Recent Developments in Detention and Return of Illegal Migrants: In Need for More Differentiated Approach

Michal Petr*

Summary: Current political situation, agitated by the hitherto unprecedented influx of irregular migrants, has brought about a public discussion concerning stricter rules on handling such migrants. It is worth recalling that the EU addressed the issue of return and detention of illegal migrants already in 2008 by the Return Directive, which has been criticised for compromising the fundamental rights of migrants; making the rules even stricter would thus be very controversial from the human rights point of view. Still, the Commission has heeded these calls and has recently issued a recommendation, suggesting a stricter interpretation of the rules currently in place. In his regard, it is important to realize that the rules contained in the Return Directive cover all persons being (currently) illegally on the EU territory, both those who have come fully in accordance with the law, in particular in order to work or provide services, and those who have entered the EU illegally, hide their identity and do not follow the rules on migration. We suggest in this article that differentiation between these categories of migrants may be in order.

Keywords: detention; entry ban; human rights; irregular migrants; migration; removal; Return Directive

1. Introduction

In 2008, the Return Directive[1] was adopted and in the following two years implemented in the EU member states. It meant a significant change in member states' laws on detention and return of illegal migrants, as it introduced *common standards*, not only minimum standards for harmonization, as is typically the case with legislation on migration and asylum.[2] The Return Directive thus unifies the

* Michal Petr, Senior lecturer, Faculty of Law of the Palacky University Olomouc, Czech Republic. Contact: michal.petr@upol.cz. This paper was prepared under the research project of the Czech Grant Agency *"Postavení osob ze třetích zemí v právu Evropské unie"* No.17-24822S.

1 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.

2 See eg. MITSILEGAS, Valsamis. *The Criminalisaiton of Migration in Europe. Challenges for Human Rights and the Rule of Law.* Springer, 2015, p. 94.

process of return and removal of illegal migrants, while the legality of their stay is still predominantly the matter for member states to decide.[3]

It is worth recalling that the Return Directive has been criticised from the outset not only by scholars,[4] but also by international organizations,[5] for not protecting sufficiently the fundamental rights of illegal migrants, in particular as far as the extent of their detention is concerned.

From the point of view of current circumstances, it needs to be observed that more than 1.5 million people need to be deported from the EU and according to available data, the rate of return of illegal migrants from EU member states does not significantly exceed 30 %.[6] This situation has brought about public demands for starker measures in connection with return policy, in particular on national level.

In 2015, the Commission adopted the European Agenda on Migration,[7] which identified return policy as its essential part. Following that, the Commission presented its Action Plan on Return,[8] including 36 concrete actions to improve the efficiency of the EU's return system. The European Council called for a reinforcing of national administrative processes for returns in October 2016.[9] Following that, the Malta Declaration[10] of Heads of State or Government of 3 February 2017 highlighted the need for a critical review of EU return policy with an analysis of how the tools available at national and EU level are applied.

---

3 In detail, see eg. BALDACCINI, Anneliese. The EU Directive on Return: Principles and Protests. *Refugee Survey Quarterly*. 2009, vol. 28, no. 4, p. 116.

4 See eg. ACOSTA, Diego. The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law*. 2009, vol. 11, no. 1, p. 19.

5 See eg. the report of the Special Rapporteur on the human rights of migrants, François Crépeau, to the United Nations General Assembly of 24 April 2013, A/HCR/23/46, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, par. 46 *et seq*. See also UN News Center, 18 July 2008, *Proposed EU policy on illegal immigrants alarms UN rights experts.* [online]. Available at: <http://www.un.org/apps/news/story.asp?NewsID=27414#.WjKK8EribmE> (15 December 2017).

6 See eg. press release of the European Commission of 27 September 2017, IP/17/3406 *State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy*.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European Agenda on Migration* of 13. 5. 2015, COM(2015) 240 final.

