



Press and Information

Court of Justice of the European Union

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Judgment in Case C-47/15

Séline Affum v Préfet du Pas de Calais and Procureur général de la Cour d'appel de Douai

The Return Directive prevents a national of a non-EU country who has not yet been subject to the return procedure being imprisoned solely because he or she has entered the territory of a Member State illegally across an internal border of the Schengen area

That is also the case where that national, who is merely in transit on the territory of the Member State concerned, is intercepted when leaving the Schengen area and is the subject of a procedure for readmission into the Member State from which he or she has come

The directive for returning illegally staying third-country nationals ('the Return Directive')¹ establishes common standards and procedures applicable in Member States for removing illegally staying nationals of non-EU countries from their territory.

The directive provides that a return decision is to be adopted in respect of any illegally staying national of a non-EU country. That decision triggers, in principle, a period for voluntary return, followed, if necessary, by forced removal measures.

If voluntary departure does not take place, the directive requires the Member States to carry out forced removal using the least coercive measures possible. It is only if there is a risk of the removal being compromised that the Member State may keep the person concerned in detention, the duration of which may not in any case exceed 18 months.

French law provides that nationals of non-EU countries are liable to a sentence of one year's imprisonment if they have entered French territory illegally. In addition, in France persons reasonably suspected on one or more grounds of having committed or attempted to commit a crime or other offence punishable by imprisonment may be deprived temporarily of their liberty in order to be held at the disposal of investigators ('police custody').

On 22 March 2013, Ms Affum, a Ghanaian national, was intercepted by the French police at the point of entry to the Channel Tunnel when she was on a bus from Ghent (Belgium) to London (UK). After presenting a Belgian passport with the name and photograph of another person, and lacking any other identity or travel document in her name, she was initially placed in police custody on the ground of illegal entry into French territory. The French authorities then requested Belgium to readmit her into its territory.

As Ms Affum disputes that it was lawful to place her in police custody, the Cour de cassation (French Court of Cassation) has asked the Court of Justice whether, in the light of the Return Directive, illegal entry of a national of a non-EU country into national territory may be punished by a sentence of imprisonment.

In today's judgment, the Court recalls first of all its decision in *Achughbaban*,² case-law to which the Cour de cassation's request for a preliminary ruling specifically relates. According to that case-law, **the Return Directive precludes any legislation of a Member State which lays down a**

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). Denmark, the United Kingdom and Ireland are not subject to this directive.

² Case: [C-329/11](#), *Achughbaban* see press release No [133/11](#).

sentence of imprisonment for an illegal stay of a national of a non-EU country in respect of whom the return procedure established by that directive has not yet been completed. According to that case-law, the directive does, however, permit such nationals to be imprisoned where they have previously been subject to that procedure and continue to stay illegally on the territory of the Member State with no justified ground.³ Nor does the directive preclude nationals of a non-EU country being placed in administrative detention with a view to determining whether or not their stay is legal.

The Court finds next that illegal entry is one of the factual circumstances that may result in an illegal stay within the meaning of the Return Directive. **The directive is therefore applicable to nationals of a non-EU country who, like Ms Affum, have entered** the territory of a Member State **illegally** and who, on that basis, are regarded as staying there illegally. Consequently, such nationals must be subject to the return procedure laid down by the directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.

The Court points out, furthermore, that the exceptions provided for by the directive⁴ do not permit the Member States to exclude nationals such as Ms Affum from the directive's scope on the ground that they have illegally crossed an internal border of the Schengen area (in this instance, the Franco-Belgian border) or have been arrested when trying to leave that area (the United Kingdom does not form part of the Schengen area).

Moreover, the fact that Ms Affum was the subject of a procedure for readmission into the Member State from which she came (Belgium) does not render the directive inapplicable to her case. Readmission simply has the effect of transferring the obligation to apply the return procedure to the Member State responsible for taking the national back (in this instance, Belgium). To imprison an illegally staying national of a non-EU country would delay the triggering of the return procedure and that national's actual removal and would thereby undermine the directive's effectiveness.

Finally, the fact that Ms Affum is merely in transit does not prevent the directive from applying: a national of a non-EU country who is on a bus without fulfilling the entry conditions is clearly present on the territory of the Member State concerned (in this instance, France) and is thus staying there illegally within the meaning of the directive, as the directive does not lay down a condition requiring presence of a minimum duration or an intention to remain on that territory.

As the directive is applicable to Ms Affum, she could not be imprisoned, solely because she had entered French territory illegally, before being subject to the return procedure. The French authorities have not even begun that procedure.

The Court thus holds that, for the same reasons as those set out in its decision in *Achughbajian*, the Member States cannot permit nationals of non-EU countries in respect of whom the return procedure established by the directive has not yet been completed to be imprisoned merely on account of illegal entry, resulting in an illegal stay, as such imprisonment is liable to thwart the application of that procedure and delay return, and thereby to undermine the directive's effectiveness. The Court makes clear that this does not, however, prevent the Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed.

³ In another judgment, the Court stated that the directive also does not preclude an illegally staying national of a non-EU country from being imprisoned when the return procedure has been applied and the national re-enters the territory of the Member State in breach of an entry ban (Case: [C-290/14 Celaj](#), see press release No [112/15](#)).

⁴ Under the directive, Member States may decide not to apply the directive to nationals of non-EU countries who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

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

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