



Bachelor Thesis



Crimmigration in the European Union

The effect of the EU Return Directive on the criminalization of migrants in Germany



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Abstract:

The EU Return Directive 2008/115/EC was the first major piece of legislation in the area of immigration policies to be decided under the co-decision procedure. It had the aim to establish EU wide rules in order to provide for an effective and harmonized return policy. However, the directive received a lot of criticism for being too restrictive and for criminalizing migrants and migration policies. This paper has the intention to study the effects of the directive on the criminalization of migrants by assessing its implementation in Germany and contrasting it to the corresponding national law.

For this purpose, this study focuses especially on the provision of migrant detention. By analyzing the respective provision and relevant ECJ case law, it will be shown that the directive does not stop Member States from using criminal sanctions for immigration related violations, it just limits its scope of application and thus opens up the way for a potentially growing criminalization.

However, as the case study of Germany shows, not all MS's necessarily make use of this possibility. Even though Germany still officially allows criminal sanctions for immigration related violations, it rarely makes use of it. Also does it fully comply with article 15 and didn't use the broad definitions of the directive to apply more strict measures. The main problems in Germany with regards to detention is the wide spread use of prisons and the missing of codified alternatives.

It has to be noted that this study is not representative of the whole EU. Some trends and effects of the directive will be presented, yet they will not draw reliable conclusions on the effect of the directive on the criminalization of migrants in all Member States. Germany only serves as a control sample, since it is the biggest MS and the one with the highest number of migrants, and therefore an interesting state to look at. Yet, the conclusions are only applicable to Germany, no specific conclusions for the effects of the Return Directive in other EU Member States can be made from this thesis.

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1. Introduction

Migration has always been an important topic in the European Union (EU) in the last decades and the significance of the topic became even more crucial with the increasing flow of migrants in the last two years. In the year 2014, a total of 626.000¹ asylum seekers have been registered in the EU, which marked an increase of 44% to 2013². Additionally to these large numbers there were more than 250,000³ migrants that entered the EU irregularly. This is a growth of 138%⁴ from 2013 to 2014 and presents worrying numbers for the EU and its member states (MS's). In order to tackle these problems, the European Union took action and implemented several procedures in recent years, with the Return Directive from 2008 representing the first major measure in European migration policy to be decided under the co-decision procedure (Acosta, 2009). With the ever-growing number of irregular migrants coming into the EU there has also been a steady increase of xenophobia throughout all areas in Europe. Therefore it is now more important than ever to analyse whether migrants are adequately protected under EU law or actually criminalized. This research thus takes a closer look at the Return Directive and how it is applied in the MS's, in this case Germany, as it stipulates one of the most crucial measures in dealing with and returning irregular migrants.

Besides the growing xenophobia, the increasing numbers of irregular migrants have the unfortunate outcome that more and more migrants and refugees are being perceived as criminals who are likely to commit future criminal acts (Stumpf, 2006). In the United States especially, but also in Europe and other parts of the world, this view on migrants began to spread quickly in the 21st century. Since the events of 9/11, immigrants have been more and more connected especially to possible terrorism. Unfortunately, also in Europe irregular migrants are sometimes treated like criminals, even though their only "crime" is mostly represented by the simple fact that they either entered a country irregularly or were identified as undocumented residents on the territory of a Member State. The high number of migrants and refugees combined with the fear that the terror attacks spread throughout Europe during the last decade (Madrid, London, Paris, Brussels) will potentially have the unfortunate effect to add to this misleading view on migrants.

Unfortunately, criminal sanctions for immigration-related violations have been applied more strictly in recent years (Stumpf, 2006). This research therefore also has the aim to analyse whether the directive was able to calm this development or whether it actually fuelled it.

In 2009, the EU implemented a directive that had the aim to introduce a common policy on how to treat irregular migrants with regard to human rights, which is commonly known as the Return Directive 2008/115/EC. Following extensive discussions between the European Parliament and Council, this directive set out common standards for effectively returning third-country nationals illegally staying in the EU.

The negotiations about the directive between the MS and the European Parliament had been very complicated and resulted in a heavily criticized compromise between the EP

¹ Eurostat (2015)

² Eurostat (2015)

³ European Commission 2015a

⁴ European Commission 2015a

and the MSs represented in the Council, who in the end implemented a directive, which both permitted but, to some extent, also limited the scope of removal proceedings (Acosta, 2009).

This paper examines in particular the provision of pre-removal detention, as codified in the Return Directive, both at European and national level. The study has its main focus on this measure, since it represents the most controversial provision of the directive, as it allows for a 18-month detention period for irregular migrants. The analysis will provide an understanding of whether the directive opened the way for a stronger criminalization of migrants or not.

This research therefore also seeks to point out the inconsistencies of the European Immigration policy, which in recent years has implemented measures usually connected to criminal law. This new phenomena is referred to as “crimmigration law” (Stumpf, 2009). Scholars describe the trend that followed this development as the criminalization of irregular immigrants (Majcher, 2013; Parkin, 2013). However, the application of criminal measures against irregular immigrants can lead to a number of problems from the point of view of international and EU law, as emerges from the recent case-law of the European Court of Justice (ECJ) of the EU (*El Dridi*, *Achughbabian*, *Kadzoev*).

The rights to liberty and freedom of movement for instance represent key elements in the protection of an individual’s human rights in Europe and are clearly codified in the European Convention on Human Rights (ECHR).

Yet, even though these rights are both written down in the treaties of the EU and strictly regulated by the case law of the ECJ and the European Court of Human Rights (ECtHR), the detention of migrants is becoming a major tool of migration policies in Europe. Since the Return Directive allows Member States to follow different national approaches on each aspect of the return process, which ultimately depends on the way the national courts interpret the provisions of the directive, this directive can lead to a growing criminalization of migrants (Baldaccini, 2009).

This paper therefore has the aim to analyze to what extent the directive actually opened the path for Member States, in this case Germany, to include features of criminal law enforcement into migration law, while at the same time leaving out protective elements that are part of a criminal process. I will therefore assess whether and to what extent the formally administrative pre-removal detention regime in Germany is indeed punitive in practice. The assessment of applied practices includes amongst others observations related to procedural safeguards guaranteed by the authorities, the conditions of confinement in the detention facilities as well as the institutional and legal actors involved.

Considering all the aspects mentioned above, I put down the hypothesis that by using broad terms and leaving much room for interpretation to the MS’s, the EU Return Directive failed to provide strong safeguards against arbitrary detention, which leads national authorities to actually use some of its provisions to justify stricter measures. The case study of Germany will serve as a control sample and shed some light on whether the directive indeed had the expected outcome in this specific Member State.

1.1 Research Design & Methodology

This study seeks to highlight the influence that the Return Directive had on the rules and practices of the German return policy and its impact on the criminalization of migrants. Therefore, in order to study the relationship between the Return Directive and German return policy, I need to contrast German law to the provisions of the Return Directive. While national practices differ within the EU, any EU country must comply with the minimum standards as codified in international and EU law. This comparison will be followed by an overview of whether Germany has to change some of its rules and practices due to its implementation or not. This assessment will get us a sense for the general impact the directive might have on national states.

Generally, in order to answer the research question accurately, a qualitative approach making use of desk research and a thorough document analysis is applied. The study is descriptive in its nature, as data is collected, organized and summarized (Punch, 2000).

A detailed content analysis of qualitative data therefore will be the main research tool for this case study. The data is going to include official EU and German documents, international treaties and conventions, both EU and national legislation and policy papers, case law by the ECJ, reports by NGOs, etc. In cases where the national legislation cannot be accessed in the English language, the original version in German is inserted. The author will add the English translation.

In addition to the content analyses of the relevant documents, a literature review of the most crucial academic literature surrounding this issue will be conducted. Journal articles and other research papers will contribute to answering the research question in greater detail.

1.2 Research Question

The main research question I intend to answer in this bachelor thesis is:

“To what extent does migrant detention as regulated by the Return Directive increase the criminalization of EU migration policy within EU MSs ? ”

In order to get a more detailed answer to this question, several sub-questions are added:

What do we mean when we talk about criminalisation of migration policy and criminalisation of migrants?

What is the regime of pre-removal detention as codified by the Return Directive?

How has the ECJ interpreted the conditions of pre-removal detention under the Return Directive?