8 Communication from the Commission *EU Action Plan on return* of 9 September 2015, COM(2015) 453 final.

9 The European Council Conclusions of 20 and 21 October 2016, EUCO 31/16.

10 Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, European Council press release 43/17 of 3 February 2017.

In March 2017, the Commission adopted a recommendation on making the return policy more effective (hereinafter referred to as "Recommendation");[11] according to it, *"it is necessary to use to the full extent the flexibility provided for in [the Returns Directive] […] [and to] reduce possibilities of misuse of procedures and remove inefficiencies"*.[12] The Recommendation was immediately criticised by human rights organization; for example, the European Council for Refuges and Exiles (ECRE) put forward that *"[a]s well as falling short in terms of good governance, the Commission document puts forward an interpretation of human rights that effectively undermines them."*[13]

It is not the aim of this article to review the whole Return Directive or indeed the EU migration policy. We will only concentrate on several selected topics, namely the scope of the Return Directive (Chapter 2), the – putatively – preferred route of voluntary return (Chapter 3), the Removal and Detention of illegal migrants (Chapter 4) and imposition of entry bans (Chapter 5), taking into account also the recent jurisprudence of the Court of Justice of the European Union (hereinafter referred to as "CJ EU") and the Recommendation. We will then strive to identify the limits of the legal regime currently in place and propose certain measures that might make the system both more effective and fair (Chapter 6).

2. Scope of the Return Directive and Illegal Migrants

The Return Directive defines *illegal stay* as the presence on the territory of a member state of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code.[14] A third-country national[15] may therefore be staying legally or illegally, and thus fully covered by the Return Directive, without there being any "third option".[16] Even applicants for renewal of already expired permit are staying illegally.[17]

---

[11] Commission recommendation of 7 March 2017, on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 final.

[12] Recommendation, par. 6.

[13] ECRE, 3 March 2017, *New EU Commission plans on returns and detention will create more harm and suffering.* [online]. Available at: <https://www.ecre.org/new-eu-commission-plans-on-returns-and-detention-will-create-more-harm-and-suffering/> (15 December 2017)

[14] Return Directive, Art. 3 (2).

[15] Return Directive, Art. 3 (1)

[16] HAILBRONNER, Kay, THYM, Daniel. *EU Immigration and Asylum Law. A Commentary. Second Edition.* C.H.Beck/Hart/Nomos, 2016, p. 677.

[17] *Ibid*, p. 678; under such circumstances, the member states shall nonetheless consider refraining from issuing the return decision [Return Directive, Art. 6 (5)].

The Return Directive applies to *all* illegally staying third-country nationals.[18] Individual member states may however opt for an exemption,[19] allowing treating differently certain categories of illegal migrants. For the purposes of this paper, the category of migrants apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a member state, who have not subsequently obtained an authorisation or a right to stay in that member state, should be pointed out. Clearly, this provision covers only the illegal crossing of the EU external borders and cannot be applied to persons who have left the border area.[20] Even if this exemption is applied, the fundamental limitations, including the principle of non-refoulement, detention conditions or limitation on use of coercive measures contained in the Return Directive do apply.[21]

The Return Directive thus does not in any way distinguish between, on the one hand, those who – originally – stayed legally on the EU territory and only subsequently lost the legal status, including those whose application for renewal of residence permit is pending,[22] and, on the other hand, those whose stay has been illegal from the outset.[23] We will argue that this lack of differentiation may constitute a significant problem.

3. Return Decision and Voluntary Departure

If a third-country national is found to by staying illegally in a member stay, such state is obliged to issue a return decision.[24] This procedure is obligatory,[25] unless specific exceptional circumstances are met;[26] in particular, the member state may

[18] Return Directive, Art. 2 (1).

[19] Return Directive, Art. 2 (2).

[20] CJ EU judgment of 7 June 2016 C-47/15 *Sélina Affum*, ECLI:EU:C:2016:408, par. 71.

[21] Return Directive, Art. 4 (4). In detail, see BALDACCINI, Anneliese. *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive.* European Journal of Migration and Law, 11 (2009), p. 4.

