

Case-study: *A v. France*

Facts:

A is an Afghan national who has obtained the status of international protection in Italy, but is now illegally staying in France. French authorities rejected A's application for international protection there, because A already had it in another Member State, and instructed A to return to Italy.

A did not comply with the instruction, and was put in detention for the purpose of forced return to Italy. French authorities considered that they could not issue a return decision to Afghanistan (which would have breached *non-refoulement* duties) and that no other EU or third country would admit A. Italy was therefore the only possible option.

A challenged in a French court the legality and modalities of the detention. A argued that administrative detention is only lawful under EU law if the State has previously issued a formal return decision against the individual (Article 6, Directive 2008/115).

A also invoked the Charter of Fundamental Rights to protest the detention decision and conditions (lack of fair trial, inhumane conditions, lack of an effective remedy).

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 (Return Directive)

Recitals 2, 4 and 5

(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.

(5) This directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

Article 1

This directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

1. This directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the [Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)], or who are 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 and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

3. This directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.'

Article 3

For the purpose of this directive:

2. "illegal stay" means 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 or other conditions for entry, stay or residence in that Member State;

3. "return" means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

- his or her country of origin, or
- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. "return decision" means 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;'

Article 4(3)

This directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this directive.

Article 5

When implementing this directive, Member States shall take due account of:

- a) the best interests of the child;
- b) family life;
- c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

Article 6

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-

country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

Article 15

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- a) there is a risk of absconding or
- b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

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