



# Defending migrants' rights in the context of detention and deportation

## SYNTHESIS REPORT

 **PICUM**

PLATFORM FOR INTERNATIONAL COOPERATION ON  
UNDOCUMENTED MIGRANTS

 **EuropeanMigrationLaw.eu**

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Fence of the detention centre 127bis in Steenokkerzeel, Belgium, decorated by migrants' rights supporters.

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Photo: © PICUM legal seminar “EU Law and Undocumented Migrants: Defending Rights in the Context of Detention and Deportation” organised by PICUM and EuropeanMigrationLaw.eu in Brussels on 8 June 2017, the content of which is included in this report.

## I. INTRODUCTION

The arrival of more than a million people on the coasts of Greece and Italy in 2015, the vast majority of them refugees and asylum-seekers, led to a series of “crises” in Europe: the “refugee” (or migrant) crisis, and the European integration and solidarity crisis. The large number of people at the outer borders of the European Union highlighted the incompleteness of the Common European Asylum System and the ineffectiveness of certain European instruments.

The emphasis of different proposed reforms of the *acquis* and of the adopted crisis instruments show that, in terms of migration, the European Union is now primarily seeking to increase the number of deportations of foreign nationals irregularly present on its territory and to decrease the number of arrivals.

Because irregular stays are not considered a criminal offence under Union law, deprivation of liberty due to irregular status cannot fall under criminal law and is therefore not subject to “imprisonment” (see CJEU, 28 April 2012, El Dridi, C-61/11 and CJEU, 6 December 2011, Achughbadian, C-329/11). As a general rule, the Return Directive stipulates that the deprivation of liberty (i.e., detention) of foreign nationals must take place at specialised centres. When it happens in a prison, the detained person must be separated from prisoners (Return Directive, Art. 16).

In the European Union, the detention and deportation of foreign nationals are regulated by a number of pieces of secondary legislation that must be applied in accordance with the Treaties and the Charter of Fundamental Rights of the European Union. The case law of the ECtHR also has fundamental significance for issues of migration in Europe.

**This report aims to present recent developments relating to the detention and deportation of foreign nationals under Union law, discussed at the legal seminar organised by PICUM and EuropeanMigrationLaw.eu, held in Brussels on 8 June 2017.**

The purpose of this meeting was to bring together practitioners of immigration law in Europe to discuss changes in European law on detention and deportation. It allowed lawyers, legal professionals from NGOs and European institutions, and academics to discuss reforms (finished and ongoing) of the Union’s *acquis*, their application in different national systems and the significance of decisions rendered by the CJEU and the ECtHR in 2016 and 2017.



## 1. RECENT DEVELOPMENTS IN EUROPEAN UNION LAW

In March 2017, after again [lamenting](#) the “low rate” of removal of undocumented migrants in the Union, the European Commission presented its [recommendation for more effective returns](#).

The recommendation is a soft-law instrument intended to guide Member States’ interpretation of the Return Directive and promote a stricter approach to its implementation. The Commission monitors the recommendation’s application to encourage Member States’ compliance and to increase the rate of return (which currently stands at around 40%).

In particular, the Commission proposes an expansion of the concept of the risk of absconding, as defined in Article 15(1) of [Directive 2008/115/EC](#), the imposition of sanctions against people “who intentionally obstruct the return processes”, and an extension of the legal period of detention (which, in most Member States, is far from the maximum of 18 months stipulated in the Return Directive).

The Commission also encourages member states to limit the suspensive effect of legal remedies, to shorten the deadlines for challenging decisions related to deportation, and to systematically attach to deportation orders an entry ban, recorded in the Schengen Information System (SIS II).<sup>1</sup>

On the legislative front, two instruments now reinforce the legal arsenal for migration enforcement. The first concerns the [uniform European travel document](#), designed to

facilitate the deportation of undocumented third-country nationals. The second, [Regulation \(EU\) 2016/1624](#), established a European Border and Coast Guard and strengthened the mandate of the agency Frontex with respect to returns. The agency can coordinate and arrange joint return flights between several member states, including at its own initiative.

In parallel, the external dimension of the European Union’s migration policy is considered crucial to reducing the numbers of arrivals and increasing returns. As a result, [cooperation](#) with third countries is ramping up and development aid is now linked to readmission and migration management clauses. There are currently 17 formal readmission agreements and a number of informal agreements to “cooperate” that are easier for the Commission to negotiate, in the absence of control by the European Parliament. In addition, there are a number of documents concluded by the EU that are not legally binding but that contain obligations relating to deportation and readmission, such as the [EU-Turkey statement](#) of 18 March 2016, the [joint way forward between Afghanistan and the EU](#) of 2 October 2016 and the [Mali-EU common communication](#) of 11 December 2016. The non-binding nature of these documents makes review by European judges impossible (on this subject, see EGC, 28 February 2017, Orders of the General Court in the cases of [NF](#) (T-192/16), [NG](#) (T-193/16) and [NM](#) (T-257/16) v European Council).