[22] HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 672.

[23] The Return Directive, Art. 12 (3), only enables to relax the formal requirements on return decision with respect to the migrants who have illegally entered the territory of the member state.

[24] Return Directive, Art.5 (1); the return decision is defined as *"an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return"* [Art. 3 (4)].

[25] See eg. HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 687. See also CJ EU judgement of 28 April 2011 C-61/11 PPU *El Dridi*, ECLI:EU:C:2011:268, par. 35: *"the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory"*.

[26] Return Directive, Art. 6 (2), (3) and (5).

"legalize" the stay of the national in question for *compassionate, humanitarian or other reasons*.[27]

In the original draft of the Return Directive, the power to issue a return decision was explicitly subjected to fundamental rights obligations; in the final text, the fundamental rights obligations have nonetheless been removed from the main text and relegated to the preamble,[28] to the criticism of human rights advocates. Even though the Return Directive specifically refers to the principle of non-refoulement, best interests of the child, family life and state of health, the member states shall only *take due account of them*.[29] This may lead to incoherence of practice among member states. Indeed, the Commission criticises those member states that do not *systematically* issue return decisions[30] and urges all the member states to put in place measures to effectively locate and apprehend third-country nationals staying illegally and to issue return decisions regardless of whether the national in question holds an identity or travel document.[31]

Due process is to be guaranteed in course of adopting the return decision. In particular, the illegal migrants must be given an opportunity to express, before the adoption of a return decision concerning them, their point of view on the legality of their stay, on the possible application of exemptions from issuing the return decision (see above) and on the detailed arrangements for their return, including the period for voluntary departure (see below). They must also be allowed to consult a legal adviser, the member states however do not need to bear the costs of it.[32]

The return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days,[33] which may be extended, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.[34] To avoid the risk of absconding (see below), specific obligations, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of certain documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure;[35] conversely, if there is no evidence for the risk of absconding, such measures may not be imposed.[36]

---

27 Return Directive, Art. 6 (4).
28 See eg. BALDACCINI, Anneliese (sub 21), p. 7. See also Return Directive, recitals 22 – 24.
29 Return Directive, Art. 5.
30 Recommendation, par. 11.
31 Recommendation, par. 5.
32 In detail, see CJ EU judgement of 11 December 2014 C-249/13 *Boudjlida*, ECLI:EU:C:2014:2431.
33 Return Directive, Art. 7 (1).
34 Return Directive, Art. 7 (2).
35 Return Directive, Art. 7 (3).
36 CJ EU judgement C-61/11 PPU *El Dridi* (sub 25), par. 37.

Even though the voluntary departure is a preferred[37] and – when the conditions are met – also a mandatory course of action,[38] it seems that the Recommendation aims at limiting its use in practice. Fist, the member states shall grant it only when the illegal migrant specifically asks for it;[39] admittedly, it is in line with the Return Directive,[40] it nonetheless might be questioned whether an alternative which ought to be default should be asked for. Secondly, the member states shall grant the shortest possible period for voluntary departure, i.e. seven days; even though the Recommendation acknowledges that individual circumstances of the case need to be taken into account,[41] such a recommendation in practice limits the possibility of voluntary departure of people staying in the member state for a longer period of time. At the same time, the rational of a recommendation that a period longer than seven days should only be granted when the person in question actively cooperates cannot be disputed.[42]

Voluntary departure shall not be allowed only exceptionally, under strictly defined conditions, which must be assessed on the basis of individual examination on the case in question.[43] According to the Return Directive,[44] these are:

(i) risk of absconding;
(ii) an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or
(iii) the person concerned poses a risk to public policy, public security or national security

As these concepts, especially the risk of absconding, are crucial for application of other legal instruments contained in the Return Directive, separate sections will be dedicated to them.

