

## Criminalization of the Immigration in the EU and Protection of Procedural Rights

Marina Matić Bošković<sup>1</sup>

*Institute of Criminological and Sociological Research, Belgrade, Serbia*

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**Abstract:** Serbia is a transit country for migrants on their way to the EU via the Western Balkan route. In 2015-2016, millions of migrants from Syria, Afghanistan, Iraq, Pakistan, and Somalia used the Western Balkan route to reach the EU countries. Serbia as the EU candidate country has to fulfil the requirement of cooperation with the EU in the area of managing migratory flows through efficient control of its borders jointly with the EU officers. In order for Serbia to reinforce the border management, it is important to understand the EU migration policy. Although the Tampere European Council Conclusion from 1999 and the European Agenda on Migration from 2015 declared the EU commitments to develop legal access to vulnerable individuals, in practice migration is perceived as a threat to security. As a result of this approach the preventive and repressive criminal law measures were introduced in the immigration law. The European member state authorities selectively use criminal law to achieve the migration policy goals. The criminal law measures that are applied across the EU are detention, arrest, police control, removal from the territory. However, there is criticism that these criminal law measures are not followed by criminal law guarantees, especially procedural rights and human rights protection instruments. The analysis is put in context of the Return Directive 2008/115 that sets the EU standards and procedures on return of illegally staying migrants. In this article the author analyses the effects of immigration criminalization and the development of the Court of Justice jurisprudence in relation to the procedural rights.

**Keywords:** criminalization of immigration, EU law, Court of Justice jurisprudence, Return Directive, procedural rights.

### INTRODUCTION

Serbia is a transit country for migrants on their way to the EU via the Western Balkan route. According to Frontex (2017) Risk Analysis from 2017, in 2015-2016, millions of migrants from Syria, Afghanistan, Iraq, Pakistan, and Somalia used the Western Balkan route to reach the EU countries (Oruc et al, 2020: 1). Serbia as the EU candidate country has to fulfil the requirement of cooperation with the EU in the area of managing migratory flows through efficient control of its borders jointly with the EU officers. In order for Serbia to reinforce the border management, it is important to understand the EU migration policy. In addition, Serbia is currently facing challenges with migrants who could not

<sup>1</sup> Corresponding author: [matimarina77@yahoo.com](mailto:matimarina77@yahoo.com) • <https://orcid.org/0000-0003-1359-0276> • Research Fellow.



reach the EU countries and who are staying on Serbian territory, which raises security issues (Srbija, nasilje i migranti, 2022).

The same challenges and dilemmas that Serbia has in relation to approach towards migrants could be noticed in the EU. Although the Tampere European Council Conclusion from 1999 and the European Agenda on Migration from 2015 (European Commission, 2015) declared the EU commitments to develop legal access to vulnerable individuals, in practice migration is perceived as a threat to security. That is clear from the 2014 Council Conclusions on EU Return Policy (Council of the European Union, n. d.), where it is stated that “a coherent, credible and effective policy with regard to the return of illegally staying third-country nationals is an essential part of a comprehensive EU migration policy”. The European Commission in the 2015 Action Plan on Return highlights the aim to establish an effective return system which should reduce incentives for irregular migration (Majcher, 2019: 667). As a result of this approach, the preventive and repressive criminal law measures were introduced in the immigration law. The return related measures, which often involve detention and deportation, are inherently coercive in nature. This raises the possibility that the enforcement of such measures could result in violations of human rights of the individuals subject to return.

Inability to establish proper approach towards the migratory phenomenon and its understanding only as a security threat to the EU resulted in merging immigration law with the criminal instruments, including law enforcement agencies and criminal sanctions (Gatta et al., 2021: 2). Criminalization of migration in Europe and its connection to a preventive rationale are aimed at deterring and preventing the entry of third-country nationals into the Schengen area. The EU has played a significant role in shaping and regulating the criminalization of migration. In 2002, the EU introduced the legislation that criminalizes human smuggling. The legislation is often referred to as “the facilitators’ package”: Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence and Council framework Decision 2002/946/JHA of 28 November 2002 (Council of the European Union, 2002: 1-3) on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence (Matić Bošković, 2016: 224). At the time of the adoption of this legislation, the EU operated under a pillar structure, which divided areas of policy between the EU and its member states (Mitsilegas et al., 2003: 106). In this context, the legislation included both a Directive and a Framework Decision, reflecting the dual nature of EU policies. The development of these legislative measures was closely related to the evolution of the EU’s policy on irregular migration. They are also seen as developments of the Schengen acquis, as a set of rules and agreements that promote open borders and the free movement of people within the Schengen Area. However, the EU did not criminalize irregular entry, transit, or stay (Mitsilegas, 2021: 26). Additional legal instrument that regulates irregular migration was adopted in 2008. The Return Directive (2008/115/EC) was adopted with the aim to regulate the return of irregular migrants.