How has Germany implemented and applied the pre-removal detention rules of the Return Directive?

To what extent is pre-removal detention compatible with the standards set by Article 5 European Convention on Human Rights

1.3 Case Selection

Since the purpose of this research is to examine whether the directive contributed to a criminalization of migrants in Europe, a case study will be conducted in order to study the effects of the directive on the EU and its Member States, in this case Germany. Analysing the implementation of the directive in a Member State will give a reference to see whether the directive indeed led to the expected stricter return policies or not.

The decision to conduct a case study of Germany has a specific reason. Germany is Europe's biggest and most influential Member State, both politically and economically, and is therefore one of the most desired targets for migrants. Germany is actually the country that had the largest number of applicants, namely 202.700, or 32% of total applicants in 2014⁵. And the number of asylum seekers increased even more in 2015. The German Federal Statistical office found that the year 2015 was characterized by unusually high numbers of migrants to Germany. In a recently published estimation, it reports "that the arrival of just under 2 million foreign people was registered by the end of 2015. At the same time, roughly 860,000 foreigners departed from Germany. Consequently, net migration of foreign people amounted to 1.14 million. This is the highest net immigration of foreigners ever recorded in the history of the Federal Republic of Germany".⁶ These high numbers make it reasonable to assume that the number of irregular migrants will be even higher than in 2014. It will therefore be interesting to see how Germany deals with this and how irregular migrants are treated. This argument alone makes Germany a justifiable choice for this case study.

1.4 Social and Scientific relevance:

Increasing migration flows from the Near East, Africa and East Europe have strongly influenced Europe in the last decade. The financial crisis of 2008, the Arab spring of 2011, the Ukraine crisis, the civil war in Syria and the expansion of the terrorist organization IS are all factors that contributed to the increased number of migrants and refugees. It is reasonable to assume that a large number of those migrants will not be officially accepted as asylum seekers and therefore fall under the scope of the Return Directive. Thus, the need for an effective European migration and asylum policy protecting human rights is now more important than ever. However, this directive, which has been one of the first major pieces of legislation in this area has been one that received much criticism in this respect.⁷

This paper therefore seeks to study the effects of this criticized directive on the MSs, since it might have significant impact on the criminalization of migrants. Examining to what extent Germany makes use of such criticized measures and by investigating to what extent its domestic detention periods have been influenced by it to the better or worse is only one crucial aspect of evaluating the criminalization of migrants. Therefore, this study tries to identify a number of legal problems in the current detention regime as codified by the directive and provide judges, lawyers and all public authorities that are involved in migration policies with an accurate description of possible tension between German and European legislation and their detention regimes.

⁵ Eurostat (2015)

⁶ German Federal Statistical Agency (2016)

⁷ see: Legomsky (2007); Majcher (2013); Stumpf (2009)

1.5 Thesis Overview

The overall structure of this paper will be as follows: first, a broad overview about the Return Directive and its aims will be provided. Afterwards, the specific provision of detention will be explored in greater detail by also examining the rulings of the most crucial case laws of the ECJ surrounding this issue. By applying case law of the ECJ on the detention of migrants, I will be able to elaborate more precisely the EU parameters and subsequently use those findings in order to assess the extent to which the German detention regime complies with the provisions of the directive and their interpretation.

The following part will evaluate the implementation of the Directive, especially the instrument of detention, in Germany. This assessment will be contrasted to EU law and principles, as codified in the Return Directive in order to determine whether the particular detention regime used those principles to increase the criminalization of migrants or not. The analysis will also include the evaluation of applied practices, the institutional and legal actors involved and the condition of detention facilities. After this analysis, a discussion about the impact the directive had on the criminalisation of migration policies and migrants in Europe and Germany will be carried out, followed by a comparison of the return directive with article 5(1) ECHR, which will give us a better perspective of the overall protection of human rights in the directive. The paper will be finished with some concluding remarks.

2. Theory and Key Concepts

2.1 Crimmigration; Criminalization of migrants / migration policy:

The concept of “Crimmigration” is still rather new in Europe. One important aspect needs to be considered in order to define the concept. It entails the application of criminal procedures for immigration-related violations. More specifically, it includes the increasing use of instruments like detention, which are usually associated with criminal law enforcement, in cases where immigration law has been violated, thus they are also being applied in cases where no actual criminal offence occurred (Stumpf, 2006).

Legomsky observed that “ (European) immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication” (Legomsky, 2007, p. 469). Following Legomsky’s theory, one can argue that the EU detention regime has increasingly implemented aspects linked to criminal justice systems.

This is what the criminalization of migration policy is mainly about.

The fact that the criminalization of migration policies has increased is due to the fact that immigration detention is often classified as administrative by states, since it allows them to not having to provide procedural guarantees to detainees that people receive during criminal procedures. The states justify the use of administrative procedures by arguing that immigration detention is a non-punitive, preventive measure aimed to enforce migration law. Instruments like detention, especially the length (max. 18 months), however undoubtedly lead to a greater use of measures associated with criminal law enforcement within a formally administrative system of immigration regulation (Legomsky, 2007; Majcher, 2013; Stumpf, 2009). The fact that the detention of irregular migrants is not considered as real punishment therefore makes way for a growing and hidden criminalization of migrants (Majcher, 2013).

In order to analyse the criminalization of migrants, it will be assessed, besides others, whether migrants who have been ordered a detention order by administrative authorities receive an automatic judicial review, whether the order is reviewed regularly, if they are released when there is no real aspect of removal or whether they are held in specific detention facilities. Furthermore it will be evaluated to which extent migrants are being deprived of their liberty for purely migration related violations like irregular stay, thus in cases where no actual criminal offence has occurred, which can also be regarded as a criminalization of migrants.

Against this background, by referring to ECJ and German Federal Court case law and by comparing the measures of the directive to German law, I will elaborate whether there have been implemented any new significant procedures in Germany after the directive took effect and whether they led to a greater criminalization of the migration policies and migrants or not.

2.2 Irregular Migrant:

With the latest developments in the European refugee crisis it is important to point out that the focus of this paper is on third-country nationals (TCN's) who are staying illegally on the territory of a Member State and not on refugees; a clear separation must be made here in order to prevent any misunderstandings. The scope of the return directive does not include refugees who apply for asylum. "A third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force"⁸. If an asylum seeker has no valid status or gets denied asylum, he is described as an irregular migrant and has to leave the country. Furthermore, "the presence of those who have either entered or remained in a state without authorization or legal justification is considered irregular or unlawful" (FRA, 2013). According to the directive, this person can be best referred to as someone who breaches or no longer meets the condition for "entry, stay or residence".⁹

2.3 EU detention regime:

According to Majcher (2013), the rules on immigration detention, as provided for in the Reception Conditions Directive and the Return Directive, are referred to as the "immigration detention regime". Detention represents the focus of this study, since it is the most controversial aspect of the directive. Generally, migrant detention means "the deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies" (Parkin, 2013). Due to the new measures introduced by the Return Directive, in particular the 18-month detention period, the detention of migrants has become a major part of migration and return policies throughout Europe. The minimum standards and conditions will be evaluated and compared to the restrictions and exceptions of the directive. Afterwards, these aspects will be assessed on the case of Germany's detention regime, in order to examine whether the country and its detention facilities follow the minimum standards laid out by the directive or whether it interpreted the provisions in such a way to implement even more strict measures.

⁸ Directive 2008/115/EC: Paragraph (9) of the preamble

⁹ Directive 2008/115/EC: Paragraph (5) of the preamble

3. The Return Directive

3.1 The aim of the EU Return Directive

For a long time the EU did not have a common policy on how to treat asylum seekers and irregular migrants with regards to human. Up until the implementation of the Amsterdam Treaty in 1999, the EU had no real competences in the area of migration. The Amsterdam Treaty therefore made a step towards the harmonization of immigration law. The aim was to establish shared principles and values, in order to treat irregular TCN's the same way throughout Europe.

In the following years, the Council began to work towards common standards and procedures for returning illegally staying third country nationals. The first proposal was provided in September 2005. From that year to its actual adoption in December 2008, it took three years to find a compromise for the Return Directive, which was then finally put into force in January 2009 (Baldaccini, 2009).