3.1. Risc of Absconding

As defined by the Return Directive,[45] the risk of absconding is such a broad concept that it led some commentators to observe that a wide application of the

[37] Return Directive, recital 10.
[38] HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 694.
[39] Recommendation, par. 17.
[40] Return Directive, Art. 7 (1).
[41] Recommendation, par. 18.
[42] Recommendation, par. 20.
[43] CJ EU judgement of 6 December 2012 C-430/11 *Sagor*, ECLI:EU:C:2012:777, par. 41.
[44] Return Directive, Art. 7 (4).
[45] According to the Return Directive, Art. 3 (7), *'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national*
who is the subject of return procedures may abscond.

risk of absconding exception can render entirely inapplicable the implementation of the voluntary return provisions.[46]

The CJ EU has repeatedly held that any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case.[47] Still, the Recommendation advises member states to introduce rebuttable presumptions that the risk of absconding may be inferred in following circumstances:[48]

(i) irregularities concerning identification, in particular refusing to cooperate in the identification process, using false or forged identity documents, destroying existing documents, refusing to provide fingerprints;
(ii) opposing violently or fraudulently the operation of return;
(iii) not complying with measures aimed at preventing absconding imposed by the return decision (see above);
(iv) not complying with an entry ban; or
(v) unauthorised secondary movements to another member state.

Indeed, the fact that migrants have breached some of their duties may indicate the risk of absconding. It is definitely the case with (ii), (iii) and probably (iv), it is however more difficult to establish a direct causal link (and thus a presumption) between refusal to provide fingerprints and the risk of absconding. Concerning the identification, the CJ EU has explicitly declared that the fact that a third-country national has no identity documents cannot, on its own, be a ground for extending detention,[49] which is only allowed when there is a risk of absconding (see below).

It also ought to be observed that presumptions always pose danger to individual assessment of a particular case; as the CJ EU observed with regard to public policy (see below), when the member state relies on presumptions, without properly taking into account the national's personal conduct, it fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality.[50] In our opinion, the introduction of such presumptions is therefore highly controversial.

In addition to these presumptions, following criteria shall according to the Commission be taken into account as an "indication" that a person poses a risk of absconding:[51]

---

[46] BALDACCINI, Anneliese (sub 3), p. 128.
[47] CJ EU judgement C-430/11 *Sagor* (sub 43), par. 41.
[48] Recommendation, par. 15.
[49] CJ EU judgement of 5 June 2014 C-146/14 PPU *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, par. 73.
[50] CJ EU judgement of 11 June 2015 C-554/13 *Zh and O*, ECLI:EU:C:2015:377, par. 50.
[51] Recommendation, par. 16.

(i) explicit expression of the intention not to comply with the return decision;
(ii) non-compliance with the period for voluntary departure; or
(iii) an existing conviction for a serious criminal offence.

As far as reasons (i) and (ii) are concerned, there is in our opinion no doubt that under such circumstances, the risk of absconding has materialised. Arguably, it is not so with reason (iii). Indeed, the conviction may motivate the person in question to leave the country, and thus avoid the sanctions imposed. At the same time, the nature of the crime is not at all taken into account, even though it is well established in the CJ EU's case law, though in the area of free movement of EU citizens, that the existence of a previous criminal conviction can only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.[52]

As will be described below, the rather extensive interpretation of the term risk of absconding, as introduced by the Recommendation, has direct implication for other instruments of the Return Directive, in particular for decisions on detention.

3.2. Dismissed application for a legal stay

Whereas the reasons concerning absconding (3.1) and public policy and security (3.3) are based on a *risk*, in this case, the mere fact that the application for a legal stay has been found *manifestly unfounded* or *fraudulent* suffices. Even though in principle understandable, these terms will need to be interpreted very carefully in order not to discourage certain migrants from applying for legal stay at all.

The Recommendation has not addressed this issue.