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1 A proposal to recast the SIS regulation, requiring member states to attach an alert to deportation decisions for the purpose of refusal of entry, is currently under discussion: “Proposal for a Regulation of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third-country nationals”, [COM\(2016\) 881](#) final, 21 December 2016.

In the field of asylum, reform of the instruments that make up the [Common European Asylum System](#) is underway, based on seven legislative proposals submitted by the Commission. This recasting of asylum legislation has specific consequences for the detention and deportation of foreign nationals. The following points stand out in particular:

- In the proposal to [recast](#) the Reception Conditions Directive, the goal of limiting movements translates as a limitation of the rights of asylum-seekers (Articles 5 and 17 bis) travelling to a State other than the one responsible for examining their application, as defined by the Dublin III Regulation;
- The draft Dublin IV Regulation provides for more frequent recourse to detention (of up to seven weeks) in order to facilitate transfers (Article 29);

- The [recast](#) EURODAC Regulation imposes new obligations in terms of obtaining fingerprints and identification photos, as of age 6, and introduces sanctions for “non-compliance with the fingerprinting process and capturing a facial image (Article 2(3)).

In parallel to these legislative developments, European and national judges have made a number of important decisions about the detention and deportation of foreign nationals. Both the ECtHR and the CJEU, for instance, have ruled to limit the possibility of deporting people who are seriously ill (ECtHR, Grand Chamber, 13 December 2016, [Paposhvili v Belgium](#), App. no. 41738/10) and Dublin transfer (CJEU, 16 February 2017, [C. K. and Others v Republika Slovenija](#), C-578/16 PPU).

#### ADDITIONAL RESOURCES

- For a complete overview, visit [the website of the European Commission](#). The [European Agenda on Migration](#) (COM (2015) 240 final, Brussels, 31 May 2015) constitutes the starting point for the legislative changes currently underway.
- For more information on the reform of the Common European Asylum System, [visit the website of the European Parliament](#).
- Concerning the implementation of the Return Directive across member states,

## 2. NATIONAL DEVELOPMENTS: CASE STUDIES

In Bulgaria, Hungary and Italy, the detention of people during the examination of their asylum applications or while awaiting their removal poses a host of problems relating to compatibility with the European acquis. As a reminder, Directives [2013/32](#) and [2013/33](#) prohibit the systematic detention

of people in need of international protection, who can only be detained if detention is deemed necessary and proportionate, and after an individual examination showing that there are no other, less coercive measures available.

### BULGARIA

Bulgaria has already implemented several of the changes proposed by the Commission for the reform of the CEAS.

Immigration law in the Republic of Bulgaria does not refer to detention, but instead uses the euphemism “accommodation”. 90% of asylum-seekers are deprived of liberty and spend an average of six months in detention.

**Article 44(6) of the [Foreigners in the Republic of Bulgaria Act](#) provides for three possible grounds for detention: (1) unknown identity; (2) risk of absconding; or (3) refusal to comply with a return decision. These vague criteria have enabled detention on a massive scale as a mechanism for regulating migratory movements.**

There are very few appeals of detention (less than 1% of detention placements) because people in detention do not have access to legal aid during the 14 day window for lodging an appeal against the decision to detain them. Judicial review of the legality of detention only happens automatically if it needs to be extended beyond the initial six months. Limited administrative capacity and availability of interpreters are also recurring problems.

In December 2016, the Foreigners Act was amended to include “short-term detention”,

which can last up to 30 days after entry into the territory, to allow for the person’s identification and to determine which administrative measures to take.

In January 2016, Bulgarian law was also amended to include detention for the “shortest possible time”, allowing asylum-seekers to be placed in a detention centre for the purpose of verifying their identity and nationality, verifying the truthfulness of the information provided in the asylum application, for national security and public policy reasons, and to determine the competent State for the examination of the asylum application, in the case of a risk of absconding.

#### ADDITIONAL RESOURCES

On the subject of the detention of foreign nationals in Bulgaria, see:

- [www.detainedinbg.com](http://www.detainedinbg.com);
- Report (2016) by the Center for Legal Aid – Voice in Bulgaria, “[Who gets detained? Increasing the transparency and accountability of Bulgaria’s detention practices of asylum seekers and migrants](#)”;
- Report (2016) by the Bulgarian Helsinki Committee, “[Detention Mapping Report – Bulgaria](#)”.



## HUNGARY

In 2016, [38.219 people attempted to enter Hungary without proper documentation](#). The border with Serbia is the main entry-point, and Hungarian authorities have built walls and fences along its length. Regular points of entry provide access to containers in the “transit zone” where asylum applications can be submitted. However, these only admit a maximum of 10 people per day.

**A [new law](#) was adopted on 28 March 2017, extending the state of emergency in Hungary to September 2017 and authorizing the detention of anyone over the age of 14 in the transit zones, for the duration of examination of their asylum applications. While the Hungarian authorities detain people less often than before, this is mainly because they push back people who cross the border irregularly.**

In fact, push-backs are now authorized by Hungarian law ([4. Amendment of Law LXXXIX of 2007 on State borders, point 11](#)) from anywhere in the country (previously, they were only allowed when the person was intercepted within 8 km of the border). Foreign nationals who are in the country irregularly, asylum-seekers, and people whose applications have been rejected, are routinely returned directly to Serbia, despite the prohibition against collective expulsions (see, e.g., the case of [Hirsi Jamaa](#)). Several cases were submitted to the ECtHR in 2017 alleging Hungary’s violation of Article 4 of Protocol 4 and Article 13 ECHR.