One reason why the adaption took so long was the fact that the Return Directive represented the first major piece of legislation in the field of immigration and asylum policy to be decided under the co-decision procedure, a procedure in which the European Parliament has the same legislative power as the Council (Acosta, 2009). The Return Directive refers to TCN's who stay illegally in the territory of a Member State and covers provisions for detaining them with the aim of removing them along with procedural guarantees. In general, the directive has the aim to provide the Member States with common standards and procedures regarding the return policy and seeks to "ensure that the return of third- country nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned" (European Commission, 2014, p. 3).

Although Art. 1 of the Return Directive underlines human rights, the overall references to human rights in the text are vague and mostly limited to the introduction. The minimum standards imposed by the Return Directive and its broad definitions actually leave plenty of room for interpretation to member states.

Consequently, responsibility for respecting the minimal standards set by the Return Directive and by national legislation lies ultimately on individual national courts. Member states are required to transpose the EU directives into their domestic legislation, i.e. to adapt their laws to meet the goals provided in the directives. In order to meet these goals, they are not allowed to use any measures that violate EU law, including EU fundamental rights.

Therefore, Member States always have to obey the general laws of proportionality¹⁰ and protection in the event of extradition¹¹ as well as the protective provision from the respective directives. However, since the directive uses broad terms, the detention regimes differ from country to country and some states might use these unclear definitions to make their measures even more strict.

¹⁰ Charter of Fundamental Rights of the European Union 2000: Article 49

¹¹ Charter of Fundamental Rights of the European Union 2000: Article 19

To give some insights on the controversial surrounding this directive, I will shortly present some inconsistencies: the directive codifies specific guarantees against detention, for instance that it may only serve the purpose of facilitating removal¹², that the right to judicial review must be granted¹³ or that the principle of non-refoulement¹⁴ must be applied. However, there are many areas where the EU detention regime lacks important standards, like judicial supervision. For instance are Member States allowed to derogate from certain aspects of the rules concerning speedy judicial review and detention conditions in “exceptional situations”¹⁵. These inconsistencies are one major reason why it was so difficult to achieve a compromise between the Council and the Parliament.

The final outcome therefore left many member States unsatisfied, as emerges from the low level of implementation of the directive even after the deadline for its transposition expired. And even today, there are still many provisions of the directive that MSs have to transpose into their national law, they include criteria for imposing detention, detention conditions and entry-bans (European Commission, 2014). Currently there are thirteen Member States that are in the process of doing so and another six Member States have stated to change their national legislation in the near future (European Commission, 2014).

One can also recognize this dissatisfaction when looking at a recent press release by the Commission¹⁶. In paragraph 4 of that press release, the Commission claims to make the EU return policy more effective. On the one hand, a so-called Return Handbook had been issued, which is supposed to present national authorities with instructions on how to “carry out returns of those migrants who do not have the right to stay in the EU”. On the other hand, they issue an EU Action Plan on Return, which is supposed to present the MSs with immediate and mid-term measures that “strengthen the implementation of the Return Directive”. Both of these documents have the aim to serve as overall training tool in standards and procedures for applying the Return Directive. These steps taken by the Commission show, that the directive is still not being applied effectively in the EU and that many MSs interpret its provisions differently.

These problems also have led several parties to raise the issue of compatibility of national measures applicable to them with the EU Directive, which in turn has led to several requests for preliminary rulings to the ECJ.

Some rulings by the ECJ argue that the Returns Directive poses some limits on Member States’ power to punish a specific person, which legal status on the territory on a MS is not clarified yet, with detention and thus the depreciation of freedom. Many cases have been referred to the ECJ concerning the imprisonment of TCN’s in return procedures for the crime of irregular entry or stay.

Before analysing these judgements, let’s take a closer look at the provision of detention and why it received as much criticism as it did and why it caused so much controversial debates.

¹² Directive2008/115/EC: Article 15(1)

¹³ Directive2008/115/EC: Article 15(2)

¹⁴ Directive2008/115/EC: Article 5

¹⁵ Directive2008/115/EC: Article 18

¹⁶ COM Press release from 9 September 2015: Refugee Crisis: European Commission takes decisive action

3.2 The provision of migrant detention

Article 15 of the Return Directive addresses the issue of immigration detention. Unless other sufficient but less coercive measures can be applied effectively, persons subject to return procedures may only be detained in order to prepare return and/or to carry out the removal process in particular when there is a “risk of absconding” or if the person concerned “avoids or hampers” the return or removal process (15.1). It can be ordered by administrative *or* judicial authorities and must be “ordered in writing with reasons in fact and law” and the grounds for the detention must be reviewed, either automatically *or* at request of the person concerned (15.2; 15.3). According to this procedure, detention has to be justified and the detainee has to be released in cases a “reasonable prospect of removal no longer exists for legal or other considerations” (15.4). In general, the time frame of custody is not supposed to exceed 6 months to “prepare and/or carry out a removal” (15.5), however, in specific cases the detention period can be extended for another 12 months (15.6), thus the maximum period of detention may not exceed 18 months. However, this extension may only be applied if there is a lack of cooperation of the third country national or documents are absent or obtained with delays (15.6).

3.3 Controversy

In this paragraph I want to shortly discuss this provisions and analyse what other scholars have to say about it.

First of all, one can say that the directive as a whole received a lot of criticism, not only from several scholars (Majcher, Baldaccini, Peers), but also from several international organizations like the Organization of American States, which raised serious concerns about the implications of the directive¹⁷ and several NGOs like ProAsyl or Amnesty International and the European Council on Refugees and Exiles, which together released a press release even before the directive was adopted, in which they argue that “detention for up to 18 months of people who have committed no crime is excessive and disproportionate”¹⁸.

Even Louise Arbour, the United Nations High Commissioner for Human Rights criticized it, arguing that it would be difficult to combine the restrictive measures of the directive with the protection of individuals rights (Arcarozo, 2009).

But is all this criticism justifiable? Did the directive, and especially art. 15 indeed lead to stricter measures applied by the Member States or did it actually not have that much of an impact as many observers thought it would have? The biggest publication on the issue comes from the EMN, an EU funded Network with the aim to provide policymakers from EU Institutions and MSs with reliable and objective data and statistical information on migration and asylum¹⁹. The study²⁰ had the general objective to “identify similarities, differences and best practices with the use of detention and alternatives to detention” (p.5).

Another big contribution on the topic was made by the European Commission. In March 2014, it published its first implementation report with the “Communication from the

¹⁷ see: OAS (2008)

¹⁸ see: ECRE (2008)

¹⁹ See: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm

²⁰ EMN Sythesis Report (2014)

Commission to the Council and the European Parliament on EU Return Policy”²¹ in which it analyses the implementation and impact of the directive on the EU Return Policy.

The EMN clearly defines detention as a non-punitive administrative measure (p.8) but finds that eight out of eleven grounds to justify detention applied by MSs that are bound by the directive go beyond administrative measures and that they are not even set out by the Return Directive, like threat to national security or public order. The European Commission however argues in its Communication that the practice is rather uniform and in compliance with the directive as regards the grounds for imposing detention, since the risks of absconding and/or hampering return were the main reasons in most Member States,

Still, the excessive list of grounds not provided for in the directive lead Izabella Majcher, who analysed the report for EU Law Analysis in 2014, to the conclusion that “an exhaustive enumeration of the circumstances justifying deprivation of liberty would prevent states from systematically ordering detention”²².

Another crucial finding of the report shows that most of the MSs use administrative rather than judicial bodies to assess whether grounds for detention are existent (p.24). Article 15 of the directive states that in such cases, a speedy judicial review (2a) or the right to appeal for such a review (2b) must be given. However, the majority of the state doesn’t use the judicial review but rather wait and see whether the detained person applies for such a review. This of course is less protective, especially because the detainee would probably in most cases need legal assistance for such an appeal (Majcher, 2014). One can argue that the possibility for states to use administrative authorities and not having to grant a mandatory and automatic judicial review is undoubtedly one of the biggest problems of article 15.