3.3. Risk to public policy, public security or national security

Concerning interpretation of these terms, it is possible to recourse to an analogy with the case law on free movement of EU citizens;[53] we will therefore not discuss these terms in detail. As the CJ EU has explained, an illegal migrant cannot be deemed to pose a risk to public policy on the sole ground that he is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law; other factors, such as the nature and seriousness of

[52] See eg. CJ EU judgement of 27 October 1977 30/77 *Bouchereau*, ECLI:EU:C:1977:172, par. 28. With respect to public security, see STEHLÍK, Václav. Discretion of Member States vis-a-vis Public Security: Unveiling the Labyrinth of EU Migration Rules. *International and Comparative Law Review*, 2017, vol. 17, no. 2, p. 127.

[53] HAILBRONNER, Kay, THYM, Daniel (sub. 16), p. 696.

that act and the time which has elapsed since it was committed may be relevant in the assessment.[54]

The Recommendation has not addressed this issue.

4. Removal and Detention

Removal means physical transportation of immigrants out of the member state where they are illegally staying.[55] Member states shall only recourse to removal in order to enforce the return decision if:[56]

(i) no period for voluntary departure has been granted (see above); or
(ii) the obligation to return has not been complied with within that period.

Crucially, a sentence of imprisonment cannot be imposed on illegally staying third-country nationals on the sole ground that they remain on the territory of the member state contrary to an order to leave that territory within a given period[57] or that they entered it illegally, resulting in an illegal stay.[58]

In accordance with the principle of proportionality, member states are obliged to use in all stages of the return procedure the least intrusive measures; that implies that even if a hitherto non-cooperating returnees credibly demonstrate their willingness to cooperate and readiness to depart voluntarily, member states shall refrain from enforcing the removal.[59]

For the purposes of removal, detention may be employed in order to prepare the return and carry out the removal process, in particular when there is a risk of absconding (see above) or the returnee avoids or hampers the return process, unless other sufficient but less coercive measures can be applied effectively in a specific case.[60] The list of circumstances under which detention may be imposed is not exhaustive (*in particular*), which is arguably not in line with the jurisprudence of the European Court of Human Rights on Article5 of the European Convention.[61]

Any detention shall be for as short a period of time as possible and only maintained as long as removal arrangements are in progress and executed with due

[54] CJ EU judgement C-554/13 *Zh and O* (sub 50), par. 65.
[55] Return Directive, Art. 3 (5). See also HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 698.
[56] Return Directive, Art. 8 (1). The conditions for postponement of removal (Art. 9) and specific conditions for return and removal of unaccompanied minors (Art. 10) will not be discussed.
[57] CJ EU judgement C-61/11 PPU *El Dridi* (sub 25).
[58] CJ EU judgement C-47/15 *Sélina Affum* (sub 20), par. 93.
[59] In detail, see HAILBRONNER, Kay, THYM, Daniel (sub 6), p. 699.
[60] Return Directive, Art. 15 (1).
[61] In detail, see BALDACCINI, Annaliese (sub 21), p. 13.

diligence,[62] it however cannot exceed six months.[63] Only exceptionally, it may be prolonged for additional twelve months if the removal operation is likely to last longer than six months, due to lack of cooperation by the returnee or delays in obtaining the necessary documentation from third countries.[64] The period of time during which the removal decision is suspended due to court review is to be taken into account in calculating the period of detention;[65] on the other hand, this limitation period does not apply to those migrants who have asked for asylum protection.[66]

The period of 18 months cannot be prolonged under any circumstances.[67] Not even the fact that the person in question is not in possession of valid documents, his conduct is aggressive and he has no means of supporting himself and no accommodation or means supplied by public authorities for that purpose does not allow the detention to continue.[68]

A maximum detention of 18 months is a rather long period[69] for non-criminal conduct;[70] some member states have therefore opted not to adopt these maximal time limits. The Recommendation however urges all the member states to provide for the maximum periods for detention in their national legislation.[71]