Additionally, systematic detention in transit zones is neither ordered nor reviewed by a judge.

The conditions of deprivation of liberty in transit zones are very difficult and, in a decision issued in March 2017 (ECtHR, 14 March 2017, [Ilias and Ahmed v Hungary](#), App. no. 47287/15), the ECtHR acknowledged that holding people in the transit zone did in fact constitute detention, as defined by Article 5 ECHR. It also recognized the violation of Articles 3, 5(1), 5(4) and 13 taken together with Article 3.

The Hungarian government considers this decision unacceptable and unenforceable, and [some Members of the Hungarian Parliament](#) have reportedly suggested that [Hungary may withdraw from the Convention](#).

### ADDITIONAL RESOURCES

On the subject of the detention of foreign nationals in Hungary, see:

- [The website of the Hungarian Helsinki Committee, including "Hungary: Law on automatic detention of all asylum seekers in border transit zones enters into force, despite breaching human rights and EU law", March 2017;](#)
- [Report](#) by the Council of Europe’s Committee for the Prevention of Torture.

The associations and lawyers involved in defending the rights of foreign nationals in Hungary have developed a litigation strategy before the ECtHR, consisting of an “Article 39 marathon”<sup>2</sup> that aims to put pressure on the Hungarian government. But this strategy is complicated by the many obstacles erected by the Hungarian authorities to prevent

access to people detained in transit zones.

In May 2017, the European Commission [launched an infringement procedure](#) against Hungary after the modification of its national law. Thus far however, the national authorities have remained relative insensitive to this pressure.

## ITALY

**There are four hotspots in Southern Italy, through which approximately on third of undocumented migrants entered Italy. The rate of identification of these people rose from 36% in late 2016 to more than 85% in May 2017, due to the implementation of systematic detention and forced fingerprinting.**

When a decision is made to deport foreign nationals, they are detained in “pre-removal centres”. Legal remedy is limited and generally ineffective: judges authorise extensions of the period of detention in 78% of cases, and appeals challenging the legality of detention must be examined by the Italian Supreme Court of Cassation, which can take one to two years, with no suspensive effect.

Under Italian law, there is no legal basis for taking people into custody or using force in hotspots, although both have become common practices. The procedures are standardized, and the forms to be completed upon arrival encourage people not to declare themselves as asylum-seekers, calling into question the real possibility of access to international protection.

### ADDITIONAL RESOURCES

- On the subject of hotspots in Italy, see reports by Amnesty International (2016), “[Hotspot Italy](#)” and by Oxfam (2016), “[Hotspot, Right Denied](#)”.
- For a systematic examination of case law from *guidici de pace* [justices of the peace] in Italy concerning the removal of foreign nationals, visit the website of the Monitoring Centre on Judicial Control on Migrants’ Removal ([www.lexilium.it](http://www.lexilium.it)). A summary of their conclusions (March 2017) is available in English [here](#).

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2 Article 39 ECHR allows the Court to indicate interim measures which are in high demand in litigation relating to the detention and removal of foreign nationals. On this subject, see ECtHR, Press Unit, “[Factsheet – Interim measures](#)”, January 2017

Augusta 16.09.2015 ore 20.30

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**Ufficio Immigrazione**

**FOGLIO NOTIZIE**  
**صفحة التعريف الشخصية**

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Firma dello Straniero (Signature)	

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PARTE RISERVATA ALL'OPERATORE DELLA POLIZIA SCIENTIFICA

RILIEVI FOTODATTILOSCOPICI  
 NR. DATA

Example of a first information sheet given to migrants to be filled in upon arrival in the hotspots. If the job search box gets ticked as in this example, they are due to receive a deportation order and excluded from seeking protection. Provided by Maurizio Veglio, Asgi and International University College of Torino, Italy, 2017.



Photo: ©Elisabeth Schmidt-Hieber | Fence of the detention centre 127bis in Steenokkerzeel, Belgium.



## II. TOOLS FOR LEGAL PRACTITIONERS: USING EU LAW TO CHALLENGE DETENTION AND DEPORTATION IN NATIONAL COURTS

The Return Directive ([2008/115/EC](#)) leaves a significant margin of appreciation to Member States, which explains why it is applied differently across the Union. Administrative and judicial practices have not been harmonised and different types of judges hear appeals relating to the detention and deportation of foreign nationals, which affects the scope of the review they can carry out.

Nonetheless, all national judges can ask preliminary questions of the CJEU and must ensure the compatibility of national

measures with the Union's *acquis*. The Europeanisation of the subject makes it possible to extend the power of national and European judges to review the legality of detention and deportation. The CJEU has ruled on numerous occasions on the interpretation and validity of the articles of the Return Directive.

The invocation of Union law by lawyers and aid organisations working with migrants has recently enabled a clarification of Member States' obligations in terms of the detention and removal of foreign nationals.