Furthermore, the first paragraph of article 15 argues that detention may only be applied „unless other sufficient but less coercive measures“ can be applied. The EMN report points out the most used alternatives, which include reporting obligations, residence restrictions, surrender of documents or electronic monitoring (p.33). It does however not clarify whether these alternatives are just provided for by the MSs in their national legislation or actually used in practice. Here, the Communication by the Commission can give some insights. It points out that „several Member States only apply alternatives to detention in rare cases“ (p.15). Majcher concludes that there may exist many national legal provisions on alternatives to detention, that however “only 32% have been used in practice, in 23% of cases there was no practical application, while for the remaining 45% there was no information about their use in practice”²³.

The last aspect I want to take a look at here is the length of detention, since it brings some surprising facts to light. According to the Communication by the Commission, the maximum length of detention varied significantly between Member States before the Return Directive had been implemented. Nine countries (CZ, CY, DK, EE, LT, FI, SE, MT, NL) actually had no maximum period at all when it comes to the question how long a third-country national may be detained. While the legal time limits of detention have increased in eight MSs, they have also decreased in 12 other MSs²⁴. Thus one could

²¹ See: European Commission (2014)/199

²² See: <http://eulawanalysis.blogspot.de/2014/12/immigration-detention-in-europe-what.html>

²³ see: <http://eulawanalysis.blogspot.de/2014/12/immigration-detention-in-europe-what.html>

²⁴ see: COM (2014)/199

without doubt say that the Return Directive has somewhat contributed to an overall reduction of detention periods across the EU. Unfortunately, their data only show half of the truth. The Commission points out that the maximum lengths of detention are not usually applied and it lays down data that show how long irregular migrants are actually held in detention to prove this. However, as Peers rightly points out, “in the absence of data about how long irregular migrants were detained for in practice before the directive was adopted, it is impossible to be sure what effect it has had on the actual length that migrants spent in detention”²⁵. Furthermore, Peers points out that the report by the Commission does not clarify whether MSs comply with the rules that the directive lays down for extending the detention period to 18 months and how many people are detained for longer periods in practice.²⁶

Concluding, one can say that the pre-removal detention regime as codified in the return directive is rather unspecific in some aspects, which led to several confusions. Also, the restrictive measures codified in the directive caused a lot of criticism beneath scholars and organizations. However, there is not enough data offered by the individual MS's to evaluate for instance the change in the length of detention in practice.

4. Rulings and interpretations of the ECJ concerning the Directive

The controversial points mentioned above as well as the findings of the reports show that there are laws in place that can lead to an increasing criminalisation of irregular migrants in some Member States. Unfortunately the Return Directive doesn't have a provision that would prevent Member States from considering irregular entry and/or stay as a criminal offence under their domestic law²⁷. Therefore, several ECJ judgments had to be made which limited the MS's ability to put irregular migrants in freedom depriving detention. In case C- 61/11 (El Dridi) for instance the ECJ ruled that the Return Directive precludes domestic legislation criminalising irregular stay since such rules undermine the effectiveness of the Return Directive. A judgment in a similar case (C-329/11 Achoughbabian) confirmed the findings of the El Dridi judgment and found that national law sanctioning irregular stay with a threat of criminal law imprisonment was not in compliance with the aim of the Return Directive.

In the following paragraph I will explain these rulings by the ECJ, which clarify the limits of the directive, starting with one of the first judgements that dealt with the Return Directive, more specifically with the maximum period of detention (Kadzoev), followed by the two above mentioned judgements that deal with criminalization (El Dridi, Achubian).

4.1 The Kadzoev case

The first case²⁸ dealing with the Return Directive by the ECJ started even before the deadline to transpose the directive had expired and dealt with the issue of maximum period of detention.

²⁵ see: <http://eulawanalysis.blogspot.de/2014/03/the-eus-returns-directive-does-it.html>

²⁶ see: <http://eulawanalysis.blogspot.de/2014/03/the-eus-returns-directive-does-it.html>

²⁷ COM (2014)/199

²⁸ ECJ, Kadzoev, case C-357/09, from November 30, 2009.

Mr. Kadzoev, a man of Chechen origin, arrived in Bulgaria in October 2006 and applied for asylum. The Bulgarian authorities immediately placed him in a detention centre. His applications for asylum were all turned down and his appeals against these rejections were unsuccessful. It was argued that he did not fulfil the conditions for protection and they ordered his expulsion as an illegal immigrant. However, it was not possible for the authorities to return him back to Russia, since he had no official identity documents from the Russian authorities. In the end, Mr Kadzoev has been detained in a detention centre for more than 3 years while he waited for an allowance to return back to Russia or another third country²⁹.

The Court ruled that when a Member State faces a situation similar to the one in Kadzoev, where the country of origin does not recognise the person as being its citizen, the third-country national has to be immediately released, since there is no reasonable prospect of removal in the period laid down by the Directive (par. 63). Furthermore, the ECJ made clear in its ruling that “where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a reasonable prospect of removal within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately” (par.60).

Furthermore, the Court made clear that “the period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115”. (par. 53).

At last, the court also made a ruling that dealt not with the duration of the detention but rather with the grounds for applying detention. In paragraph 70, the Court makes clear that “the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115”.

4.2 The El Dridi case:

The judgment of the ECJ in the El Dridi case³⁰ put an end to judicial and administrative chaos in Italy, in which the application of national criminal provisions related to irregular migration were of uncertain applicability.

It affected all national legal systems providing for detention of irregularly staying third-country nationals merely based on their migration status, since in it the Court has set a balance between national criminal legislation and European immigration policies (Raffaeli, 2011).

Mr. El Dridi, a third-country national, entered Italy illegally. A deportation decree was issued against him on which basis he was told to leave Italian territory within five days. The grounds for that order were amongst others that he had no identification documents and that it was not possible for the authorities to put him into a detention

²⁹ COM: Kadzoev Case Summary, retrieved from http://ec.europa.eu/dgs/legal_service/arrets/09c357_en.pdf

³⁰ ECJ, El Dridi, case C-61/11, from April 28, 2011

center, since there were no places free. Mr. El Dridi didn't comply with that order and was sentenced by the District Court of Trento to one year's imprisonment.³¹

The Court made clear in its judgement that the directive does provide for the possibility for Member States to adopt measures, including criminal law measures, aimed at returning third-country nationals who have already been the subject of removal measures from remaining within their territory (par. 52). However, the Court emphasises that national legislation, including in the field of criminal law, may not jeopardise the attainment of the objectives pursued by a directive and therefore deprive it of its effectiveness (par. 55).

Since the Return Directive makes coercive measures expressly subject to compliance with the principles of proportionality and effectiveness with regard to the means used and objectives pursued (par. 57), Member States may not provide for a custodial sentence on the sole ground that an illegally staying third-country national has not complied with an order to leave the national territory on expiry of the period granted, but instead must pursue their efforts to enforce the return decision (par. 58).

The Court concludes that the national legislation is contrary to EU law and suggests that the national court should not apply it in this case. It clarified that migrants in an irregular situation should be detained in the framework of administrative measures foreseen by the Return Directive, and that the safeguards established by that directive should apply. Italy subsequently changed its legislation with the implementation of the 2011 Security package. (FRA, 2013).

Since this judgement requires all Member States to pursue the enforcement of the return decision in a proportionate manner, "using the least coercive measures possible and with due respect for fundamental rights" (FRA, 2013, p.145), it seems that not only Italy, but all Member States criminalizing illegal immigration are required to change their respective national legislation in order to ensure full implementation of the directive.

4.3 The Achughbabian case:

In the Achughbabian case³², the Court examined "whether the principles established in El Dridi also applied to a third-country national's imprisonment sentence for an offence of entry or illegal stay in the territory of an EU Member State" (FRA, 2013, p. 146) and thus further clarifies the scope of the directive. The case reached the ECJ, since French judges became aware of similar problems arising from national criminal law soon after the ruling in the El Dridi judgment.

In this case, Mr. Achughbabian, an Armenian national, entered France in 2008. In 2009 he was ordered to leave French territory within one month by a voluntary departure. After he refused to leave France, a new return decision was adopted in June 2011, this time via a deportation order, not accompanied by a period for voluntary departure. In addition, he was placed in police custody and then in detention for an unlawful stay, which he challenged before the French courts³³.