The European member state authorities selectively use criminal law to achieve the migration policy goals. Individual EU member states have been adopting measures within their national legal systems to address illegal migration through criminal law (Waasdorp & Pahladsingh, 2018: 248). These measures can include the introduction of criminal offenses and sanctions related to illegal entry, stay or related activities. This practice has been crit-



icized because it essentially transforms administrative violations into criminal offences. Such a transformation can be seen as symbolic criminalization, sending a message about the undesirability of perceived danger of migrants. The concept of symbolic criminal law suggests that the criminalization of certain behaviours related to migration may serve to send a message about the state's stance on migration, even if it is not the most appropriate or effective legal approach. The criminalization contradicts with immigration enforcement objective to facilitate the return of irregular migrants to their home countries.

The aim of the paper is to analyse the effects of immigration criminalization in the EU member states and the development of the Court of Justice of the EU (CJEU) jurisprudence in relation to the procedural rights regulated by the Return Directive 2008/115 (Directive 2008/115/EC). Better understanding of the EU *acquis* and jurisprudence could provide guidelines for the legislator in Serbia how to regulate this area.

For the purpose of this research, the author applied comparative legal method, analysing legal framework of the EU and the Court of Justice of the EU jurisprudence, with the aim to assess if the European Commission goal of effectiveness of the return system is achieved through increased return rate and discouraging migrants from coming to the EU.

The relevant legal provisions were analysed:

- the Return Directive 2008/115 (Directive 2008/115/EC) and specifically the Chapter III on procedural rights that have to be applied during the return procedure;
- Court of Justice of the EU jurisprudence, specifically in relation to the criminalisation of the illegal immigration and protection of the procedural rights in the return procedure.

In addition, the author analysed the effectiveness of criminalisation of illegal immigration and the results of implementation of the Return Directive.

## EU LEGAL FRAMEWORK

The criminalisation of irregular migration, particularly irregular entry, is characterised by a focus on prevention and deterrence rather than on addressing specific harms. Precautionary criminalisation in the context of irregular migration means treating irregular entry as a wrong of public kind that warrants criminal sanctions. This approach raises questions about the role and effectiveness of criminal law in dealing with immigration related issues, since it may not be clear what criminal law is designed to achieve when applied to irregular migration. Furthermore, it is open for discussion whether administrative immigration law alone would be sufficient to regulate migration flows. However, the EU member states are using criminal law in addition to administrative measures, indicating a dual approach to managing irregular migration.

The Return Directive was adopted with two primary goals. First, it aims to establish an effective policy for the removal and repatriation of individual who are to be returned to their home countries. Second, it seeks to ensure that these returns are carried out in a human manner and with full respect for fundamental rights and dignity of the individual involved. Both principles, effectiveness and protection of fundamental rights, are mentioned in the Directive and the CJEU's jurisprudence. The Return Directive aims to strike



a balance between effective managing returns and upholding fundamental rights, but the CJEU's emphasis is on effectiveness that can sometimes appear to outweigh the need for such a balance. The CJEU explicitly states that the use of coercive measures should be subject to the principles of proportionality and effectiveness with regard to the means used and the objectives pursued. Additionally, the Court has ruled that the rights of the defence must not undermine the effectiveness of the directive (Case C-383/13 PPU, par. 36).

The criminal law measures that are applied in case of illegal immigration across the EU are detention, arrest, police control, and removal from the territory. However, there is criticism that these criminal law measures are not followed by criminal law guarantees, especially procedural rights and human rights protection instruments. The analysis is put in the context of the Return Directive that sets the EU standards and procedures on return of illegally staying migrants. Chapter III of the Return Directive regulates procedural rights that have to be applied during the return procedure, while the Court of Justice of the EU provided further interpretation of the rules, specifically a right to be heard during the proceedings and a right to legal remedy.

