also stressed that the TCN is required to regularise his or her situation, even after the payment of the fine; otherwise a return decision will apply ([Andalucía, 7 October 2014, n° 1910/2014](#)). These ground-breaking judgments of the Spanish Supreme Court setting aside the particular domestic legal model of sanctioning irregular TCNs in favour of the EU model of returning irregular TCNs, were, however, not followed by all Spanish courts. ([Spanish Report, p. 5](#)) In the context of divergent jurisprudential opinions, a regional court (the High Court of the Basque county) sought to put an end to the jurisprudential debate, by sending a preliminary reference to the CJEU. The referring national court essentially asked the CJEU to decide whether Articles 4, 6(1) and 8(1) of the RD precluded the application of Spanish legislation and its corresponding practice (also known as ‘the doctrine of fine’); these make irregular TCNs subject to either a fine, or depending on the circumstances, a removal order ([High Court of Justice of the Autonomous Community of the Basque Country, 2014/C 93/32 \(2013\)](#)).

Despite the CJEU’s finding in ‘*Zaizoune*’, the High Court of Galicia relied on the principle of non-retroactivity of the Court’s decisions to continue applying its established case-law regarding financial penalties ([Tribunal Superior de Justicia de Galicia, 323/2015 \(05/2015\)](#)). The High Courts have recently developed an interesting reasoning aimed at reconciling the Court’s interpretation with the ‘inherent’ Spanish conception of punitive measures: High Courts now explicitly reject the ‘alternative nature’ of fines and resort to removal as soon as an irregularly staying TCN is apprehended, as prescribed by the CJEU. However, in cases where no ‘aggravating circumstances’ (*negative factors*) exist, the ordinary procedure apply and Spanish judges may perform a deeper individual assessment of the applicant’s situation: it might, for instance, rely on Articles 5 and 6 RD in order to prevent the enforcement of removal when the principle of *non-refoulement* and/or the best interests of a child are at stake ([Tribunal Superior de Murcia, Sala de lo Contencioso-Administrativo, STSJ 791/2015 \(09/2015\)](#)); or, as ruled by the High Court of Castilla y Leòn, reducing the length of the entry-bans from three to two years while continuing with the removal ([Tribunal Superior de Justicia de Castilla y Leòn, Valladolid, Sala de lo Contencioso-Administrativo, STSJ 967/2015 \(2015\)](#)). The ban is reduced to one year, in cases where the TCN has only performed non-authorized working activity ([Tribunal Superior de Justicia de Castilla y León, Valladolid, Sala de lo Contencioso-Administrativo, STSJ 966/2015 \(2015\)](#)).

#### **Sagor/Mbaye (Italy/CJEU) – an example of internal judicial interactions following the CJEU rulings**

The CJEU’s abundant case-law regarding the criminalisation of irregular stay also gave rise to an interesting exchange of views among national courts, notably in **Italy** as with the interpretation of the EU cases *Sagor* and *Mbaye*. In 2012, the Court of Monza explicitly referred to *Sagor* where the Justice of the Peace had previously imposed a fine of 5000 Euros on a TCN who illegally entered Italian territory. It stated that the substitution/conversion mechanism applicable (according to which a fine can be replaced by a house confinement) was not compatible with the Return Directive. Therefore, the first Instance criminal Court should have raised this issue and disregarded it if deemed to contradict EU law. The Court, however, did not address or suggest any alternative to be applied by the tribunal, likely to be compatible with the RD ([Court of Monza, 2560/2012 \(12/2012\)](#)). One year later, the Italian Court of Cassation referred to *Achughbajian* when stating that home confinement could be an option as long as it does not contravene the Directive’s objectives and the enforcement of the TCN’s return. The Court thus overturned the Justice of the Peace’s decision in the first instance, which interpreted the Directive as

preventing the MS from imposing home confinement instead of financial penalties as criminal sentences brought against TCNs. ([Corte di Cassazione – Supreme Court, 35587/2013 \(08/2013\)](#)).