The aim of detention is to secure removal of the person in question; thus, when it appears that a reasonable prospect of removal no longer exists for legal or other considerations, detention ceases to be justified and the person concerned shall be released immediately.[72] As the AG Mazák summarised in the *Kadzoev* case, the existence of an abstract or theoretical possibility of removal, without any clear information on its timetabling or probability, cannot suffice.[73]

If the detention is terminated because the prospect of removal is no longer realistic or because the maximum limitation period has elapsed, what is the legal status of the person in question? The law is silent in this regard, which allowed

62 Return Directive, Art. 15 (1).
63 Return Directive, Art. 15 (5).
64 Return Directive, Art. 15 (6).
65 CJ EU judgement of 30 November 2009 C-357/09 PPU *Said Samilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, par. 57.
66 CJ EU judgement of 30 may 2013 C-534/11 *Mehmet Arslan*, ECLI:EU:C:2013:343, par. 49.
67 CJ EU judgement C-357/09 PPU *Kadzoev* (sub 65), par. 60.
68 *Ibid*, par. 71.
69 In this regard, see in detail eg. BALDACCINI, Anneůiese (sub 3), p. 130.
70 As the AG Bot explained in opinion to case C-473/13 and C-514/13 *Adala Bero and Ettayebi Bouzalmate*, par. 92, detention does not constitute a penalty following the commission of a criminal offence is not to correct the behaviour of the person concerned; any idea of penalising is missing from the rationale forming the legal basis of detention.
71 Recommendation, par. 10 (b).
72 Return Directive, Art. 15 (4).
73 Opinion of AG Mazák to case C-357/09 PPU *Kadzoev*, par. 35.

some commentators to claim that the person affected is left in legal limbo.[74] The CJ EU only held in the *Mahdi* case that member states cannot be obliged to issue to such persons an autonomous residence permit or other authorisation conferring a right to stay, they however have to provide such person with a written confirmation of his situation.[75]

5. Entry Bans

Return decision shall be systematically accompanied by an entry ban of up to 5 years if no period for voluntary departure has been granted or if the obligation to return has not been complied with; entry ban may also be imposed in other situations.[76] Entry ban is EU wide, ie. it consists in prohibiting entry into and stay on the territory of the member states for a specified period of time.[77]

The obligatory imposition of entry bans made this provision of the Return Directive one of the most controversial.[78] In the Recommendation, wider use of discretionary imposition of entry bans is encouraged.[79]

It is in particular relevant that the entry ban may be systematically added to the return decision,[80] while the member states shall only *consider* withdrawing or suspending it when the migrant has orderly returned;[81] this might significantly limit the motivation to return voluntarily.[82]

6. Limits to the Current System of Return and Removal and a Way Forward

As mentioned in the introduction, the current system of return and removal of illegal migrants is facing its limits. Many problems are extraneous to the Return Directive, in particular the cooperation of states to which the migrants shall be returned. That is predominantly the task for European External Action Service,

74 MITSILEGAS, Valsamis (sub 2), p. 103; see also BALDACCINI, Annaliese. (sub 3), p. 138.
75 CJ EU judgement C-146/14 PPU *Mahdi* (sub 49), par. 89. See also the Return Directive, recital 12.
76 Return Directive, Art. 11 (1).
77 Return Directive, recital 14 and Art. 3 (6).
78 HAILBRONNER, Kay, THYM, Daniel (sub 16), p. 708. See also BALDACCINI, Annaliese (sub 3), p. 133.
79 Recommendation, par. 24.
80 Return Directive, Art. 11 (1), par. 2.
81 Return Directive, Art. 11 (3).
82 In detail, see BALDACCINI, Annaliese (sub 21), p. 10.

consisting in negotiating international readmission agreements with the states concerned. The EU is well aware of this task and 17 readmission agreements have already been concluded, negotiations with several crucial states, including Algeria and Morocco, have however not significantly advanced.[83]

Other problem is connected with identification of the migrants, whose identity documentation might be missing; this presupposes cooperation on part of the migrant himself as well as the state of that he claims to be the citizen. Again, this is a practical problem difficult to be addressed by the Directive itself, but with profound consequences for the migrant in question.