### *RETURN DIRECTIVE*

The EU law, including the Return Directive, is presented as assuming a protective function against disproportionate and uncritical criminalization at the national level. It aims to ensure that national laws align with the overall objectives of the EU immigration policies, including the timely and effective return of irregular migrants.

The Return Directive was adopted in 2008 and it followed after three years of challenging negotiations among EU member states (Acosta, 2009: 21). The Directive was introduced as part of the EU's efforts to establish a common framework for the return of irregular migrants and to introduce minimum standards for fair treatment during the return procedure (Giupponi, 2014: 171). End of 2010 was the deadline by which member states were expected to transpose the Directive's provisions into their national laws and regulations.

Although the European Commission in the Proposal for Directive (European Commission, 2005: 2.) emphasised that objective is "to provide clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, which take into full account the respect for human rights and fundamental freedoms", the Directive faced immediate criticism from non-governmental organizations and third countries (Baldaccini, 2009: 2). Critics likely had concerns about the Directive's provisions and their potential impact on the rights and treatment of irregular migrants (Peers, 2015: 291). One of the primary concerns was the considerable length of detention allowed under the Directive in preparation for removal. Another concern relates to the mandatory link between entry bans and return decisions. This means that when a return decision is issued, an entry ban is also imposed. Such entry bans can have significant consequence for individuals, and critics argue that they are applied too broadly (European Parliament, 2019, recast).

The Directive is designed to address the situation of third-country nationals who are residing in the EU member states without meeting the necessary legal conditions for entry, stay or residence, as specified either in the Schengen Borders Code or other relevant con-



ditions set by the member states (Article 5 of the Directive). A key provision of the Return Directive is obligation for member states to issue a return decision to every third-country national staying illegally on their territory. While the Directive establishes a general obligation to issue return decision, there are conditions and criteria under which this obligation may not apply (Article 6 of the Directive).

The Return Directive generally provides irregular migrants with the opportunity for voluntary departure within a specific timeframe, which is between 7 and 30 days. However, exceptions may apply in certain situations (Article 6 of the Directive). If an irregular migrant, who has been issued a return decision, does not leave the country within the specified timeframe, the default course of action is to initiate the process of removal (Article 8 of the Directive).

The whole Chapter III of the Return Directive is dedicated to the regulation of procedural safeguards for irregular migrants. The procedural safeguards include the requirement for written and justified decision, as well as the information on available remedies. In addition, the procedural rights include right to translation (Article 12), effective remedy (Article 13), and right to legal aid (Article 13).

EU member states have discretion to define and establish penal sanctions for violations of their migration rules. According to the European Commission, this includes the authority to determine which specific actions related to migration may result in criminal penalties (European Commission, 2015: 18). While member states have the authority to set penal sanctions, they have to do so in a manner that does not compromise the application of the Return Directive and to ensure that sanctions are consistent with the Directive and do not hinder its application (Pahladsingh & Waasdorp, 2017: 24).

According to the European Commission the Return Directive is “limiting the use of detention, binding it to the principle of proportionality and establishing minimum safeguards for detainees” (European Commission, n. d.). Specifically, Article 15 of the Return Directive relates to the immigration detention. Immigration detention is only permissible for the purpose of preparing for return and carrying out the removal process. The Directive provides guidelines for immigration detention. Although, the Directive sets that Detention is only permitted for specific purposes and under certain conditions, including regular reviews and the possibility of judicial oversight, it failed to enumerate in an exhaustive way the grounds that that can justify detention (Basilien-Gainche, 2015: 111). The Directive aims to ensure that detention is used as a measure of last resort and is not unduly prolonged. Detention can be ordered when there is a risk of the person absconding or if the person is actively avoiding or obstructing the return or removal process. However, the Directive is leaving to member states to define objective criteria that will be used in each individual case to assess if a person under return procedures may abscond (Majcher, 2013: 24). According to the Directive, detention can be ordered by either administrative or judicial authorities, depending on the national legal framework. Any decision to detain must be issued in writing and include detailed reasons. Detention shall not exceed six months unless national law allows for extension of up to one additional year.

Limitation of the detention by the Return Directive has led to both standardisation of detention time limits across member states and an increase in the maximum duration allowable detention periods in some countries. The Directive has had positive impact in the countries that previously did not have specified time limits for immigration detention



in their legislations like Denmark, Sweden or Finland, while in some cases the countries, including Italy, Greece, Spain, which previously had shorter maximum detention periods, extended it to maximum 18 months following the transposition of the Directive (Majcher, 2013: 27) These changes reflected the complex and varied approaches to immigration detention within the EU.