### **Skerdjan Celaj (Italy/CJEU) – an example of follow-up reaction by the referring national jurisdiction**

As for the correct application of criminal sanctions by Member States, the CJEU recently ruled on the criminalisation of re-entries in breach of valid entry bans, as requested by the Tribunal of Florence (**Italy**) in the case Skerdjan Celaj ([Tribunale di Firenze – Court of Florence, N. 941/2013, \(05/2014\)](#)). Unlike the AG's opinion, the Court stated that criminal measures sanctioning illegal re-entries could be admissible, in as much as they apply to 'illegally staying third-country nationals for whom the application of the procedure established by the Return Directive resulted in their being returned', but who then re-entered the Member State's territory irregularly. The Court of Justice required that for the application of the RD to be excluded, the first entry ban must have been issued in compliance with Article 11 RD (a matter which is for the referring court to determine).

It seems that the Italian referring court (Tribunal of Firenze) did not find a supporter of its view in the CJEU, namely that considering Italian legislation as not in conformity with the RD. The Court of Justice established that re-entry differs from a first illegal entry and permitted criminalisation of re-entry in breach of an entry ban. The Italian referring court conformed to the Court of Justice's interpretation and upheld the criminal sanction of imprisonment proposed by the public prosecutor.

It is interesting to note that a legislative framework that is similar to the Italian one exists in the Netherlands. The difference is that the Dutch Council of State does not require the competent authorities to check whether the return procedure had been fully applied, as required by the Court of Justice (**Dutch Supreme Court 4, December 2014, 12/05658; Tribunale di Firenze – Court of Florence, N. 941/2013, (05/2014)**). The Court of Justice ruling, dating from 1 October 2015 is for the time being, too recent. It remains to be seen what will be the impact of the judgment on national courts' interpretation and subsequent national case-law.

#### *A.2. Interpretation of the 'Risk of Absconding'*

##### **Pending Preliminary Ruling (Czech Republic/CJEU)**

According to Article 7(4) of the RD, voluntary departure can be refused if one of the three circumstances therein provided are found to exist. All the Member States have not though transposed this list of three circumstances. For instance, **Hungary** has its own list of circumstances,<sup>6</sup> the Bulgarian implementing legislation does not include the risk of absconding, but only 'threat to national security or public order'<sup>7</sup>; while Czech legislation does not include the risk of absconding and the dismissal of an application for legal stay as being manifestly unfounded or fraudulent. Faced with these inconsistencies between the national transposition of legislation and the RD, national courts have either sought direct guidance from the CJEU or indirect evidence, by interpreting the existing jurisprudence of the CJEU.

The **Czech** Supreme Court recently sent a preliminary request to the CJEU, seeking to obtain an answer on how to interpret national legislation to ensure conformity with the relevant EU law (C-

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<sup>6</sup> Section 42 of Act No II of 2007 provided the following four circumstances 'a) the third-country national's right of residence was terminated due to his/her expulsion or exclusion, or for whom an alert has been issued in the SIS for the purpose of refusing entry and the right of residence; b) the third-country national's application for residence permit was refused by the authority on the grounds referred to in Paragraphs b) and d) of Subsection (1) of Section 18; c) the third-country national has expressly refused to leave the territory of the Member States of the European Union voluntarily, or, based on other substantiated reasons, is not expected to abide by the decision for his/her expulsion; d) the third-country national's residence in Hungary represents a serious threat to public security, public policy or national security'.

<sup>7</sup> See, the Law on Foreign Nationals in the Republic of Bulgaria, Article 39b (4).

**528/15, *Al Chodor and others, op.cit.***). In light of the fact that the Czech Aliens Act does not refer to the risk of absconding as a ground for refusing voluntary departure, on 24th September 2015, the Supreme Administrative Court addressed a preliminary reference to the CJEU asking for clarification on this matter of legislative conformity. Although the preliminary reference concerns the definition of the ‘risk of absconding’ in Art. 2(n) the Dublin III, the judgment is reckoned to also affect cases concerning return of irregular migrants outside of the EU.