³¹ see: CJEU Press Release (2011)

³² ECJ, Achoughbabian Case C-329/11, from December 6, 2011

³³ see: European Commission (2012)

The case aimed to answer the question whether irregular immigrants could be subjected to police custody, since in France this measure “may only be applied to persons who are suspected of having committed a crime punishable by imprisonment” (Raffaelli, 2012, p. 2). Since the El Dridi judgment argued that irregular immigration must not be criminalized, the provision of French criminal law was legally regarded as doubtful (Raffaelli, 2012). Therefore, this judgement aimed to clarify the scope of application of article 2(2)(b) of the Return Directive, which allows States to exclude third country nationals from the scope of application of the who “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”.

According to the ECJ, this article “clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying” (par. 41).

The Court clarified that even though illegal immigration may still be criminalized in special circumstances, “criminal sanctions may only be adopted once the return procedure is exhausted, if the adoption of coercive measures did not enable the removal of the immigrant to take place” (par. 46), and only in so far as there is “no justified ground for non-return” (par. 48).

Therefore, the scope of application of criminal sanctions became very limited after the ruling. People, whose irregular presence in a Member State had justified grounds, were no longer allowed to be criminalized.

The case also made some general remarks in this judgement. It argued that besides issues regarding legality and procedural safeguards, detention must always comply with the fundamental rights contained in the ECHR and under the EU Charter of Fundamental Rights.³⁴

4.4 Analysis

So what are the most important lessons that the MSs and their authorities had to take from these judgements?

Firstly, in the Kadzoev judgement, which clarified issues related to detention, namely its maximum period and its grounds, the ECJ pointed out especially the protective provisions of article 15 of the Return Directive. It made the arguments that detention always has to be justified and that the detained person must be released instantly if removal to a non-EU country within the maximum period of detention is not likely to be carried out. Furthermore, in this judgement the ECJ made clear that reasons of public order and safety do not fall under the scope of the Return Directive and thus clarified some of the controversies that related to detention grounds.

Secondly, in the El Dridi case, which dealt with the criminalization of detained persons under reference to the directive, the ECJ found that the Return Directive precludes domestic law that criminalizes and imprisons illegally staying third-country national that did not comply with an order to leave the national territory, since applying such sanctions would jeopardise the objectives of the directive. However, as Peers pointed

³⁴ FRA (2014)

out, even though the Court's case law on this subject might have interpreted the directive "more liberally than its wording might suggest, it has focus more on the objective of efficient expulsion, rather than on irregular migrant's human rights"³⁵. Lastly, the Achoughbabian case, which had very similar implications, basically just confirmed the findings of the El Dridi judgement and made it even harder for MSs to criminalize persons via a threat of criminal law imprisonment on the sole ground for illegal stay. Even though the Court declared in this judgment that criminal provisions punishing irregular immigrants are per se not incompatible with the directive, "it has subjected them to a number of limitations and conditions, with the effect of severely limiting their possible scope of application."³⁶

One might think that these cases, which by far do not represent all the cases that have been dealing with the Return Directive, clarified the scope of the directive with regards to detention and criminalization enough for MSs to apply it rightfully. However, the Court still has to engage itself with questions relating to detaining immigrants for the sole reason of illegal stay under reference to the Return Directive rather often, as the most recent preliminary ruling³⁷ shows. This case was a bit different than the others however, since the person concerned was on French territory only for transiting to another MSs and was arrested and put into detention on the border leaving France, not entering it. A French court therefore asked the ECJ whether Article 3(2) of the Return Directive is "to be interpreted as meaning that a third-country national is staying illegally in the territory of a Member State and thus falls within the scope of that directive, as defined in Article 2(1) thereof, where that foreign national is merely in transit as a passenger on a coach travelling in the territory of that Member State from another Member State forming part of the Schengen area and bound for a different Member State"³⁸.

Referencing the El Dridi case as well as the Achoughbabian case, the ECJ pointed out that the Return Directive applies to this person and that the imprisonment under national law is unlawful. According to the Advocate General of the ECJ who issued this preliminary ruling, detention under the Return Directive is only justified in a very few cases, one of which is when there has been a return procedure performed against that person but the third-country national stays in the territory of the Member State in question nevertheless, even though there is no legitimate reason for not returning (Achoughbabian)³⁹. Such a procedure has however never been applied to the person concerned in this case and the detention is therefore not compatible with the directive. This case therefore gave the Court yet another opportunity to clarify that the Return Directive applies for each third-country national who is staying in an illegal situation, regardless for what reason his stay is illegal and where he was arrested, and that imprisonment may be imposed only in very specific cases, none of which is present here.

As we have seen, even though the ECJ pointed out in several cases that it is unlawful to criminalize migrants for illegal stay with imprisonment and even though it limited

³⁵ Peers, S. (2014)

³⁶ Raffaeli, R. (2012)

³⁷ Case C-47/15 from February 2, 2016

³⁸ Request for a preliminary ruling, Question 2, retrieved from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163052&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=84987>

³⁹ Affum, Case C-47/15, from February 2, 2016, par. 56

detention orders to several conditions, thus limiting the scope of unlawful application, it still has to deal with this issue today. The question for amendments of the directive therefore seems at least justifiable and it remains to be seen whether the ECJ will suggest changes for some provisions or wordings of the directive in order to clarify the scope of the directive and end the unlawful criminalization of illegally staying third-country nationals once and for all.

5. A Case Study of Germany: migrant detention in Germany under the Return Directive

Now that we have seen how the ECJ interpreted the directive and how it limited its unlawful application, it will be interesting to see how Germany transposed the measures of the directive into national law. In this section I will therefore analyze how the Return Directive was been transposed into national legislation in Germany and evaluate the extent to which the criticized measures on detention, as implemented in German law, led to a criminalization of migrants in Germany.

At present, the return policy is part of the asylum policy in Germany. The return and detention of migrants is mainly regulated by the so-called “Residence Act” (German: *Aufenthaltsgesetz, AufenthG*). All measures regarding the return policy are implemented by the individual *Länder*, the Residence Act, however, serves as main legislation setting the overall standards and guidelines that need to be followed by every *Land* (Grote, 2014).

It is important to mention that there are two types of detention possible, namely the so-called *Vorbereitungshaft* (preparatory detention) and *Sicherungshaft* (security detention) and both require different forms of justifications. The former is applied whenever a decision on whether the person will be returned or not cannot be taken immediately and it is foreseen that he or she will hamper or hinder removal.

Preparatory detention has a limit of six weeks. However, this type of detention barely has a practical effect⁴⁰.

The latter form of detention is used in most cases and can be ordered by a judge to secure a persons deportation when there is sufficient evidence indicating that the alien intends to elude the expulsion or when other, specific grounds apply, which will be presented later in this Chapter (Möller & Poth, 2013). Generally, this kind of detention has to follow the principle of proportionality and is only possible if it is secure that removal will take place within the next three months and that the speediness of the process is independent of the detained person’s behavior (Möller & Poth, 2013).

Detention may last up to six months, but may be extended to another twelve in specific cases, which will again we portrayed later in this chapter.

In the following section I will contrast the six paragraphs of article 15 of the Return Directive to the corresponding national law in Germany and analyze in detail whether it is line with the EU regulations and whether the directive has been used to apply criminalizing measures. As we have seen in Chapter 3, section 3.2, Article 15 of the Return Directive codifies the standards and procedures for migrant detention. It has also been shown that this paragraph of the directive led to a lot of confusion in several Member States, which forced the ECJ to clarify some sections of the paragraph in crucial

⁴⁰ Jesuit Refugee Service (JRS) - Europe, AISBL , Detention in Europe: Germany

rulings (see chapter 4). It will therefore be interesting to see how Europe's biggest Member State implemented the directive and whether it led to similar problems. In order to analyze this, the following section will contrast article 15 of the directive to the corresponding German law.

5.1 The implementation of Article 15(1) of the Return Directive⁴¹:

This first article states that detention shall only be applied during return procedures, be issued as a last resort and only when there are no other, more efficient ways measures to return a TCN. It also mentions that the duration of detention shall be for as short as possible and that there have to exist specific grounds in order to apply detention.