### 1. RISK OF ABSCONDING

The risk of absconding is defined in Article 2 of the [Dublin III Regulation](#) and in Article 3(7) of the Return Directive as "the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is the subject of a return procedure (or a transfer procedure under Dublin) may abscond". Absconding is characterised by the avoidance or hindrance of the return (or transfer) procedure. Yet, in many Member States, such as the Czech Republic for example, the implementation of the Dublin Regulation is not accompanied by a definition of "objective criteria" in domestic law that could be used to evaluate the risk of absconding.

The CJEU ruled on the compatibility of Czech law with Union law in its [Al-Chodor](#) judgement issued in March 2017.

In that case, an Iraqi couple with two young children fleeing Daesh were detained at the Czech-Hungarian border, the Czech authorities having determined that they presented a risk of absconding to Germany. In the appeal of the decision to detain the family in the context of a Dublin procedure, the applicant asserted that, by virtue of the ECHR and the Charter, the risk of absconding had to be defined under national law and assessed on a case-by-case basis.

In a decision from 2013, the ECtHR ruled that a national law authorising "any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application

in order to avoid all risk of arbitrariness” (ECtHR, 21 October 2013, [Del Río Prada v Spain](#), point 125).

The national judge therefore requested a preliminary ruling based on an interpretation of Articles 2(n) and 28(2) of the Dublin III Regulation. The Supreme Administrative Court essentially asked whether the Czech law regulating detention, which was based on administrative practice and on consistent

case law, was compatible with Union law requiring that the risk of absconding used as ground for detention be “defined by law”.

**The CJEU confirmed that an administrative practice and consistent case law are not sufficient for the risk of absconding to be based on objective criteria, and that those criteria must definitely be defined by law, i.e. in “binding provisions of general application”.**

**Example of objective criteria used at national level for establishing a risk of absconding:**

Objective criteria	BE	BG	FR	IT	SK	SI	HU	CZ	AT	ES
No application for a residence and work permit after <b>an irregular entry</b>			X							
<b>Overstaying a visa</b> or, for cases where a visa is not necessary, staying longer than three months without applying for a residence and work permit			X							X
<b>Overstaying, by more than one month, a residence and work permit, a receipt for application for a residence and work permit, or a temporary residence permit, without applying for renewal</b>	X		X							
No <b>residence and work permit</b>					X					
False information about <b>identity</b>	X		X	X			X			X
No <b>place of residence</b> , either actual or permanent			X*							
The <b>declarations</b> provided indicate a <b>likelihood of absconding</b>							X			

\*Linked to a lack of sufficient guarantees to reappear before the competent authorities.

Based on: Madalina Moraru, Géraldine Renaudière: European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention, REDIAL Research Report 2016/05; [ANNEX I. Example of objective criteria used at national level for establishing a risk of absconding](#), page 63.



## 2. RIGHT TO BE HEARD AND PROCEDURAL SAFEGUARDS

Although the right to be heard is not specifically addressed in the Return Directive, it is one aspect of the “fundamental principle that the rights of the defence must be observed” (see in particular ECJ, 9 November 1983, [Nederlandsche Banden-Industrie-Michelin v Commission](#), 322/81, point 7, ECJ, 18 October 1989, [Orkem v Commission](#), 374/87, point 32, and ECJ, 18 December 2008, [Sopropé](#), C349/07, point 36). In the case of [Mukarubega](#) (CJEU, 5 November 2014, C-166/13), the Court explicitly based the right to be heard on the general principle of Union law that the rights of the defence must be respected, those rights being protected by Articles 41(1), 41(2) and 47 of the [Charter](#) of Fundamental Rights of the European Union. The ECHR and many national constitutions also recognise this right. The CJEU has ruled multiple times on its application in asylum and deportation procedures.

For example, in the [MM](#) ruling (CJEU, 22 November 2012, C-277/11; see also CJEU, 11 December 2014, [Boudjlida](#), C-249/13) on the rejection of an application for subsidiary protection, the Court considered that “[t]he right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely” and “[t]hat right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision” (points 87 and 88).

When making decisions about deportation, member states must respect every person’s right to be heard before adopting an adverse individual measure. Every person is entitled to access to their case file and to legal counsel.

National administrations must take the explanations and arguments made by the person in question into account and provide reasons for their decisions. In fact, in the [Mahdi](#) ruling, the Court held that the obligation to provide reasons “is necessary both to enable the third-country national concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question” (CJEU, 5 June 2014, [Bashir Mohamed Ali Mahdi](#), C-146/14 PPU, point 45). Article 15(2) and (6) of [Directive 2008/115](#) requires the administration to indicate the reasons for the placement or extension of the detention in a written decision, with reasons being given in fact and in law.

In the case of [G. and R.](#) (CJEU, 10 September 2013, [G. and R., C-383/13 PPU](#)), the Court clarified that non-compliance with the right to be heard would only annul the decision if the procedure had been affected by that non-compliance. It further considered that the administration is not bound to hear the person again “on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory on the conclusion of a procedure in the course of which that person was heard, it is contemplating the adoption of such a decision” (CJEU, 5 November 2014, [Mukarubega](#), C-166/13).