## *B. Indirect Judicial Interaction*

### *B.1. The significant Influence of *El Dridi* and *Achughbabian**

Following the CJEU’s *El Dridi* judgment, it seems that national courts are slowly accepting the idea of extending their judicial review beyond the manifest errors committed by national authorities. They are prepared to assess, too, whether the authorities have respected the principles of gradualism, individualism and proportionality, in particular where the fundamental rights or procedural guarantees of the TCNs are at issue. Significant changes have occurred in the practice of the supreme courts of **Bulgaria, Italy and Spain**, as they have aligned themselves and their interpretation of the RD with the CJEU’s. The national authorities’ decisions granting VD have been considered, since 2014, by the **Italian** Corte di Cassazione to be an integral part of the RD which is subject to full judicial review ([Italian Corte di Cassazione, Judgment No.437/2014](#)). The **Spanish Supreme Court** changed, in 2013, the long established doctrine of a fine requiring that public authorities follow the Directive as regards the precise steps in the return procedure ([judgment of 13 March 2013 \(STS 988/2013\)](#)). The **Bulgarian** Supreme Administrative Court more readily assesses the conformity of national legislation and administrative decisions with the RD and CJEU jurisprudence ([Dorofeev, 12 December 2011, 15505/2010](#), ([Hossam Eldin, judgment of the same court, 07 March 2012, 6339/2011](#)). In two cases the CJEU quashed the administration’s decision to refuse a VD period. The CJEU did so on the basis of inadequate or insufficient proof establishing that the TCN represents a danger to national security or public order. The mandatory nature of the voluntary departure measure is increasingly recognised as the preferred means of return based directly on Article 7 RD (e.g. [Wojewódzki Sąd Administracyjny w Warszawie \(\(Wojewódzki Sąd Administracyjny w Warszawie, IV SA/Wa 2918/12 – WSA, 25/03/2013\); \(judgment of 17.10.2011, A858-2332/2011\); \(Hossam Eldin, judgment of the same court, 07 March 2012, 6339/2011\).](#)

Furthermore, *El Dridi* and *Achughbabian* are also the first cases in which the Court of Justice has touched upon the sensitive issue of criminal law, applied to migration-related offences. These judgments (see section 1.a.) led to important changes in some Member States’ legal and judicial systems. While certain Member States strictly followed the Court’s interpretation – **France** reformed its criminal legislation, abolishing its former system of ‘police custody’ ([Advisory opinion from the Court of Cassation, 9002 \(06/2012\)](#)). **The Netherlands** enshrined the principle according to which criminal imprisonment can only be imposed when all the steps of the return procedure have been applied ([Supreme Court, 12/05522 \(12/2013\)](#)), others, like the **Czech Republic**, intended to somehow restrict the scope of application of the Court’s case-law, notably for suspended prison sentences given out during the course of the return procedure. In this regard, the **Czech Supreme Court** admitted such criminal sanctions when the prior use of administrative law proceedings failed in forcing the TCN to leave EU territory (in the present case, the TCN had neither complied with the return decision nor with the subsequent punitive administrative measures taken against him) ([Nejvyšší soud \(Supreme Court\), 7 Tdo 500/2014 \(05/2014\)](#)). However, with regard to stateless people, the **Czech Supreme Court** ruled that prior consideration for the return procedure was not required (given the lack of reasonable prospect of removal) so that any further assessment should be made in the light of domestic law. While criminal law is likely to apply in practice, the prison sentence imposed (in one particular case, up to ten months) is not yet fair and proportionate ([\(Nejvyšší soud \(Supreme Court\), 8 Tdo 230/2014 \(02/2014\)](#)).

Finally, there are some cases in which national courts explicitly rely on the CJEU's case law in order to fill the gap resulting from the non-transposition of the Return Directive in a given Member State.