Corresponding German Law

This paragraph of the directive has been transposed by paragraph 62(1), 62 (2) and 62(3) of the Residence Act, which state that "custody awaiting deportation shall not be permissible if the purpose of the custody can be achieved by other, less severe means which are also sufficient"⁴² and that "a foreigner shall be placed in custody by judicial order to enable the preparation of deportation, if a decision on deportation cannot be reached immediately and deportation would be much more difficult or impossible without such detention"⁴³. In section 62(3) AufenthaltG, Germany mentions five grounds for which a judge may order detention, namely in case the individual has entered the territory unauthorized and is obliged to leave the country, where the permission to stay expired and the alien changed his location without informing the aliens' registration authority, when the alien does not appear at the expulsion appointment or if the alien circumvented the expulsion in any other way. This list of grounds effectively transposed paragraph (a) and (b) of article 15(1). The last sentence of art. 15(1) is covered by the so-called principle of expedience (*Beschleunigungsgrundsatz*), which obliges the administration to take all possible measures not to unduly prolong a deprivation of liberty⁴⁴. Also, detention is only justified for as long as meaningful measures to prepare the removal are taken⁴⁵.

⁴¹ *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*

⁴² Compare § 62(1), AufenthaltG Germany

⁴³ Compare § 62(2), AufenthaltG Germany

⁴⁴ FRA (2010)

⁴⁵ Compare § 62.0.2. Administrative Regulations of the Residence Act (translated by author)

5.2 The implementation of Article 15(2) of the Return Directive⁴⁶:

This article regulates which authorities can order a detention order. It is specifically mentioned that detention can be ordered by both judicial and administrative authorities. However, if it has been ordered by administrative authorities, a judicial review has to be carried out quickly and the TNC must have the right to appeal the decision.

Corresponding German Law:

Both section 62(2) and 62(3) mention that a foreigner may only be placed in custody by a judicial order either to prepare or secure deportation⁴⁷. Furthermore, article 104 of the German Basic Law mentions that “only a judge may rule upon the permissibility or continuation of any deprivation of liberty. However, German law actually also allows administrative authorities (specifically the Aliens Department) to put a TCN into custody without a judicial order, but only when “it is not possible to obtain the judicial decision on the order for custody to secure deportation beforehand” or when “there is a well-founded suspicion that the foreigner intends to evade the order for custody to secure deportation”⁴⁸. However, if such a deprivation is not based on a judicial order, a judicial decision has to be obtained as quick as possible and without delay⁴⁹.

Thus, even though Germany makes use of the controversial possibility to obtain a detention order by administrative authorities, articles 62(2), 62(3) of the AufenthaltG and article 104 of the German Basic Law make sure that a foreigner ultimately cannot be placed into custody without a judicial order and thus comply with the directive.

Further, reasons for detention have to be given. This is specifically stated in section 62.0.3.2. of the Administrative Regulations of the Residence Act, which state that in order to apply detention grounds have to be issued.

⁴⁶ *Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. When detention has been ordered by administrative authorities, Member States shall: (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention; (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings. The third-country national concerned shall be released immediately if the detention is not lawful.*

⁴⁷ Additionally see the General Administrative Regulations to the Residence Act 62.0.0. (Allgemeine Verwaltungsvorschrift zum AufenthaltG, German version), which states that „a foreigner may generally not be put into detention without a judicial order“ (translated by author).

⁴⁸ Compare § 62(5) Residence Act

⁴⁹ Compare § 104, Basic Law for the Federal Republic of Germany, 2014 and § 62(5) Residence Act

Germany also provides for a speedy judicial review and allows the foreigner to take legal actions. First, section 62.3.3. of the Administrative Regulations states that during the detention period, the Aliens Department continuously has to examine whether the grounds for detention still apply and that the custody has to be omitted immediately if the relevant reasons for detention don't apply anymore.

The detainee also has the right to take legal actions against the detention order himself. During such a process, the foreigner has the right to be represented by a lawyer⁵⁰. The appeal will be decided by the regional Court of Appeal, which has to hear the detainee again unless it is entirely convinced that it would lead to no new findings. If the Court of Appeal holds that detention shall be continued, the detainee has a further right of appeal to the Federal High Court, which will only judge the legal aspects of the case without hearing the detainee⁵¹.

5.3 Implementation of Article 15(3) of the Return Directive⁵²:

This sections codifies that the detention order has to be reviewed regularly by judicial authorities, either on appeal of the TCN or automatically.

Corresponding national Law:

This regulation is again accounted for in the Administrative Regulations. In section 62.3.0.1 it is codified that *“die Ausländerbehörde ist während der Dauer der Haft zur Prüfung verpflichtet, ob die Voraussetzungen für die Aufrechterhaltung der Sicherungshaft weiter vorliegen oder auf Grund nachträglich eingetretener Umstände entfallen sind“*. This means that, “during the time of custody, the Aliens Department is required to frequently examine whether detention is still justifiable or whether the grounds for custody are dropped” (translated by author).

⁵⁰ Compare §62a(2) Residence Act

⁵¹ JRS (2013)

⁵² *In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*

5.4 The Implementation of Article 15(4)⁵³, 15(5)⁵⁴ and 15(6)⁵⁵:

These three articles can be analyzed together since they all cover the same issue, namely the duration of detention. Article 15(4) regulates that the person concerned has to be released immediately as soon as the detention is no longer justified.

Article 15(5) codifies that each MSs shall set a maximum period of detention and that this may not exceed six months. The last article however allows the MSs to extend this period for another twelve months in situations where the detainee refuses to cooperate or when necessary documents could not be obtained in time.

Corresponding National Law:

As laid down in section 62.3.3. of the Administrative Regulations, the Aliens Department has to release the TCN immediately if the relevant reasons for detention don't apply anymore. Furthermore, the principle of expedience (Beschleunigungsgrundsatz) obliges the administration to take all possible measures not to unduly prolong a deprivation of liberty. Detention is therefore only justified for as long as meaningful measures to prepare the removal are taken⁵⁶ and thus corresponds with article 15(4) of the return directive.

Concerning the overall length of detention, Germany used the full scope of the articles 15(5) and 15(6) of the directive and implemented the maximum period of 18 months. However, there are certain limits that have to be taken into account before that full period can be applied.

Generally, detention is illegal if it is clear that for reasons for which the detainee is not accountable, the deportation will not be possible within the next three months⁵⁷. The Federal High Court (Bundesgerichtshof) has issued that this 3-month-limit must be taken into account in any court decision ordering or extending detention⁵⁸.

The next limit to be considered lies of six months in detention. Section 62(4) of the Residence Act states, that "custody to secure deportation may be ordered for up to six months and that only "in cases in which the foreigner hinders his or her deportation, it

⁵³ *When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately*

⁵⁴ *Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.*

⁵⁵ *Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries*

⁵⁶ Compare § 62.0.2. Administrative Regulations of the Residence Act (translated by author)

⁵⁷ Compare § 62(3) Residence Act

⁵⁸ Jesuit Refugee Service (JRS) - Europe, AISBL, Detention in Europe: Germany

may be extended by a maximum of twelve months". However, German law generally orders detention only unless "the purpose of the custody can be achieved by other, less severe means which are also sufficient"⁵⁹ and has codified that "detention shall be limited to the shortest possible duration"⁶⁰.

5.5 Analysis

As can be seen from the analysis carried out above, Germany fully converges with the six paragraphs of Article 15 regarding detention. Section 62 of the Residence Act and its Administrative Regulations is the main corresponding body regarding detention in Germany. In it, it is codified that a foreigner may only be put in detention when deportation would be more difficult to execute without such detention, where it enables the preparation of deportation, when there is a risk of absconding or where he or she evades deportation and is thus in line with 15(1) of the Return Directive. Furthermore, section 62 of the Residence Act states that only a judge can order detention, even though in specific cases, the Aliens Department can issue a detention order without a judge. In such a case however, the order has to be reviewed by a judge with no delay, and thus minimizes the risk of criminalizing migrants. A speedy and regular judicial review and the possibilities for the TNC to take legal actions are also provided for in German law. Moreover, the dropping of detention in cases there are no valid grounds for custody anymore is defined. All these measures are in line with Article 15(2), 15(3) and 15(4) of the Return Directive. Lastly, the length on detention is legally in line with the standards of the Return Directive as well, since a detainee may not be kept in custody for more than 18 months. Thus, Section 62 of the Residence Act also converges with Article 15(5) and 15(6). On the first look, it seems rather disappointing to see that Germany implemented the full maximum period of 18 months as codified in the Return Directive. However, one has to recognize that the maximum period has already been at 18 months before the implementation of the directive⁶¹ and that many legal limits exist before the full period of detention can be applied. The possible 18-month period therefore is very unlikely to be enforced. The average length of detention in Germany is actually said to be between 10 and 50 days, whereas the longest recorded detention period has been 238 days, which is nearly 8 months (Grote, 2014). The average length of detention in practice according to national statistics show that 73% of detainees are kept for less than 42 days⁶².