In sum, the Court's case law requires that the foreign national be heard before a return decision may be issued and that the decision to place that person in detention (or to extend his or her detention) must be reviewed by a judge for its compatibility with the principles of necessity and proportionality. Such decisions must be explained and be based on objective criteria after an individual examination of the foreign national's circumstances<sup>3</sup>.

#### ADDITIONAL RESOURCES

- The HEAR (Hearing Entails Awareness and Rights) Project promotes the application of the right to be heard and has created a [handbook](http://www.hear.farbg.eu) on the subject ([www.hear.farbg.eu](http://www.hear.farbg.eu)).
- The [analysis](#) of the REDIAL (REturn Directive DIAlogue) Project for the implementation of Chapter III of the Return Directive, including the right to be heard.

### 3. RIGHT TO AN EFFECTIVE REMEDY AND THE SUSPENSIVE EFFECT

The “right to an effective remedy and to a fair trial” is enshrined in Article 47 of the [Charter of Fundamental Rights](#) of the EU and in Article 19 of the [TEU](#). A general principle of Union law, affirmed by the CJEU, it guarantees access to a judge (see in particular ECJ, 15 May 1986, [Johnston](#), 222/84). The right to an effective remedy is also protected by the [European Convention](#) on Human Rights and Article 13 thereof, which constitutes a general guarantee, where more specific guarantees do not apply, such as the right to a fair trial (Article 6(1)) or the right to a review of the lawfulness of detention (Article 5(4)).

#### FOR DECISIONS RELATING TO REMOVAL

The Return Directive's provisions on the right to an effective remedy against decisions relating to removal are far from reflecting the Commission's original proposals. Article 13(1) of the text only provides for a right to a remedy against return, an entry ban and removal decisions mentioned in Article 12(1) and empowers states to provide for administrative or ad hoc, rather than judicial, remedies.

This secondary legislation must however be interpreted in accordance with primary legislation. Consequently, a remedy must be available in the case of any and all removal decisions (e.g. Article 7(2) on extending the period for voluntary departure). Additionally, although the national authorities can provide

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<sup>3</sup> For a summary of the obligations incumbent on national authorities, as interpreted by the Commission, see: [Commission Recommendation of 1st October 2015 establishing a common “Return Handbook”](#) to be used by member states' competent authorities when carrying out return related tasks, C (2015) 6250 final. The Commission announced an update to that handbook in Summer 2017, to align it with its recommendation for making returns more effective.

for initial remedies before an administrative or ad hoc authority, the right to a judge demands the existence of a judicial remedy, at least on appeal.

**Under the Return Directive, the suspensive nature of the remedy available against a removal decision remains optional, since the directive simply permits (and does not oblige) the relevant authority or court to suspend execution of the contested decision (Article 13(2)). In the [Abdida](#) ruling, the CJEU adopted reasoning on this subject that was very similar to that of the Strasbourg Court in relation to Article 13 taken together with Articles 2 and 3 of the European Convention on Human Rights, establishing a link between an applicant's state of health and the principle of non-refoulement.**

The case concerned the refusal of leave to remain and a removal decision imposed by Belgium on a Nigerian national with AIDS, on the ground that the necessary care was available in his country of origin. Two preliminary questions were put to the CJEU by the Higher Labour Court of Brussels. They related to the suspensive effect of the remedy against those two decisions and the responsibility for meeting the applicant's basic needs until a final judgement was issued.

The CJEU rejected the applicability of the Asylum acquis, i.e. the Reception ([2003/9](#)), Qualification ([2004/83](#)) and Procedures ([2005/85](#)) Directives, in that case, insofar as the requests submitted to the referring court did not constitute applications for international protection. Consequently, the Court turned to the relevant provisions of the Return Directive. It considered that Articles 5 and 13 of the Return Directive, read in accordance with Articles 19(2) and 47 of the Charter and interpreted in the light of ECtHR case law, demand recognition of the suspensive effect of a remedy against a removal decision that would expose the

applicant to a serious risk of grave and irreversible deterioration of his state of health.

It also deduced that Article 14 of the Return Directive requires, to the extent possible, meeting basic needs (emergency health care and essential treatment of illnesses) in the case of a deferral of removal associated with the application of a suspensive effect.

## FOR DECISIONS RELATING TO DETENTION

Article 15 of the Return Directive pertains to detention for the purpose of removal. Paragraph 2 stipulates the terms for judicial review of the legality of the decision, where ordered by an administrative authority.

Paragraph 3 of the same article provides for further review of detention at reasonable intervals of time, either ex officio or at the request of the third-country national. In the case of prolonged detention periods, this review must be subject to judicial supervision. This provision does not however specify the nature of that supervision. Nor is the suspensive or non-suspensive nature of the available remedy addressed.

In the absence of additional specifications in the directive, member states retain authority to determine the terms for review of detention, in accordance with the principle of procedural autonomy. In practice, most national judges appear to restrict themselves to a limited review of the legality of the detention decision (where this remedy is possible).