### *B.2. National courts relying on the CJEU jurisprudence to offer direct effect to EU legal provisions*

This was notably the case with the **Dutch** Council of State, confronted with the general issue of the conformity of national legislation governing return and asylum procedure with Article 7 RD. The Council of State was obliged to assess an administrative decision establishing forced return in an accelerated procedure without any period of VD immediately after a TCN's renewed asylum application was rejected. More particularly they had to decide whether this was in conformity with Article 7 RD. The Ministry justified its decision to reject the residence permit for a certain period of time and to order immediate expulsion on the basis of Article 28(2) of the Asylum Procedure Directive 2005/85 and Article 7(4) RD which mentions as grounds justifying refusal to grant a VD period the 'application for a legal stay has been dismissed as manifestly unfounded or fraudulent'. The Ministry, first, highlighted that at the time of the administrative decision (26.02.2011) the Netherlands had not implemented Article 7 of the RD. The Council disagreed, and held that the applicant can nevertheless rely directly on Article 7 RD since, on the basis of the *Becker* judgment of the CJEU, individuals can directly rely on provisions of EU Directives, after the period of implementation has expired when they are 'unconditional and sufficiently precise'. Article 7(1) and (4) RD were held to be directly effective by the Council of State. Second, the Council rejected the argument that the Ministry is justified in refusing VD on the basis of Article 28(2) AP Directive and Article 7(4) RD, since, the legislator had chosen not to implement Article 28, par 2 of the Asylum Procedures Directive (2005/85) in Dutch legislation. Therefore, according to jurisprudence of the CJEU (judgement of 21 October 2010, C-227/09, *Accardo*, paragraphs 46 en 47) the derogating provisions in question cannot be relied on directly by the authorities against individuals, for the purpose of denying TCNs, such as the applicant in the main proceedings, a period for voluntary departure. The Council of State quashed the first instance court's judgment and annulled the administrative decision of January 26, 2011 on the grounds that it contained a return decision contrary to Article 7 of the Return Directive ([in a judgment of 12.04.2012, 201102602/1/V2](#)).

### *B.3. The effect of the Boudjilida preliminary ruling preliminary remarks<sup>8</sup>*

The first instance administrative court of **Thessaloniki** postponed the delivery of a judgment in a case challenging the conformity of an administrative decision ordering voluntary return in 30 days on grounds of violation of the right to be heard; this was based on the pending preliminary request of the French court in the *Boudjilida* case. The Greek Court (decision no 14/2014), in light of the request for a preliminary ruling by a French Court concerning a third-country national's right to a judicial review, postponed the final judgement regarding the legality of the concerned measure of the return of the applicant. After the publication of the CJEU judgement C-166/13, **Mukarubega**, and C-249/13, **Khaled Boudjilida**, the case was brought back for a hearing. The claim put forward in the application, namely that the third country national was not adequately heard before issuing a removal order, was accepted by the Court. Thus, the Court annulled the contested removal order. Furthermore, the Court remitted the case to the administration with the obligation, to call her to a hearing where she would have the possibility to expose facts that could be properly discussed and might influence the removal order (*e.g.* she could justify her stay in the country with a residence permit of another type provided by national legislation) (**692/2015, 23/04/2015**).

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<sup>8</sup> A more detailed discussion will follow up in the second edition of the REDIAL Electronic Journal.

#### B.4. The Added Value of ‘Judicial Interaction’ in the Implementation of the Directive

Having explored various modes of judicial interaction, it seems that certain national courts immediately conform to the preliminary rulings of the CJEU, and readily set aside conflicting national legislation: *e.g.* Italian courts following the *El Dridi* CJEU judgment; French courts following the *Achughbabian* CJEU judgment. However, other national courts have adapted their national jurisprudence to the CJEU precepts more slowly (Spain, post-*Zaizoune*). As long as the requirements set out by the Return Directive and jurisprudentially confirmed by the CJEU are met at domestic level, it is less important whether the compliance method that is used is disapplication of national law in favour of direct application of the Directive, or conform interpretation. National courts have at their disposal a number of judicial interaction techniques to ensure primacy of the EU treaty and Return Directive based provisions, ranging from: consistent interpretation of national law with EU law; the power/duty to make a reference for a preliminary ruling; proportionality within the margin of deference afforded by the EU law; mutual recognition of foreign judgments; comparative reasoning with national legislation and jurisprudence from another Member State; disapplication of national law due to violation of EU norms.<sup>9</sup>

The post-*Zaizoune* saga shows that national courts sometimes prefer to find ways of securing compliance with the CJEU judgment(s) without having recourse to disapplication. Instead, Spanish courts developed a constructive judicial dialogue, by having recourse to an innovative conform interpretation technique, which manages to simultaneously acknowledge the authority of EU law, as well as national law and judicial doctrine.