The Return Directive has been a subject of significant attention from the CJEU. The CJEU has delivered over a dozen judgements related to the Directive, indicating the legal complexity and importance of this instrument within the EU legal framework.

#### *COURT OF JUSTICE OF THE EU JURISPRUDENCE ON RETURN DIRECTIVE*

The Court of Justice of the EU plays a role in harmonizing immigration policies across the EU member states, ensuring that they adhere to the EU law and do not hinder the effective application of the EU acquis, especially the Return Directive. Furthermore, the CJEU has crucial role in setting limits on the powers of the EU member states to criminalize irregular entry and stay. These limits are established with a primary consideration for the effectiveness of the EU law.

The CJEU's decisions emphasize the supremacy of the EU law over national laws, particularly in cases related to immigration and the Return Directive. This means that member states must align their national legislations with the EU law and its objectives and the CJEU's decisions serve as an assessment if there is an over-criminalisation of irregular migration. The CJEU's decisions are aimed at ensuring that the implementation of the Return Directive is not hindered by overly punitive or restrictive national laws related to irregular migration. This approach is confirmed in the series of the CJEU decisions that will be elaborated in the following text.

The CJEU emphasised in the jurisprudence that the EU Return Directive does not intent to fully harmonise national rules on the stay of foreign nationals (Case C-329/11, par. 32; Case C-430/11, par. 32). This means that member states retain the authority to define and regulate illegal stays thorough their own criminal law. Member states have flexibility in how they address illegal stays, including the use of criminal sanctions, within the bounds of the EU law.

The CJEU had to assess the criminalisation of irregular migration within the context of immigration detention and the Return Directive. As it is mentioned, some EU member states choose to treat irregular migration, such as illegal entry or stay, as a criminal offense that can be subject to prison sentence, which has as a consequence that an individual found guilty of irregular migration may face imprisonment as a punishment. When irregular migration is treated as a criminal offence with prison sanction, the safeguards and conditions related to immigration detention, as outlined in the Return Directive, may not apply, since the individual is detained as a result of criminal conviction.

The complex interplay between immigration detention and criminalisation of irregular migration highlights the need for clear legal frameworks and safeguards to ensure that the rights of individuals, including those in irregular migration situations, are protected. It also underscores the importance of addressing legal and procedural issues related to immigration and criminal law within a comprehensive legal framework.



In the *El-Dridi* case (Case C-61/111), the CJEU ruled that member states cannot use prison sanction as a means to address irregular stay or entry of third-country nationals. Instead, they are obliged to focus on enforcing the return decision issued to such individuals. Imposing prison sentence was found to be counterproductive as it could hinder the achievement of the EU Directive's objective, which is the effective removal and repatriation of irregularly staying third-country nationals (paragraph 55 of the Judgement). The decision emphasised the importance of pursuing enforcement measures rather than resorting to punitive detention. Furthermore, the CJEU decision in the *El-Dridi* case underscores the importance of aligning national immigration enforcement practices with the objectives and principles outlined in the EU Return Directive (Raffaelli, 2011: 473). In the *El-Dridi* case the CJEU analysed the rules related to the return of illegally staying third-country nationals, specifically application of Articles 15 and 16 and comparability with the national legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State.

The CJEU concluded that the prison sentence given to *El-Dridi* was problematic because it ran counter to the main objective of the EU Return Directive. The proportionality and the need to prioritise the effective and human return of irregular migrants should be emphasised, rather than resorting to prison sentence as the default approach. The CJEU found in the *El-Dridi* case that a prison sanction imposed by the Italian government risked violating the main objectives of the EU Return Directive. The Italian Government's approach to enforcing the return decision, in this case, was found to lack proportionality. A prison sanction was imposed solely because an immigrant had stayed illegally after being notified of an order to leave, even after the granted period of departure had expired, instead of pursuing measures to ensure the return of individual. This approach was seen as disproportionate to the offense.

As a result of the CJEU's ruling in this case, Italian judges were instructed to disapply the prison sanction contained in Italy's immigration legislation. The decision clarified that detention should be used when an individual's behaviour poses a genuine risk to the removal process.