That being said, recitals 13, 16, 17 and 24 of [Directive 2008/115](#) and paragraphs 39 to 42 of the [El Dridi](#) ruling state that all ordered detentions are strictly regulated by the provisions of Chapter IV. As a result, national authorities must guarantee that fundamental rights are respected, namely Article 6 of the Charter of Fundamental Rights on the right

to liberty and security of person, interpreted in the light of ECtHR case law relating to Article 5 of the Convention. The principles of proportionality and necessity of the measure must also be respected.

**The Return Directive and related CJEU case law require, in particular, that the national judge ensure that the following requirements are met:**

- **Possible detention in the absence of other appropriate, less coercive measures, and only to prepare for the return and/or removal of the foreign national (Return Directive, Art. 15(1));**
- **A written decision explaining the reasons for detention in law and in fact and providing for a remedy (Return Directive, Art. 15(2));**
- **Regular review of detention and maintenance in detention (Return Directive, Art. 15(2) and (3));**
- **Reasons for detention listed exhaustively, even if the interpretation of the “risk of absconding” remains at the discretion of the member states (Return Directive, Art. 15(1));**
- **Termination of detention where there are no longer any reasonable prospects for removal (Return Directive, Art. 15(6)), etc.**

Article 5(4) of the European Convention on Human Rights also protects the right of “[e]veryone who is deprived of his liberty by arrest or detention [...] to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. The European Court of Human Rights does not comment on the form of the remedy, but is clear that the scope of the review must “be wide enough to bear on those conditions which are essential for the lawful detention of a person” in view of Article 5(1), the purpose of that article being to protect the individual from arbitrariness (ECtHR, [A.M. v France](#), 12 July 2016, no. 56324/13, point 38). The suspensive effect of the remedy against placement in detention is not however compulsory (point 40).

**Consequently, both EU and ECtHR law provide grounds for challenging detention, by requiring relatively expansive judicial review of the lawfulness of the measure.**

#### ADDITIONAL RESOURCES

- For more information, see “[Explanations relating to the Charter of Fundamental Rights](#)” OJEU C 303/17 of 14 December 2007.
- To access the CJEU’s rulings on the Return Directive, see the blog [European Migration Law](#), [available online](#), and click on the links to the relevant articles.

## 4. FREEDOM OF MOVEMENT / SECONDARY LEGISLATION

Under EU law, certain categories of people enjoy the right to freedom of movement within the territory of Member States<sup>4</sup>. As a result, the Return Directive is not applicable to them (Return Directive, Art. 2(3)).

### RIGHT TO FREEDOM OF MOVEMENT FOR FAMILY MEMBERS OF AN EU CITIZEN

EU law very quickly granted freedom of movement and freedom of establishment to workers and other economic agents<sup>5</sup>. Now the simple status of [European citizen](#), whether an active citizen or not, generates rights for the person (right to move, right to reside, access to economic activities, etc.) that are formalised by obligations assigned to member states (prohibition on discrimination on the basis of nationality, principle of equal treatment, prohibition on indiscriminate restrictions)<sup>6</sup>.

Conversely, access to free movement and residence within the territory of the EU for third-country nationals is limited and determined by the applicability of European legislation on short-term visas, asylum and

immigration. In the vast majority of individual situations however, the migration status of third-country nationals is the exclusive jurisdiction of the national law of each Member State.

Nonetheless, some third-country nationals enjoy a “derived” right to free movement. This concerns family members (spouse, partner, direct descendants under 21 years old or who are financially dependent, and financially dependent direct ascendants) of a European citizen, economic agent (TFEU, Art. 45; Regulation No 1612/68, Art. 11) or inactive citizen (Directive 2004/38, Art. 3).

**However, the enjoyment of such derived rights is conditional on the European citizen’s use of their own freedom of movement in a Member State other than that of their nationality. This means that, in situations where this intra-European migration condition is not met, the third-country national and family member of a European citizen<sup>7</sup> or of a European worker<sup>8</sup> may not, in theory, enjoy the benefits of derived rights under EU law.**

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4 A definition of this category of people is provided in Article 2(5) of the [Schengen Borders Code](#).

5 See [TFEU](#), Arts. 45, 49 and 56; [Regulation \(EU\) No 492/2011](#) of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union; [Directive 2006/123/EC](#) of the European Parliament and of the Council of 12 December 2006 on services in the internal market; ECJ, 5 July 1984, [Caisse d’Allocations Familiales de la Région Parisienne v Meade](#), C-238/83.

6 See [TFEU](#), Arts. 20 and 21; [Directive 2004/38](#) of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.

7 [Directive 2004/38](#) of 29 April 2004, Art. 3; CJEU, 5 May 2011, [Shirley McCarthy v Secretary of State for the Home Department](#), C-434/09.

8 See in particular ECJ, 28 June 1984, [Hans Moser v Land Baden-Württemberg](#), C-180/83; ECJ, 27 October 1982, [Morson and Jhanjan v Staat der Nederlanden](#), consolidated cases 35 and 36/82; ECJ, 5 May 1997, [Land Nordrhein-Westfalen v Uecker and Jacquet](#), consolidated cases C-64/96 and C-65/96.