This can be demonstrated on the *Ali Mahdi* case, in which the named illegal migrant was not issued identification documentation by his home country because he apparently conveyed to the representative of his embassy that he was not willing to return; the CJ EU refused to determine whether such a situation may be classified as "non-cooperation" on part of the migrant, leaving it on the national court as a question of the facts.[84]

There are however other problems, inherent to the Return Directive itself, which might be tackled by legislation. As we have observed, its most controversial provisions are connected with detention, which can last up to (but cannot exceed) 18 months, and with entry ban, which is to be systematically imposed on practically all the illegal migrants. At the same time, while the problem of entry bans is "only" concerned with the willingness of illegal migrants to return voluntarily, the issue of detention may threaten the entire system enshrined in the Return Directive: if the detention is too long, it will be in breach of fundamental human rights, if it is too short, it will not be effective and the return policy would collapse.

In this respect, we put forward that, as is often the case, the one-size-fits-all approach is not adequate. As is obvious form recent activities of the Commission, it is preoccupied with migrant illegally entering the EU and mostly not fulfilling the requirements for legally staying therein.[85] With regard to such migrants, making the return policy more stark, or – as the Commission puts it – *to use to the full extent the flexibility provided for in the Directive*[86] may be warranted;

[83] Communication from the Commission to the European Parliament and the Council *On a More Effective Return Policy in the European Union – A Renewed Action Plan*. 2 March 2017, COM(2017) 200 final (hereinafter referred to as "Renewed Action Plan").

[84] CJ EU judgement C-146/14 PPU *Mahdi* (sub 49), par. 72.

[85] See eg. Return Action Plan, p. 13, which argues that the measures contained therein should *"send a clear message to those migrants that will not have a right to stay in the European Union that they should not undertake the perilous journey to arrive in Europe illegally"*.

[86] Recommendation, par. 6.

indeed, such migrants will probably not be inclined to return voluntarily to their home country.

In this context, it is also legitimate to ask whether the exemption from the regime of the Return Directive for migrants illegally entering the EU and subsequently apprehended shall be retained, as it is obvious that these are the "typical" illegal migrants that are to be removed from the EU; with regard to them, starker measures might be justifiable.

On the other hand, we believe that those migrants who have entered the EU legally and were entitled to stay there, often with their families, and who, during that time, established strong social connections in the place of their residence, deserve a more forthcoming approach. Arguably, this can only be achieved if the definition of illegal migrant, contained in the Return Directive, is modified, allowing for distinction between these two categories of migrants. We strongly support such a legislative change.

7. Conclusions

The Return Directive was drafted in times of "normal" level of migration into the EU, but it is not well adjusted for present situation. The attempts of the Commission to "flexibly" reinterpret it in order to contain the influx of migrants illegally entering the EU are stretching the limits acceptable from the point of view of fundamental human rights; at the same time, such attempts have disproportionately negative consequences for those migrants who have entered the EU legally.

We put forward that a legislative amendment to the Return Directive is in order. The Directive should fully cover also migrants apprehended in connection with illegally crossing the external EU boarder, and the place of their apprehension should not be limited to close vicinity of the boarder; otherwise, the Directive would not apply to "typical" illegal migrants, as we currently experience. Such migrants, if their stay in the EU is not "legalised" (eg. by being granted asylum), indeed need to be removed from the EU, and if they do not cooperate with the competent authorities, their detention, if need be even longer than 18 months, might be justifiable. On the other hand, those who have legally entered and stayed within the EU, but lost this status, should be treated more favourably. For example, entry ban would only rarely be justified.

Even though such an approach (but for the prolonged time of detention) might be covered by the Return Directive in its current wording, we are afraid that the latest interpretative approaches, including the Recommendation, go in the opposite direction, and an explicit amendment would be significantly more effective.