

Crimmigration law in the European Union

(Part 2)

**The Return Directive:
return decision and detention**

Aniel Pahladsingh



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List of abbreviations

AFET	Committee on Foreign Affairs
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
C	Communication of the European Commission
CEPS	Centre for European Policy Studies
Cf.	compare
Charter	Charter of the Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COM	Commission Document
COREPER (I and II)	Committee of the Permanent Representatives of the Governments of the Member States to the EU
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DEVE	Committee on Development
Directive	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”)
EC	European Commission
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed.	edition
EEC	European Economical Community
e.g.	for example
EP	European Parliament
EU	European Union
FRONTEX	Frontières extérieures
Ibid	Ibidum
i.e.	that is
L	Legislation
LIBE	Committee on Civil Liberties, Justice and Home Affairs
no.	number
op. cit.	cited above

CONTENTS

para(s).	Paragraph(s)
p(p).	page(s)
Reception Conditions Directive	Directive 2013/33/EU of the European Parliament of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
SBC	Schengen Borders Code
SCIFA	Strategic Committee for Immigration, Frontiers and Asylum
SEC	EC Staff Working Document
SIS	Schengen Information System
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VIS	Visa Information System
vol.	volume

Chapter 1

Introduction

1.1 The migration phenomenon and the Directive¹

Illegal migration flows and in particular migration by sea, primarily along the Central and Eastern Mediterranean routes, increased exponentially over the past years. In 2014, 276,113 migrants entered the EU illegally, which represents an increase of 138% compared to the same period in 2013.² Furthermore, in 2015 alone, over 432,000 migrants and refugees landed on the coasts of southern Europe. According to the UN refugee agency, the exodus is mainly people seeking protection, fleeing the war in Syria and Afghanistan or Eritrea's dictatorship.³ To enter the EU clandestinely via land, air and sea routes, most migrants have recourse to criminal networks of smugglers.⁴ Over one million people sought refuge in the EU in 2015, a fivefold increase from the year before.⁵

In the EU, migration management remained mostly a competence of the Member States, as it was considered an issue of national sovereignty and often approached from a security perspective. However, over the past decades, harmonization of rules at EU level progressed towards a common policy for migration and migration management. In this respect, the EU adopted the Directive.⁶ This directive was approved by EP on 18 June 2008, formally adopted by the Council on 9 December 2008 and published in the Official Journal on 24 December 2008.⁷ The Directive applies to all EU Member States except the United Kingdom and Ireland.⁸ It also covers

¹ See also Pahladsingh and Waasdorp (2016)

² See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/index_en.htm.

³ See http://www.swissinfo.ch/eng/refugee-crisis_making-sence-of-migration--facts-and-figures/41560118.

⁴ See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/index_en.htm.

⁵ Annual Fundamental Rights Report 2016: In its Fundamental Rights Report 2016, the EU Agency for Fundamental Rights (FRA) examines the scale and nature of the challenge and proposes measures to ensure fundamental rights are respected across the EU.

⁶ Cf. Manieri and LeVoy (2015), p. 4.

⁷ Official Journal L 348, 24 December 2008, p. 98. The Directive entered into force on the twentieth day following the date of publication (*i.e.* 13 January 2009).

⁸ In accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty of the European Union, this Member State decided to implement the Directive in its national law.

Iceland, Norway, Switzerland and Liechtenstein within the meaning of the agreements concluded between the EU and those countries as regards their association with the Schengen *acquis*. Member States were required to bring domestic legislation necessary to comply with the Directive into force by 24 December 2010, except for legislation concerning Article 13(4) on legal assistance and representation, which had to be in place by 24 December 2011.⁹

The Directive aims at establishing common standards and procedures to be applied in Member States for returning illegally staying third-country nationals (Article 1). To actually effectuate their return, the Directive provides for several instruments, *inter alia*, such as the return decision, the entry ban and the detention. In part 1 there was a research about the entry ban. In part 2 the research will focus on the other two instruments: the return decision and the detention.

As defined in Article 3 (4) a 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.”

In the Return Directive there is no definition of the term detention. The requirements for issuing detention for the purpose of removal are mentioned in Article 15 of the Return Directive. The conditions of detention are described in Article 16 and 17 of the Return Directive. According to Recital (16) of the Directive the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient. The legislation of the detention of illegal third country nationals can be derived from EU law, in the Return Directive, but also from the ECHR, more specific Article 5 (right to liberty and security). In this research the legal framework of the detention will be found in both legal orders of EU law and ECHR. More specifically the research will examine if both legal orders give the same requirements regarding the detention of illegal third country nationals and if that is not the case which differences there are between EU law and the ECHR on this point. In this perspective it is important to note that according to Recital (24) of the Return Directive it respects the fundamental rights and observes the principles recognised in particular by the Charter. This research will not focus on the other detention regimes in EU law regarding asylum seekers and persons who are detained under the Dublin regulation because the main focus in this research is about the Return Directive and the position of the illegal staying

⁹ Article 20(1) of the Directive.

third-country nationals. Only when there is a relevant link with the Return Directive I will use the information about the other detention regimes in this research.

1.2 The crimmigration phenomenon

The use of criminal sanctions in the area of return and more generally in asylum and immigration law, opens the largely political debate on the legitimacy of the process of criminalizing foreigners. In this respect, we note that the Directive does not preclude national legislation from classifying a breach of an entry ban as an offense and laying down penal sanctions. However, the duty of loyal cooperation under Article 4(3) TEU means that Member States may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by the Directive and thus to deprive it of its effectiveness. As criminal law and immigration law were once quite separate, or so it seemed, nowadays these areas of law are increasingly seen together. In 2006, Stumpf classified the merger of criminal law and immigration law as “crimmigration”.¹⁰ According to Majcher, this phenomenon involves two main issues:

- (1) formal criminalization, or the application of criminal procedures (leading to sanctions like incarceration or fines) for immigration-related violations; and
- (2) the apparent increasing reliance on measures that are more commonly associated with criminal law enforcement (like detention) for immigration law infractions.¹¹

Examples of instruments in the area of crimmigration are the return decision and the detention. A return decision falls within the scope of the first issue of the crimmigration phenomenon, namely the application of criminal procedures for immigration-related violations. A detention falls within the scope of the second issue of the crimmigration phenomenon, namely the apparent increasing reliance on measures that are more commonly associated with criminal law enforcement for immigration law infractions.

¹⁰ See Stumpf (2006), p. 379.

¹¹ See Majcher (2013), p.1.

1.3 Research Question

In the light of the findings presented above, the following research question is posed:

Which legal requirements have to be taken into account when the Member States use the return decision as foreseen in Article 3(4) of the Directive and the detention in Article 15 of the Directive?

1.4 Outline

To answer the research question posed above, in the Chapters 2 and 3 I will first outline the conceptual framework in which our research takes place. In Chapter 2 I will discuss the concept and development of crimmigration law in both the US and the EU. Thereafter, in Chapter 3 will focus on EU law, the preliminary ruling procedure before the CJEU, the ECHR and the role of the ECtHR. In Chapters 4 there is an overview of the Return Directive. In Chapter 5 there is an analysis of the Return Directive and the instrument of the return decision followed by an analysis of the measure of detention in Chapter 6. In Chapter 7 there is an overview and discussion of the relevant case law of the CJEU regarding the return decision and the detention measure. In Chapter 8 I will discuss the relevant case law of the ECtHR regarding the detention measure. Finally I will bring together the findings in Chapter 9.