## SPECIAL CASE OF FOREIGN PARENTS OF UNION CITIZEN CHILDREN, IN THE ABSENCE OF A “DERIVED” RIGHT TO FREEDOM OF MOVEMENT

Article 20 of the TFEU may however be applicable in certain “purely internal” circumstances, such as when the citizen has not exercised their right of free movement and qualifies for a remedy against a removal measure. To a certain extent, a right “is born” for the third-country national with ties to an EU citizen. In the [Ruiz Zambrano](#) ruling (C-34/09), the CJEU considered that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.

This argument, based on the “effectiveness of Union citizenship”, applies exclusively to situations where a decision to deny residence and to remove a third-country national forces the Union citizen to “leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole” ([Dereci and Others](#), C-256/11). The need to “live together” is not sufficient.

Under CJEU case law, these very specific cases only apply when the rights of a child who is a Union citizen are being challenged. This means they do not apply where a removal measure compels a childless couple to leave the EU in order to preserve their family unity.

**According to the CJEU, the application of the European citizen’s rights must be assessed by the judge in view of several criteria:**

- **If the removal measure would affect the parent with legal custody of the child, assuming the financial burden for the child and with whom there is an emotional dependency, taking account of the child’s best interest and the right to a private life and family life (CJEU, [C-133/15](#));**
- **If the child has a European nationality other than that of the member state in which they reside and in which the residence or work application was submitted, and which might allow the child and the foreign parent to move there so as not to leave the EU (CJEU, [C-165/14](#));**
- **In the context of blended families, the relationship of dependency that exists between a step-father who is a third-country national and his wife’s child with European citizenship, and the simultaneous existence of a biological parent remaining in the territory of the EU (CJEU, [C-356/11](#) and [C-357/11](#)).**





Photo: © Anjo Kan | Dreamstime.com  
Children in the Moria camp, Lesbos, Greece

**III. IMPLICATIONS OF ECTHR CASE LAW FOR MIGRANT RIGHTS UNDER EU LAW: *KHLAIFIA AND OTHERS V ITALY*, NO. 16483/12**

Photo: © Piotr Adamowicz | Dreamstime.com

Three Tunisian nationals arrived undocumented on the Italian coast in 2011. They were detained in a reception centre in Lampedusa, then transferred on board the ships *Vincent* and *Audace*, moored in Palermo. All three were deported to Tunis on 27 and 29 September 2011.

In an application brought before the ECtHR on 9 March 2012, the applicants alleged a violation by the Italian authorities of Article 3 and of Article 13 taken together with Article 3 of the Convention, for exposure to inhuman and degrading treatment during their stay and their ability to obtain an effective remedy. Lawsuits challenging the conditions of their detention were dismissed on 1 June 2012.

The applicants also alleged that they were subjected to a violation of Article 5(1), (2) and (4) of the Convention, as well as Article 4 of Protocol 4, and Article 13 taken together with Article 4 of Protocol 4. They claimed not to have received documents or information about the legal basis for the measures taken against them nor the availability of possible legal remedies, and to have been subjected to collectively expulsion. In response, the government claimed that the applicants were first identified individually in Lampedusa, and then received by the Consul of Tunisia for verification of their civil status. It also produced three deportation

orders, provided on the day of removal, and alleged that the applicants had refused to sign them. To support the existence of an effective (but not suspensive) remedy mentioned on those documents, the government presented two orders annulling deportation orders by the justice of the peace because they had not been adopted within a reasonable period of time after questioning.

In *Khlaifia*, the Strasbourg Court addressed for the first time the detention of migrants in Lampedusa, at a time when the number of arrivals was on the rise.

The [Grand Chamber](#), confirming the ruling of the [Chamber](#), considered that the measures taken against the applicants constituted deprivation of liberty within the meaning of Article 5 of the Convention and thus fell under the Court's jurisdiction *ratione materiae*. The characterisation of the sites under national law, which according to the government did not constitute "imprisonment" but rather "first aid", "assistance" and "reception", was deemed irrelevant.

The Court found multiple violations of the Convention by the Italian authorities, as explained below.

- **Violation of Article 5(1) (right to liberty and security)**

The lack of “*any clear and accessible basis did not satisfy the general principle of legal certainty and was incompatible with the need to protect the individual against arbitrariness*” (points 105-108).

The Court considered that the provisions regulating the deprivation of liberty of undocumented foreign nationals must be clearly defined in national law. This holding does not just require the existence of relevant domestic law, but also concerns the “*quality of the law*”.

**The CJEU also based its decision on this requirement of the quality of the law, as derived from Article 5 ECHR, in the [Al Chodor ruling of 15 March 2017](#), considering that Article 2(n) and Article 28(2) of the Dublin III Regulation require member states to “*establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond*” and may justify placement in detention.**

**Thus, the combination of ECtHR and CJEU case law offers an interesting starting point for future remedies concerning the quality of national laws relating to the detention of foreign nationals, particularly in respect of explanations of the grounds for depriving a foreign national of liberty, such as for example the risk of absconding.**

- **Violation of Article 5(2) (right to be promptly informed of the reasons for being deprived of liberty)**

The deportation orders issued by the Italian authorities contained no reference to the “*legal and factual grounds*” for the detention and were not transmitted to the applicants within the required timeframe (points 117-122).