Nevertheless, regardless of the outcome of direct or indirect vertical judicial interaction for the legal order of the referring court or other national jurisdiction,<sup>10</sup> these types of interaction lead to a beneficial exchange of views among judicial authorities: more elaborate judicial reasoning; questioning of existing judicial doctrines or domestic political or executive practices. Ultimately, they help to tackle concrete difficulties resulting from the practical implementation of the Directive.

That being said, the lack of explicit references should not necessarily be taken as a sign of judicial isolation or a firm refusal to take the European jurisprudence into consideration. Due to judicial economy considerations, the CJEU rules set in the preliminary rulings might be followed without citing the relevant CJEU jurisprudence. Ultimately, judicial interactions, whether direct (*e.g.* preliminary reference), indirect (*e.g.* citation of European or foreign judgments), informal (*e.g.* meetings between national judges, circulation of legal enquiries or questionnaire on the application of a certain EU legal provision) are not an end in themselves, but should help to proactively respond to the requirements of the Return Directive and respect of European fundamental rights.

<sup>9</sup> On the definition of ‘Judicial Interaction Techniques’, see Final Handbook [Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication](#), available online, p. 38-40.

<sup>10</sup> That is, depending on the issue at stake, the CJEU sometimes rules more in favour of the TCNs’ rights – *Zh. and O.*, while sometimes relies on the principle of efficiency of the Return procedure – *Zaizoune, El Dridi* etc.).

## 2. Ruling in isolation – Similar Return-related Issues Receiving Varied Answers from National Courts

The above direct/indirect judicial interactions (mainly between the CJEU and the Member States' judicial authorities) are unfortunately not as widespread as they could be. A still considerable number of common issues, related to the termination of illegal stay, continue to be solved differently by national courts. Some of these cases, which could have served as inspiration for other national courts, will be discussed in the following paragraphs.

Prior Administrative Assessment before Conferring/Refusing a Period of Voluntary Departure on the basis of Article 8 ECHR In several jurisdictions (**Belgian, Dutch, Slovenian**), national courts had to assess whether issues related to Article 8 ECHR needed to be taken into consideration by the administration when establishing voluntary departure or removal. For instance, they had to assess whether the right to private life should have been taken into account in considering whether to grant VD, or whether this related only to removal cases. Likewise, they had to decide whether the principle of proportionality and the respect of Article 8 ECHR might be legitimate grounds for rejecting the enforcement of removal orders.

The Supreme Administrative Court of **Lithuania** ([judgment of 17.10.2011, A858-2332/2011](#)) had to define whether issues related to Article 8 ECHR had to be assessed by the administration only should the TCN not leave the territory voluntary, or whether it had more general application. The applicant, in this case, had illegally stayed in Lithuania for several years and had had a son there. In 2012 she was ordered to leave Lithuania together with her son within fifteen days. The administration argued that according to national legislation, Article 8 ECHR is only relevant if the alien does not leave the territory voluntarily. The Court ruled that although the Law, *expressis verbis*, does not establish the obligation to evaluate relevant circumstances at the stage of adoption of decision, ordering the alien to depart from Lithuania, the provisions of Directive 2008/115 favour voluntary departure and require an evaluation of all relevant circumstances before a return decision is adopted. Thus a systemic interpretation of the Law on the Legal Status of Aliens leads to the conclusion that all relevant circumstances should be evaluated in all cases, be it a decision ordering voluntary departure or a decision ordering forced expulsion. A different interpretation of the Law might result in violation of Article 8 of the ECHR, since the alien concerned might find himself or herself in an uncertain situation for a long time. It is interesting to note that the Supreme Administrative Court supported its conclusions by invoking the opinion of the AG in *Zurita Garcia*.<sup>11</sup>

It seems that the **Dutch** Council of State shared a different interpretation on the need to check the compliance of a return decision with Article 8 ECHR. The Council held that, since the TCN can apply for a residence permit on grounds of family life, then the public administration is not required to perform the specific removal examination in conformity with Article 8 ECHR. In another case, the Dutch Council of State held that family aspects can be considered in the context of prolonging the period for voluntary return, as provided for in Article 7(2) RD (**ABRVS 1 November 2012, 201111708/1/V3**). According to the CJEU judgment in *Boudjlida*, national authorities 'must necessarily observe the obligations imposed by Article 5 RD [when issuing return decisions]' (see *Boudjlida*, C-249/13, para 49).