Summarizing, one can say that in German law, the legal provisions for a detention order are quite detailed and they all make sure that the rights of the person to be detained are secured as good as possible. It becomes apparent that the country overall converges with the required EU standards and that it doesn't use the measures of the article to criminalize migrants.

However, there has also been some criticism concerning the practical application of detention orders. In the next chapter, some of these inconsistencies of German law with the Return Directive will be analyzed.

⁵⁹ Compare § 62(1) Residence Act

⁶⁰ Compare § 62(1) Residence Act

⁶¹ COM (2014)/199

⁶² COM (2014)/199

6. A look beyond Article 15

As we have seen in the previous chapter, when looking exclusively on Article 15 of the Return Directive and how Germany implemented it into national law, one cannot say that migrants are criminalized. However, there are some other areas of the Return Directive and its respective German law, which are worth looking into, since they highlight some inconsistencies between the Return Directive and the German practices. Some of these problems will therefore be discussed in the following section in order to analyze the extend of criminalization of migrants in more detail.

The first example is the missing of definitions of clear alternatives to detention. In this regard, German Law does not provide a detailed legal foundation. There are only two provisions which could be interpreted as alternatives in German Law, namely geographic restrictions and departure facilities, in which voluntary departure shall be promoted⁶³. The Residence Act further codified that detention is prohibited where other sufficient means can lead to the same results⁶⁴. However, no examples, clarifications or specific guidelines are provided, which lead to some confusion. While some observers and institutions have interpreted this provision as an “alternative to detention” (see, for instance, FRA 2010, p. 52; and European Commission 2014, p. 16), others argue that these measures have not been defined as alternatives in law as such and are therefore no real applicable alternatives (JRS, 2013; Global Detention Project, 2014; WGAD, 2012). Therefore this is still an area where Germany has to make efforts in order to fully comply with the directive and being able to apply less strict measures.

Another example is the widespread use of prisons for immigration detention, which several NGO’s and Civil Society Organizations have criticized (Global Detention Project, 2014; JRS, 2013; Pro Asyl, 2013). For instance could the combination of applicable Penal Law Acts as well as the specific house rules of the respective prisons leads to similarly restrictive rules for detention like for inmates who serve a criminal sentence (JRS, 2013).

Germany is one of a very small number of European countries where prisons are used for the purposes of immigration-related detention, which leads to a couple of serious problems, as I will show in the next paragraph.

The problem with regards to the use of prisons comes from the wrongly worded transposition of article 16(1) of the Return Directive into the Residence Act. Article 16(1) of the Return Directive regulates that “detention shall take place as a rule in specialized detention facilities. Where a Member State *cannot* provide accommodation in a specialized detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners”. This regulation can be found in section 62a(1) of the Residence Act, which states that “as a general principle, custody awaiting deportation shall be enforced in specialised detention facilities. If a Land *has no* specialised detention facilities, custody awaiting deportation may be enforced in other custodial institutions in that Land; in such cases the persons in detention awaiting deportation shall be accommodated separately from prisoners serving criminal sentences”. Thus, unlike the Returns Directive, which refers to the territory of the whole member state, the

⁶³ §61 Residence Act

⁶⁴ §62(1) Residence Act

Residence Act allows using prisons in those federal states that do not have a dedicated immigration detention facility.

In 2014, this inconsistency led the ECJ to rule on the use of prisons in Germany twice. In the joined Bero & Bouzalmate case⁶⁵, a female Syrian national (Ms Adala Bero) had been detained in a prison, since the responsible Land of Hessen did not have a specialized facility which could accommodate women, and had not even been separated from ordinary prisoners. On the other hand, Mr Ettayebi Bouzalmate, a Moroccan national, was detained for three months in a separate area of the prison of Munich, due to a lack of specialized detention facilities in the Land of Bavaria. In the second case⁶⁶, Ms Thi Ly Pham, a Vietnamese national, was also placed in detention in a prison in Bavaria, however, in this case she consented to be detained with ordinary prisoners.

The court argued “that a Member State may not rely on the lack of specialized facilities in part of its territory to detain a third-country national awaiting removal in a prison, including where the person concerned has waived his right to be separated from ordinary prisoners”⁶⁷.

It therefore required the federal states that do not have specialized facilities to implement procedures that enable them to place migrants in specialized facilities located in other states⁶⁸. Currently, in ten out of sixteen federal states in Germany, migration detainees are held in prisons⁶⁹. However, thanks to the rulings by the ECJ, these states are now required to place migrants in specialized facilities located in other states.

The Court also highlighted article 18(1) of the Return Directive, which states that a Member State may only order detention in prison if there is an emergency situations and that even then, all detainees have to be separated from ordinary prisoners⁷⁰.

These judgments will therefore potentially lead to some major changes to the German practice of using prisons for immigration detention purposes and it remains to be seen whether the country takes them seriously and changes national law accordingly.

The last but maybe most crucial problem I want to point out here is the fact that immigration related offences like illegal entry or stay are still punishable by criminal sanctions in Germany. A one-year prison sentence or a fine may be imposed on a non-citizen who, amongst other grounds, is residing in the country without necessary documents and has failed to depart despite being ordered to do so, repeatedly fails to adequately report to authorities or does not abide by geographic restrictions or other conditions imposed on their stay⁷¹.

There is even the possibility of three-year prison sentences for non-citizens who enter or reside in the country despite a re-entry ban⁷².

These measures certainly give way for a disproportionate criminalization of migrants in Germany and made the UN Working Group on Arbitrary Detention (WGAD) raise serious concerns on the issue of proportionality concerning the detention of foreigners for

⁶⁵ Bero & Bouzalmate, Joined Case (C-473/13 & C-514/13), from July 17, 2014

⁶⁶ Pham, Case (C-474/13), from July 17, 2014

⁶⁷ CJEU (2014), Press Release No 68/14, from April 30, 2014

⁶⁸ Bero & Bouzalmate Joined Case (C-473/13 & C-514/13)

⁶⁹ CJEU (2014), Press Release

⁷⁰ CJEU (2014), Press Release

⁷¹ Section 95(1), Residence Act

⁷² Section 95(2), Residence Act

illegal entry or stay in Germany. This is also closely linked to the fact that Germany does not provide any alternatives to detention, which would be especially required in such cases. The Working Group therefore also recommended that Germany should consider the possibility of implementing more specific alternatives to detention.

However, it should also be noticed that while there are numerous cases of people being criminally charged for immigration-related violations, according to the WGAD these processes rarely result in prison sentences. For example, in 2010 there were some 2,700 convictions for undocumented stay in Germany, yet, only 251 of those cases resulted in prison sentences, of which only 70 actually led to time being served in criminal incarceration⁷³.

7. The Human Rights perspective

The analysis carried out in the chapters four and five highlighted the fact that the German detention regime is fully in line with the return directive. Though it takes full use of the restrictive measures codified in the directive like the 18-month period, the actual application of detention orders always seeks to protect the most crucial procedural safeguards as laid down in the directive. But are these procedural safeguards also in line with human rights as codified in the European Convention on Human Rights (ECHR)? In order to answer this question, this section will shortly compare article 5 of the ECHR with the detention regime as codified in the Return Directive.

Under the ECHR, Article 5(1) regulates issues regarding the deprivation of liberty. It has codified that “everyone has the right to liberty and security of person”.

Its subparagraphs (a)-(f) provide a list of exceptions, by stating, that “no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

In general, the ECtHR has found in several rulings that the state is required to justify detention by relying on one of these six grounds. If the detention cannot be ordered on any of these grounds, it is said to be automatically unlawful⁷⁴. For the scope of this research, however, subparagraph (f) is the one that should be paid most attention to,

⁷³ WGAD (2012)

⁷⁴ see Council of Europe (2013), FRA (2014)

since it regulates the grounds for immigration related violations and thus specifically corresponds to the Return Directive. The ECtHR therefore differentiates between detention for criminal offences under articles 5.1 (a), (b), (c) ECHR and detention of individuals in an irregular situation.⁷⁵

Article 5(2), 5(3) and 5(4) guarantee all detained persons a fair trial and speedy judicial reviews, the right to be given reasons and the right to take legal actions.⁷⁶ As has been shown above, all these measures can also be found in the Return Directive (see chapter 5).