In the case law the CJEU continued to interpret deprivation of liberty of immigrants. The ruling in the *Achughbabian* case (Case C-329/11) clarified that initial detention by the police for a brief period is permissible when questioning irregular migrants. However, the CJEU considered the treatment of irregular immigrants, including the issues related to detention and return procedures in the context of immigration enforcement and the Directive's provisions, not as a matter of fundamental rights. Reasons for that are that fundamental rights approach would involve a more explicit recognition of the importance of safeguarding the rights of individuals, including their right to liberty. Instead of emphasising fundamental rights, the CJEU's decision places a greater focus on the responsibilities and obligations of the member states towards the EU.

The CJEU addressed the compatibility of the French law, which criminalized irregular entry and residence, with the Return Directive (Raffaelli, 2012: 176). The CEJU recognised that the Directive does not prevent member state from classifying an illegal stay within its territory as an offence. A member state may also impose penal sanctions as a means to deter and prevent illegal stays (paragraph 28 of the Judgement). The Court of Justice assessed common standards and procedures for returning illegally staying third-country



nationals and national legislation making provision, in the event of illegal staying, for a sentence of imprisonment and a fine. The CJEU found that such criminalization was incompatible with the EU law when applied solely to an individual staying irregularly. The CJEU emphasized that detention jeopardises the primary goal of the Directive, which is the expulsion of irregular migrants from the EU territory. Additionally, the Court established that, following national criminal procedure rules, penal sanctions can be imposed on third-country nationals to whom the return procedure specified by the Directive has been applied. These sanctions are imposed on individuals who are illegally staying in an EU member state without justified grounds for non-return. However, the Court did not rule out other forms of punishment that do not involve detention. In practice, that means that sanctions could include fines but not detention, as the latter would potentially delay the implementation of the removal process.

Later, in the *Sagor* case (Case C-430/11), the CJEU clarified that criminal sanctions for irregular migration can take the form of fines. The CJEU found that Italy's practice of replacing fines with expulsion orders accompanied by entry bans is in line with the Return Directive, provided that it is done based on an individual examination of the specific situation of the person involved and when there is a risk of absconding to avoid the return procedure (Case C-430/11, par. 41). This practice appears to provide an alternative means of enforcing return measures while aligning with the Directive's objectives. Furthermore, the CJEU's ruling in *Sagor* case highlights the importance of member states duty of loyalty and ensures the effectiveness of the return procedure for illegally staying third-country nationals. Home detention orders, when used as a replacement for fines, should not impede or delay the removal process but should be aligned with achieving the physical transportation of the individual out of the member state as soon as possible to comply with the Return Directive (Case C-430/11, par. 44-45).

In relation to the procedural rights, the CJEU in *Mahdi* case (Case C-146/14 PPU) emphasised the importance of judicial review of detention after six months. According to the Court interpretation, the review should involve a detailed assessment of facts and allow detainees to present their arguments. However, it raises concerns about whether similar standards are applied to subsequent period reviews, given the permissible length of detention and potential new facts arising during removal preparations. The CJEU highlighted that the Directive does not provide for automatic reviews. This lack of access to review may render them inaccessible for many non-citizens held in immigration detention. The Court highlighted that member states must comply with their obligation under Article 5 of the European Convention on Human Rights (ECHR) to ensure an accessible and effective review of detention. Furthermore, the Directive prioritises the use of dedicated detention centres over prisons. However, it does not address the use of police of border police stations, which some member states frequently use for detention purposes.

The CJEU emphasises that the voluntary departure period is designed to safeguard the fundamental rights of migrant. As a result, any exception to this rule should be interpreted strictly in a manner that preserves and respects the rights of an individual. In that regard, any assessment of the risk of absconding must be made on the case-by-case basis. This means that decisions regarding the detention of irregular migrants should not be based on general assumptions but should consider the specific circumstances and individual characteristics of each case.





The right to be heard before a return decision is issued was discussed by the CJEU in the case of *Sophie Makarubega v. Préfet de police* in 2014 (Case C-166/13). The CJEU upheld the right of individual to be heard before a return decision is issued. This means that before a decision is made to return a third-country national who is staying illegally, that individual has the right to present their case and be heard (Matić Bošković, 2020: 34). The CJEU cited the Charter of Fundamental Rights in its decision and pointed out that the right to be heard is affirmed not only in Articles 47 and 48 of the Charter, but also in Article 41 that guarantees the right to good administration, which includes the right of every person to be heard before any individual measure that would adversely affect them is taken (paragraph 43). The CJEU emphasised that the obligation to issue a return decision, as laid down in the Return Directive, must be carried out within a fair and transparent procedure (Giupponi, 2014: 185). Member states are required to explicitly incorporate this obligation into their national laws for cases of illegal stay and ensure that the person subject to the decision is given a proper opportunity to be heard during the procedure, including in matters related to their residence application or the legality of their stay (paragraph 62).