By contrast, the Supreme Court of **Slovenia** explicitly referred to ECtHR case-law and to EU law when addressing the issue of Article 8 ECHR, to be considered in the context of voluntary departure.

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<sup>11</sup> C-261/08 *Zurita Garcia*, ECLI:EU:C:2009:648. This is a case decided by the CJEU along similar lines to those in *Zaizoune*, namely whether a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfil, the conditions of duration of stay applicable there, that 'Member State is not obliged to adopt a decision to expel that person'. It should be noted that the period for the transposition of the Return Directive (up to 24 December 2010) had not yet elapsed at that time.

In this case, the TCN challenged a VD measure, with attached obligations, on the grounds of the TCN's right to a family life. The Supreme Court held that the return measure had to comply with the principle of proportionality to find out whether the restriction of the right to a family life, as enshrined in Articles 7 EU Charter and 8 ECHR, is legitimate. The Supreme Court has stated that the principle of proportionality means that the following questions must be asked: is the contested measure necessary; is the contested measure feasible in the sense that it can actually achieve a legitimate goal; is there proportionality in the narrow sense? The Court added that the infringement of the right to the family life of the applicant must be weighed against the right of the State to control its borders and to control immigration flows. The Supreme Court did not apply the aforementioned standards in a given case. It, however, quashed the judgment of the Administrative Courts and returned the case to the Administrative Court with the indication that the Administrative Court should apply these rules to the case in hand. Nevertheless, the Supreme Court stated that the Administrative Court should have taken into account the fact that the applicant entered Slovenia illegally; that he lived in Slovenia illegally; and that he was certainly aware that he did not have a legal stay in Slovenia. In this judgment, the Supreme Court referred to the UN Convention on the Rights of a Child, Article 8 of the ECHR, including judgments in cases of *Nunez v. the Netherlands*, *Boultif v. Switzerland*, *Maslow v. Austria*, and EU Law: Article 7 of the Charter and recital of the Returns Directive.

The Administrative Court, after having received this judgement, followed the guidelines set by the Supreme Court and took into consideration the right to family life and applied the principle of proportionality. Nevertheless, the TCN's application was still dismissed on grounds that the VD measure with attached obligations was not disproportionate. The Supreme Court confirmed the judicial assessment of the Administrative Court in appeal.

#### *A. Judicial Interpretation of the Proportionality Assessment in the Pre-removal Context*

When applying the Return Directive, Member States are notably required to comply with general principles, such as effectiveness or proportionality. As already mentioned in section 1.b., it is interesting to note that in some Member States, the judicial review of this last principle is even broader and sometimes goes beyond the EU law's interpretation of 'gradualism' and balanced appreciation of the measures adopted. This is notably the case for the Supreme **Bulgarian** Administrative Court which relied on domestic law. The court stated that proportionality also implies an enforcement of a removal order 'on time', whereas otherwise any changes of circumstances in the TCN's situation as well as the legal grounds invoked at the date of serving should be taken into account ([Върховен административен съд \(The Supreme Administrative Court court\), 3366/2011 \(06/2012\)](#)). Although in **Austrian** law, a removal does not represent a second decision, it has to be specifically subject to a proportionality assessment and to a judicial review, which is distinct from the one applying to the return decision ([Verwaltungsgerichtshof \(High Administrative Court\), 2010/21/0056 \(10/2011\)](#)). Finally, in **France**, proportionality in resorting to pre-removal measures now implies giving preference to house arrest instead of administrative detention ([Cour administrative d'appel de Versailles \(Administrative Court of appeal of Versailles\), 13VE03044 \(03/2014\)](#)), unless the former is judged insufficient to prevent the TCN absconding.

