



Press and Information

Court of Justice of the European Union

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Judgment in Case C-61/11 PPU
Hassen El Dridi alias Soufi Karim

The Directive on the return of illegal immigrants precludes national rules imposing a prison term on an illegally staying third-country national who does not comply with an order to leave the national territory

A penalty such as that provided for by the Italian legislation is liable to jeopardise the attainment of the objective of introducing an effective policy for removal and repatriation in keeping with fundamental rights

Mr El Dridi, a third-country national, entered Italy illegally. In 2004 a deportation decree was issued against him, on the basis of which an order to leave the national territory within five days was issued in 2010. The reasons given for that order were that he had no identification documents, no means of transport were available and it was not possible for him to be accommodated temporarily at a detention centre as no places were available. As he did not comply with that order, Mr El Dridi was sentenced by the District Court, Trento (Italy) to one year's imprisonment.

The Appeal Court, Trento, before which he appealed, asks the Court of Justice whether the Directive on the return of illegally staying third-country nationals ('the Directive on return')¹ precludes national rules which provide for a prison sentence to be imposed on an illegally staying foreign national on the sole ground that he remains, without valid grounds, on the national territory, contrary to an order to leave that territory within a given period.

The Court of Justice granted the referring court's request for the reference for a preliminary ruling to be dealt with under the urgent procedure, as Mr El Dridi is being held in custody.

It observes, first of all, that the Directive on return establishes common standards and procedures with a view to implementing an effective removal and repatriation policy for persons with respect for their fundamental rights and their dignity. Member States may not depart from those standards and procedures by applying stricter standards.

That directive sets out specifically the procedure to be applied to the return of illegally staying foreign nationals and fixes the sequential order of the different stages of that procedure.

The first stage consists in the adoption of a return decision. As part of that stage, priority must be given to the possibility of a voluntary departure, with a period of between seven and 30 days normally being granted to that end to the person concerned.

If the voluntary departure has not taken place within that period, the Directive then requires the Member States to proceed with forced removal using the least coercive measures possible.

It is only where the removal risks being jeopardised by the conduct of the person concerned that the Member State may hold that person in detention. Under the Directive on return,² that detention must be for as short a period as possible, is to be reviewed at reasonable intervals of time and is to be ended when it appears that a reasonable prospect of removal no longer exists; it

¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

² Articles 15 and 16.

cannot exceed 18 months. Furthermore, the persons concerned are to be placed in a specialised centre and, in any event, to be kept separated from ordinary prisoners.

The Directive thus provides for a gradation of the measures to be taken in order to enforce the return decision and for the principle of proportionality to be observed at each stage of the procedure. That gradation goes from the measure which allows the person concerned the most freedom, namely, the grant of a period for voluntary departure, to the most serious constraining measure allowed under the directive under a forced removal procedure, namely, detention in a specialised centre.

The Directive therefore pursues the objective of limiting the maximum duration of detention in the context of the return procedure and of ensuring the observance of illegally staying third-country nationals' fundamental rights. In that regard the Court of Justice takes account of, inter alia, the case-law of the European Court of Human Rights.

The Court observes, next, that the Directive on return has not been transposed into Italian law³ and states that, in such a situation, the provisions of a directive which are, so far as their subject-matter is concerned, unconditional and sufficiently precise, as is true of Articles 15 and 16 of the Directive on return, may be relied on by individuals against the Member State which has failed to transpose them. In that regard the Court considers that the Italian removal procedure differs significantly from that provided for by that directive.

The Court further observes that, although in principle criminal legislation is a matter for which the Member States are responsible, and although the Directive allows them to adopt measures, including criminal measures, for cases where coercive measures have not led to removal, the Member States must in any event adjust their legislation in order to ensure compliance with European Union law. Thus they may not apply rules, even criminal rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and deprive it of its effectiveness.

The Court considers therefore that the Member States may not, in order to remedy the failure of coercive measures adopted in order to effect a forced removal, provide for a custodial sentence, such as that provided for by the national legislation at issue in the main proceedings, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired. Those States must continue their efforts to enforce the return decision, which continues to produce its effects.

Such a custodial sentence, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by the Directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals in a manner in keeping with fundamental rights.

It is therefore for the referring court, which is called upon to apply and give full effect to provisions of European Union law, to refuse to apply any national provision which is contrary to the result of the Directive (including a provision providing for a prison sentence of between one and four years) and to take account of the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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³ The time-limit for transposition of the Directive into national law was 24 December 2010.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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