The *Zaizoune* ruling (Case C-38/14) underscores the need to maintain a delicate balance between safeguarding fundamental rights and ensuring the effectiveness of the return process under the Return Directive. In the *Zaizoune* case, the CJEU ruled that more favourable provisions, such as stronger procedural guarantees to appeal the return decision or limitations on the use of force during the removal process, must not undermine the effectiveness and the primary objective of the Directive, which is the removal of individuals subject to return. The ruling raises a critical question regarding whether certain procedural guarantees that enhance the rights of individuals subject to return, or limitations on the use of force that could potentially delay or impede the removal process, are permissible under the Directive. The key consideration is whether these provisions strike an appropriate balance between safeguarding fundamental rights and ensuring the effectiveness of the removal procedure. There are concerns that deficient standards in the Directive may become widespread across the EU, potentially impacting the protection of individual rights. In other words, there is a risk that the Directive's focus on effectiveness may lead to lowering of standards in the protection of individual rights in the context of return procedures (paragraphs 38-40).

According to the CJEU, the right to be heard is not just a formal requirement but should have a substantive impact on the outcome of an administrative procedure. In the *G. and R.* case, the CJEU states that if the right to be heard is breached during the administrative procedure related to immigration detention, a national court responsible for assessing the legality of detention may order the lifting of the detention if it finds that the infringement deprived the affected party of the chance to present their defence effectively. This assessment takes into account all the factual and legal circumstances of the case.

When it comes to the conditions of detention centres, the Directive is criticised for not setting out minimum conditions of detention explicitly (Matić Bošković, 2022: 161). It is also mentioned that it does not explicitly prohibit the practice of detaining children alongside unrelated adults, and it only requires states to place unaccompanied children in facilities that take their needs into account. The principle of the best interest of the child is seen as potentially being rendered meaningless in practice. The *Mahdi* case also reveals that there are no adequate rules on treatment of vulnerable detainees. The Directive in-



adequately addresses the treatment of other vulnerable categories of detainees. The inadequate conditions of detention, coupled with excessive duration of detention and detainee vulnerabilities, may violate Article 3 of the European Convention on Human Rights, which prohibits ill-treatment.

In two specific cases, *Bero and Bouzalmate case* (Joined cases C-473/13 and C-514/13) and *Case Pham* (Case C-474/13) the CJEU made important rulings related to immigration detention. In *Bero case*, the CJEU addressed arguments put forth by member states that, due to federal systems, they could place immigration detainees in regular prisons rather than dedicated immigration detention centres. The CJEU ruled against this argument, emphasising that sub-federal entities within member states should cooperate to ensure that immigration detainees are not placed in regular prisons, in line with the rules that favour keeping them out of prison conditions as a general rule. In the *Pham case*, the CJEU considered the possibility that an irregular migrant might accept certain possibility, reasoning that detainee might not have genuine autonomy to resist pressure from national administrations to waive these protections. This suggests that the CJEU prioritises procedural and substantive safeguards of the rights and humane treatment of detainees and insist on the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners (paragraph 21).

## CONCLUSIONS

The Return Directive is initially seen as a legal framework aimed at harmonising policies and legislation related to the return of immigrants who are staying illegally within the European Union. The harmonisation is considered necessary for the development of unified migration policy across EU members states. During the negotiation of the Return Directive, efforts were made to strike a balance between protecting human rights and combating illegal immigration. This balance is crucial to ensure that immigrants' rights are respected while addressing concerns related to illegal immigration. Despite the laudable efforts to reconcile these interests, there are concerns that the Return Directive may not provide an adequate level of protection for immigrants. Certain aspects of the Directive are seen as ambiguous and could potentially lead to situations where the human rights of immigrants are not guaranteed. This is specifically the case when person is in immigration detention and should have guarantees of fair trial, including access to the remedy, access to the translation and interpretation and right to legal assistance (Majcher, 2020: 126).