#### *B. Removal Orders Issued against Unaccompanied Minors (UM) and Prior Consideration to 'Reception Guarantees'*

The **Dutch** Council of State interprets Article 10(2) RD as not covering the 'voluntary return' of unaccompanied minors, considering indeed that that requirement of 'adequate reception facilities' does not apply in such circumstances ([Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201104976/1/V2 \(06/2012\)](#)). The **German** Administrative Court interprets, meanwhile, the Return Directive as *de facto* suspending any deportation of UM as long as 'the immigration authorities have not ensured the concrete fact that a member of the minor's family or

another authorized person or institution will receive the minor'. In the Court's view, the RD implies that if a negative decision is issued, the unaccompanied minor should be able to challenge his or her return before the Courts and to claim a follow-up protection order from the government ([Bundesverwaltungsgericht \(German Federal Administrative Court\), 10 C 13.12 \(06/2013\)](#)).

#### *C. Circumstances Likely to Extend/Reduce a Period for Voluntary Departure (AT, HU, BG, NL)*

The Return Directive allows a considerable margin of discretion to the Member States under Chapter II of the RD. For instance, voluntary departure can take place in a period from seven to 30 days: the Member States can choose whether to confer the voluntary departure measure automatically or by individual application. The Member States can include other circumstances than those enumerated in Article 7(2) as grounds for extending the VD period. There is no strict list of circumstances qualifying as 'risk of absconding' or 'risk to public policy'. Article 8(4) does not exhaustively prescribe the coercive measures available to Member States for carrying out removal. The specific circumstances when removal may be postponed are also not exhaustively enumerated, with Art. 9 providing only requirements to be followed when establishing these measures at national level. According to Article 11, Member States may exceed the five years period of an entry ban in cases of a threat to public policy, public security or national security. However there is no precise limit on the duration of an entry ban. This discretionary power left to the Member States when implementing the RD and taking legislative choices is not though absolute. There are limits imposed by EU law and the jurisprudence of the CJEU. For instance, the respect of fundamental rights and ensuring an effective return of irregular migrants: the Member States cannot ignore these aspects when they act within their margin of discretion. Certain national courts have paid significantly more attention to the protection of fundamental rights when deciding on the prolongation of voluntary departure or on reducing the voluntary departure period.

For instance, the **Austrian** High Administrative Court adopted a broader interpretation of the concept of '*specific circumstances in individual cases*' in favour of ensuring the fundamental rights of TCNs and a fair balance between personal and public interest. For instance the High Administrative Court included, among its specific circumstances, those on the ground in the country of destination ([High Administrative Court, Judgment No.2012/21/0072, 16.5.2013](#)). The Federal Administrative Court included medical reasons, such as: eye surgery and the pregnancy period of the partner of the TCN as circumstances justifying the prolongation of the VD period.

As to the definition of the 'risk of absconding' as a legal grounds for reducing or refusing VD, certain national courts reject general statements invoked by the administration as constituting 'risk of public policy', such as: risk of committing a crime. As long as the administration's statements are deprived of concrete factual references to individual situations, they cannot form the grounds for refusing voluntary departure (see more on this in **Part II – Risk of absconding**, and **European Synthesis Report**, p. 12-14, 16-19).

#### *D. Circumstances likely to reduce the period of entry bans*

The **Austrian** High Administrative Court has, for instance, shortened a period of entry ban of more than five years to ensure respect of Article 8 ECHR ([High Administrative Court, VwGH 2012/21/0044, 2.10.2012](#)). The Vienna Administrative Court, meanwhile, reduced the residence ban of ten to seven years because of the need for a fair balance between drug offences and established family life.

## V. General Conclusion: The Added Value of Judicial Interactions on Return Policy

Having explored these various dimensions of judicial interaction, the question is: what is their added value for the implementation of the Return Directive, and why is it desirable to have them?