The ECtHR has pointed out in many rulings that states and their authorities have to fulfill the quality of the domestic law and procedures regarding detention in order to be adequately protective against arbitrariness, and has ruled that unclearly defined laws ordering detention are not in line with the objective of Article 5 ECHR.⁷⁷

Specifically this can be found in the case *Medvedyev and Others v. France*, in which the Court stressed that:

“where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention”⁷⁸

In addition to the requirements related to the legality of the measure, migrants in detention are subjected to other procedural safeguards, including the protection from arbitrariness.

In the case *Saadi v. the United Kingdom*, another crucial ruling of the ECtHR regarding the deprivation of liberty, the court ruled that any deprivation of liberty on basis of article 5(1) ECHR must be lawful in the sense that national law has to protect individuals from arbitrariness. The ECtHR specifically ruled, that:

“Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness... It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.”⁷⁹

Thus, any deprivation of liberty has to follow the purpose of Article 5 of the ECHR, which seeks to protect the individual from arbitrariness. In this judgment, the court further requires the national authorities to carry out detention with the principle of “good faith”.

⁷⁵ Council of Europe (2013)

⁷⁶ see article 5 (2), (3), (4) ECHR

⁷⁷ see Council of Europe (2013), FRA (2014)

⁷⁸ ECtHR, *Medvedyev and Others v. France* (no. 3394/03), 29 March 2010, paragraph 80.

⁷⁹ ECtHR, *Saadi v. the United Kingdom* (no. 13229/03), 29 January 2008, paragraph 67

The Court specifically ruled that in order “to avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.”⁸⁰

With the last sentence of that paragraph, the ECtHR has highlighted the absence of maximum detention periods under Article 5 ECHR. Therefore, the ECtHR has established that detention pending deportation is justified as long as the principle of due diligence is applied. Specifically, the court held that “any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”⁸¹

Thus one can conclude that the pre-removal detention regime as codified in the Return Directive is in most aspects compatible with article 5 ECHR. The ECtHR has pointed out in several cases the requirement of lawfulness and protection from arbitrariness. It further clarified the importance of principles like good faith and due diligence. Furthermore, under both the EU return directive and the ECHR, there must be a realistic prospect for removing someone who is being detained.⁸² A deprivation of liberty must comply with the procedural safeguards in Article 5 (2), (3) and (4) on the right to be informed of the reasons, to have the detention order reviewed speedily and to take legal proceedings. All these safeguards can also be found in the Return Directive.

There is however an aspect that article 5 ECHR does not consider. It does not have a provision regulating maximum duration for detention. Here the ECtHR had to rule that the limits of detention for the purposes of Article 5 (1) (f) ECHR should be as short as possible, but ultimately depend on an examination of national law and the particular facts of the case.⁸³ It thus missed a chance to put more restrictions on the MS's and to amend the criticized article 15(6) of the Return Directive in a positive manner.

8. Conclusion

So what now can be said about the effects of the directive on the criminalization of migrants? Or more specifically, if we go back to the main research question of this paper: To what extent does migrant detention as regulated by the Return Directive increase the criminalization of EU migration policy within EU MS's?

The implementation of the Return Directive has certainly caused a lot of controversy. Already the negotiations about the directive between the MSs and the European Parliament had been very complicated; a lot of emphasis of this bargaining process had been put into the wording of specific passages, which in the end lead to confusion among

⁸⁰ ECtHR, *Saadi v. the United Kingdom*, paragraph 74

⁸¹ ECtHR, *Saadi v. the United Kingdom*, paragraph 72

⁸² see: FRA (2014), section 6.6.3.

⁸³ FRA (2014)

member states, since they didn't know how to interpret some paragraphs. After the directive had been approved, but also during the negotiations, many civil society organizations and NGOs criticized the directive for being too restrictive. The expressed fear was that the directive, and especially article 15, which regulated detention, might be used by the MS's to implement stricter policies against irregular migrants and ultimately criminalize them to a greater extent. Now, were these fears justified?

First of all one can say that the minimum standards imposed by the Return Directive are in line with human rights standards as codified in the ECHR. However, its broad definitions actually leave plenty of room for interpretation to member states.

Consequently, responsibility for respecting the minimal standards set by the Return Directive and by national legislation lies ultimately on individual courts, both on domestic and European level. These broad terms and varying applications within MS's therefore forced the ECJ and ECtHR even till this year to make several rulings in which they clarify and regulated the scope of several provisions of the directive. The fact that the ECJ still has to make rulings on the directive and that the European Commission recently presented a handbook on how to apply the directive correctly and more efficiently makes clear that its wording is not very successful and thus still leads to cases where migrants are being criminalized, meaning that they are deprived of their liberty not for criminal offences, but only for immigration related violations.

Even though the Court hasn't declared in its judgments that criminal provisions punishing irregular immigrants are per se not incompatible with the directive, it strongly limiting their possible scope of application.

However, since it still has to deal with this issue today, the question for amendments of the directive therefore seems at least justifiable and it remains to be seen whether the ECJ will clarify the scope of the directive and end the unlawful criminalization of illegally staying third-country nationals once and for all.

In order to analyse the effects of the implementation in more detail, a thorough case study of Germany, the EU's biggest MSs and the one with the biggest number of migrants has been carried out. The results of the analysis don't give a clear yes or no answer, but they make it possible to draw some general conclusions on the application of the directive and its effect on the criminalization of migrants in Germany.

The first thing that has to be mentioned is that Germany overall converges with the standards and procedures laid down in article 15 of the return directive. All of its paragraphs have been implemented into German law. The relevant guarantees that aim to protect an irregular migrant from unlawful detention are codified in German law as well. All detention orders have to be reviewed by a judge and detention is unlawful if a prospect of removal within three months is not realistic. Germany also tries to keep detention as a last resort and for as short as possible. The maximum period of detention is 18 months, thus uses the full scope of the directive, however, this period has never been applied in Germany. The average time of detention in Germany actually lies between "just" 10 to 50 days. Thus, when looking exclusively on Article 15 of the Return Directive and how Germany implemented it into national law, one cannot say that migrants are being criminalized.

However, the case study of Germany made clear that the directive indeed uses too broad definitions. This becomes apparent, especially with regards to alternatives, which do not exist in German law. This is due to the fact that the directive does use the word alternative, but does not mention any specific examples for alternatives or when and

how to apply them. Another problem in the German detention regime is the widespread use of prisons in which TCN's are being detained, which was a result of misinterpretations of the directive (article 16.1) as well. Furthermore, immigration related offences like illegal entry or stay are still punishable by criminal sanctions in Germany. This is very unfortunate and obviously makes way for a criminalization of migrants, but again, this is due to the fact that the directive doesn't have a provision that would prevent Member States from considering irregular entry and/or stay as a criminal offence under their domestic law. This, together with the fact that the possibility for states to use administrative authorities and not having to grant a mandatory and automatic judicial review is one of the biggest problems of the directive.

Yet, even though the directive certainly didn't stop the possibility for a criminalization of migrants and migration policies, I still tend to argue that Germany didn't make use of this to make its procedures stricter or to use more criminal sanctions for immigration related violations. It even implemented a law which forces a judicial review of every detention order and thus doesn't make use of the missing obligation in the directive to do so. The implementation of the directive in the case of Germany thus didn't have an effect on the criminalization of migrants to the better or worse.

In the case of Germany, I therefore have to partly reject my hypothesis that by using broad terms and leaving much room for interpretation to the MS's, the EU Returns Directive failed to provide strong safeguards against arbitrary detention, which would lead national authorities to use some of its provisions to justify more stringent measures. Even though the use of broad terms in the directive still cause trouble in Germany, especially with regards to alternatives and detention facilities I don't think that the country used this to implement stricter measures. However, Germany only served as a control sample. A more reliable answer to what extent migrant detention as regulated by the Return Directive increased the criminalization of EU migration policy within EU member states therefore could only be given by making this kind of analysis in every MS's.

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