The Court of Justice of the EU rulings in the *El Dridi* (Case C-61/11 PPU) and *Achughbalian* cases set limits on the criminalisation of irregular entry and stay in the EU member states. These decisions emphasise the importance of prioritising enforcement measures over punitive detention and highlight the protective function of the EU law in safeguarding the rights of individuals, even in the context of immigration enforcement (Vavoula, 2016: 312).

It may be concluded that while the Return Directive serves as a framework for addressing immigration issues within the EU, there may be challenges and ambiguities that need to be carefully addressed to ensure the effective protection of human rights in the context of immigration control.



The success of the Return Directive depends on how it is practically implemented in each member state. The way in which individual countries apply the Directive can have a significant impact on the protection of immigrants' rights.

Related to the effectiveness of the Return Directive, the rates of effective return are low and decreasing over the years. According to the European Commission data in 2022 only 18.5% of all issued return decisions were enforced (European Commission, 2023). Low rates of removal of irregular migrants suggest that many individuals subject to return decisions are not actually being successfully returned to their home countries of origin. Some of the obstacles to successful removal are administrative and can include issues such as a lack of necessary documents for return, refusals from authorities in the migrant's home country to issue the required documents, or non-cooperation from third-country authorities. The legal reasons also can pose challenges to removal and often relate to human rights protection instruments, like the right to asylum, the right to family reunification, or the right to medical assistance. Overall, the implementation of return decision has complex and multifaceted nature, which has to be addressed in the future EU acquis.

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### REFERENCES

- Acosta, D. (2009). The good, the bad and the ugly in EU migration law. *European Journal of Migration and Law*, 11(1), 19-39.
- Baldaccini, A. (2009). The return and removal of irregular migrants under EU law: An analysis of the returns directive. *European Journal of Migration and Law*, 11(1), 1-17.
- Basilien-Gainche, M-L. (2015). Immigration detention under the Return Directive: The CJEU shadowed lights. *European Journal of Migration and Law*, 17, 104-126.
- Case C-61/11 PPU, Judgement of 28 April 2011, El Dridi, ECLI:EU:C:2011:268.
- Case C-329/11, Judgement of 6 December 2011, Achughabian, ECLI:EU:C:2011:807.
- Case C-430/11, Judgement of 6 December 2012, Sagor, ECLIC:EU:C:2012:777.
- Case C-383/13 PPU, Judgement of 10 September 2013, G. and R., ECLI:EU:C:2013:553.
- Case C-146/14 PPU, Judgement of 5 June 2014, Mahdi, ECLI:EU:C:2014:1320.
- Case C-474/13, Judgement of 17 July 2014, Pham, ECLI:EU:C:2014:2096.
- Case C-166/13, Judgement of 5 November 2014, Mukarubega, ECLI:EU:C:2014:2336.
- Case C-38/14, Judgement of 23 April 2015, Zauzoune, ECLI:EU:C:2015:260.



Council of the European Union. (2002, November 22). Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA). [https://eur-lex.europa.eu/eli/dec\\_framw/2002/946/oj](https://eur-lex.europa.eu/eli/dec_framw/2002/946/oj)

Council of the European Union. (n. d.). Council conclusions on EU Return Policy: Justice and Home Affairs Council Meeting, Luxembourg, 5 and 6 June 2014. <https://www.consilium.europa.eu/media/28075/143105.pdf>

Directive 2002/90/EC. Defining the facilitation of unauthorised entry, transit and residence. European Parliament and Council. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0090>

Directive 2008/115/EC. *On common standards and procedures in Member States for returning illegally staying third-country nationals*. European Parliament and Council. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115>

European Commission. (2005, September 1). *Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* (COM (2005) 391). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005PC0391>

European Commission. (2015, May 13). Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration (COM (2015) 240 final). [https://home-affairs.ec.europa.eu/system/files/2020-09/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/communication_on_the_european_agenda_on_migration_en.pdf)

European Commission. (2015, October 1). Commission recommendation of 1.10.2015 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks (C (2015) 6250 final). [https://home-affairs.ec.europa.eu/system/files/2020-09/commission\\_recommendation\\_establishing\\_a\\_return\\_handbook\\_for\\_member\\_states\\_competent\\_authorities\\_to\\_deal\\_with\\_return\\_related\\_tasks\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/commission_recommendation_establishing_a_return_handbook_for_member_states_competent_authorities_to_deal_with_return_related_tasks_en.pdf)

European Commission. (2023, October). People living in the EU. [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en)

European Commission. (n. d.). *A humane and effective return and readmission policy*. [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en)

European Parliament. (2019). *The proposed Return Directive (recast) – Substitute impact assessment: Study*. European Parliamentary Research Service.