It seems that vertical judicial dialogue has improved the efficient implementation of the Return Directive by: 1) filling up the gaps left by the legislator (*Zh. and O.*); 2) eliminating incompatibilities between national legislation and the Return Directive provisions (*El Dridi, Achughbabian*); and 3) raising to a certain extent the national level of fundamental rights protection (*Boudjlida*)

The preliminary ruling also has the capacity to ensure the coherent interpretation and application of the RD, in a field that is subject to different jurisdictional models (*i.e.* civil, administrative, criminal), and thus subject to various methods of judicial interpretation. Therefore, regardless of the type of courts assessing the implementation of the RD and their constitutionally recognised powers *vis-à-vis* the state authorities, the preliminary rulings of the CJEU have confirmed certain common powers to national courts deriving from the EU legislation: 1) setting aside conflicting national legislation (post-*El Dridi, Achughbabian, Sagor*); 2) filling the national legislative acts with directly effective provisions of the RD and relevant EU secondary legislation, without having to wait for the national legislator to fill these gaps or bring national legislation in line with EU legal provisions ([in a judgment of 12.04.2012, 201102602/1/V2](#)). Additionally CJEU preliminary rulings force changes in domestic jurisprudence that is in conflict with European law (post-*Zaizoune*). This might ultimately lead to common judicial interpretation and understanding of the sometimes abstract and general RD provisions (*e.g. Z. Zh and O.*). It is interesting to note that certain national courts oppose preliminary CJEU rulings (post-*Zaizoune*, Spain), preferring to use consistent interpretation rather than disapplication, as suggested by the CJEU. Other national courts, though, conform without opposition to the CJEU preliminary rulings, even if they disagree with the CJEU's interpretation of the Return Directive (*e.g. Celaj*, Italy).

However, besides this traditional type of interaction, there are alternative forms of judicial dialogue, though rarely used in practice by national courts. Limited judicial cross-referencing can notably be explained by: limited access to foreign cases; language barriers; time constraints; and strong differences across legal and judicial cultures. More fundamentally, explicit references to EU law considerations may also be limited by national capacities and resources. For instance, French national courts, especially first instance ones, dealt in 2011 with more than 190,000 administrative cases (30% of which were on immigration law). Time and resources limitation do not allow a systematic dissemination of national judgments or in-depth analyses based on foreign legislation and judgments.

While waiting for legal improvements from national legislators in adequately transposing the Return Directive (limiting for instance the use of discretionary clauses, better defining overly vague and general terms), challenges remain for national jurisdictions. They must ensure: greater internal consistency (*such as* avoiding conflicting judgments emerging from courts or even chambers from the same court having overlapping jurisdiction<sup>12</sup>); transparency (public and accessible case-law); and transnational exchanges of knowledge. As demonstrated by academic initiatives such as the present REDIAL project but also our previous project CONTENTION on judicial control of return detention, online platforms and [case-law databases](#) could be valuable tools to ensure that national judges active in this particular field have access to the relevant information.

Formal judicial interactions of the types discussed above can be complemented by informal mechanisms of judicial consultation. A possible additional tool that might offer prompt support to national judges, in addressing difficult and concrete issues on the application of the Return Directive and that, at the same time, might ensure coherent application of the RD, would be an online

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<sup>12</sup> See *e.g.* the diverging interpretation following *Achughbabian* by the CA Paris, B 11/04993 and B 11 04971.

questionnaire for national judges (a mechanism which is established in the ambit of civil judicial cooperation). This would be filled in and then sent automatically to all the judges on the same network. Each of the national judges would there express his or her view on the question submitted by another domestic judge, and thus a complete comparative overview would be immediately available to judges, who are ruling on the return of irregular migrants. Something like this happened last December when a Hungarian Judge addressed several questions on voluntary departure and entry bans to the REDIAL judicial network. A dozen answers from other participating judges dealing with similar issues were sent in and a fruitful exchange of views leads to a common understanding and interpretation of the Return Directive provisions.

More flexible and less costly than questions referred to European Courts, ‘horizontal’ interactions among national courts across the European Union thus represent a significant source of inspiration when interpreting and implementing the Return Directive at national level. The exchange of knowledge is desirable not only to ensure a better implementation of EU law in national systems but also to guarantee that TCNs, within the scope of the RD, have better protection for their fundamental rights and procedural guarantees. As demonstrated by the jurisprudence here discussed (see, in particular the French, Belgian, Slovenian jurisprudence on Article 7 and 8 RD, and German jurisprudence on Article 10 and 11 RD), a stronger protection of the TCN’s fundamental rights<sup>13</sup> can be ensured through judicial interaction.

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<sup>13</sup> For instance, the right to private and family life, proportionality assessment, limited criminal sanctions, protection of minors etc.