Frontex. (2017). *Risk analysis for 2017*. [https://www.frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf)

Gatta, G. L., Mitsilegas, V., & Zirulia, S. (2021). Introduction. In G. L. Gatta, V. Mitsilegas, & S. Zirulia (Eds.), *Controlling Immigration through Criminal Law* (pp. 1-8). Hart Publishing.



Giupponi, B. O. (2014). EU return policy and international human rights law: Keeping the balance between border security and human dignity. *Spanish Yearbook of International Law*, 18, 163–197.

Joined Cases C-473/13 and C-514/13, Judgement of 17 July 2014, Bero and Bouzalmate, CLI:EU:C:2014:2095.

Majcher, I. (2013). The European Union returns directive: Does it prevent arbitrary detention? *Oxford Monitor of Forced Migration*, 3(2), 23–30.

Majcher, I. (2019). *The European Union returns directive and its compatibility with international human rights law: Analysis of return decision, entry ban, detention, and removal*. Brill Nijhoff.

Majcher, I. (2020). The effectiveness of the EU return policy at all costs: The punitive use of administrative pre-removal detention. In N. K. Šalamon (Ed.), *Causes and consequences of migrant criminalization* (pp. 109–130). Springer.

Matić Bošković, M. (2016). Politika migracija u EU od projekta otvorene i bezbedne Evrope do zatvaranja granica, In J. Ćirić, & B. Knežić (Eds.), *Migranti na raskršću ili bespuću zemlje Srbije* (pp. 213–229). Institut za uporedno pravo; Institut za kriminološka i sociološka istraživanja.

Matić Bošković, M. (2020). Uređenje procesnih prava osumnjičenih i okrivljenih u pravnim tekovinama Evropske unije. *Strani pravni život*, 64(1), 29–43.

Matić Bošković, M. (2022). *Krivično procesno pravo EU*. Institut za kriminološka i sociološka istraživanja.

Mitsilegas, V., Monar, J., & Rees, W. (2003). *The European Union and internal security*. Palgrave/Macmillan.

Mitsilegas, V. (2021). The criminalisation of migration in the law of the European Union: Challenging the preventive paradigm. In G. L. Gatta, V. Mitsilegas, & S. Zirulia, (Eds.), *Controlling immigration through criminal law* (pp. 25–46). Hart Publishing.

Oruc, N., Raza, S., & Santic, D. (2020). *The Western Balkan migration route (2015-2019)*. International Centre for Migration Policy Development.

Pahladsingh, A., & Waasdorp, J. (2017). Criminal sanctions and the Return Directive: The position of illegally staying third-country nationals in the European Union. *Crimmigration & Recht*, 1(1), 20–35.

Peers, S. (2015). Irregular migrants: Can humane treatment be balanced against efficient removal? *European Journal of Migration and Law*, 17(4), 289–304.

Raffaelli, R. (2011). Criminalizing irregular immigration and the returns directive: An analysis of the El Dridi case. *European Journal of Migration and Law*, 13(4), 467–487.

Raffaelli, R. (2012). Case note: The Achughbabian case: Impact of the return directive on national criminal legislation. *Diritto Penale Contemporaneo* (pp. 176–183). [https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC\\_Trim\\_1\\_2012-182-189.pdf](https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Trim_1_2012-182-189.pdf)



*Srbija, nasilje i migranti: Posle pucnjave u Horgošu privedeno više od 1.000 migranata – pretragom pronađeno oružje i municija.* (2022, November 26). BBC News na srpskom. <https://www.bbc.com/serbian/lat/srbija-63753797>

Vavoula, N. (2016). The interplay between EU immigration law and national criminal law: the case of the Return Directive. In V. Mitsilegas, M. Bergstrom, & T. Konstadinides (Eds.), *Research handbook on EU criminal law* (pp. 294-314). Edward Elgar Publishing.

Waasdorp, J., & Pahladsingh, A. (2017). Expulsion or imprisonment? Criminal law sanctions for breaching an entry ban in the light of crimmigration law. *Bergen Journal of Criminal Law and Criminal Justice*, 4(2), 247-266.