- **Violation of Article 5(4) (right to a speedy ruling on the lawfulness of the deprivation of liberty)**

The lack of information about remedies against the deprivation of the applicants’ liberty rendered meaningless their right to lodge an appeal against the disputed decisions and to obtain a court ruling (points 132-135).

In fact, ECtHR (and CJEU) case law requires an extensive judicial review of the lawfulness of the detention measure (see above, “*Right to an effective remedy*”).

- **No violation of Article 3 (prohibition of torture and of inhuman or degrading treatment)**

The conditions at the centre in Lampedusa and on board the ships in Palermo did not exceed the level of severity required to fall within Article 3 of the Convention (points 187-211). (Although the Chamber did consider that the conditions of detention in the Lampedusa reception centre violated Article 3 ECHR.)

- **No violation of Article 4 of Protocol 4 (prohibition of collective expulsion of aliens)**

According to the ECtHR, this provision “does not guarantee the right to an individual interview in all circumstances”, only the “genuine and effective possibility of submitting arguments against his or her expulsion” and their examination “in an appropriate manner by the authorities of the respondent State” (point 248). Because the applicants had undergone an identity check, the Court considered that they had had this possibility (paragraphs 243-255). The Chamber had however concluded that there was a violation of Article 4 of Protocol 4, based on the standardised nature of the refoulement decrees.

**Some legal practitioners and academics consider<sup>9</sup> that the conclusions of the Grand Chamber relating to Article 4 of Protocol 4 undercut the procedural safeguard against collective expulsion and constituted a backslide of ECtHR case law on the right to an individual interview. How can it be determined whether a person is or is not alleging personal risks in the event of deportation without an individual interview?**

**Under EU law, asylum procedures guarantee the systematic right to an individual interview<sup>10</sup>. That right is limited in the context of return procedures (see above, “Right to be heard”).**

- **Violation of Article 13 (right to an effective remedy) taken together with Article 3**

The absence of any indication of possible avenues to complain about the conditions in which the applicants were held (points 270-271) was held to justify the finding of a violation.

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9 See [Denise Venturi](#), “The Grand Chamber’s ruling in *Khlaifia and Others v Italy*: one step forward, one step back?”, 10 January 2017; [Stefano Zirulia & Steve Peers](#), “A template for protecting human rights during the ‘refugee crisis’? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling”, 5 January 2017; [L. Tsourdi](#), “Refining the prohibition of collective expulsion in situation of mass arrivals: a balance well struck?”, EDEM Newsletter, January 2017.

10 See in particular [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Articles 14 and 15; [Regulation \(EU\) No 604/2013](#) of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person, Articles 3 and 5.

- **No violation of Article 13 taken together with Article 4 of Protocol 4**

For the Court, it is enough that the deportation orders indicate the possibility of legal recourse, because *“the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention where, as in the present case, the applicants do not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country”* (points 272-281). The Chamber had taken the opposite position.

**The Court’s reasoning that the suspensive nature of the remedy provided by Article 13 depends on the existence of a claim under Article 2 or 3 ECHR would seem to invalidate the conclusions of the Grand Chamber’s ruling in [Souza Ribeiro v France](#) (no. 22689/07). The CJEU case-law developments mentioned above on this subject offer greater protection.**

Many commentators think that it is vital for ECtHR case law on this issue to evolve in a manner guarantees the effectiveness of remedies by means of a suspensive effect in all circumstances related to return procedures.

Since the *Khlaifia* ruling, detention in Italian hotspots continues to take place without any basis in law or time limitation. There is therefore opportunity for legal practitioners to mobilise to bring additional cases.

#### ADDITIONAL RESOURCES

- For information on the *Khlaifia* case, see [“A template for protecting human rights during the ‘refugee crisis’? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling”](#), 5 January 2017.
- For more information, see also Steve Peers, [“Detention of asylum-seekers: the first CJEU judgement”](#), 9 March 2016.





Photo: © Maxironwas | Dreamstime.com  
Migrants waiting to be identified after arriving in Italy.



## **IV. REGULATION INSTITUTING A EUROPEAN BORDER AND COAST GUARD: A FRAMEWORK FOR RESPONSIBILITY**

Photo: © Vladimir Jovanovic | Dreamstime.com  
Border fence, Hungary.

## 1. EUROPEAN BORDER AND COAST GUARD

Adopted in record time and in a context of urgency, Regulation (EU) [2016/1624](#) on the European Border and Coast Guard<sup>11</sup> is now in effect. Its provisions are grounded in the text that gave rise to the European Agency for the Management of Operational

Cooperation at the External Borders of the member states of the European Union (Frontex)<sup>12</sup> and reinforce or develop a number of pre-existing activities.

### European Border and Coast Guard Regulation – Some Key Provisions:

- The European Border and Coast Guard, made up of member states' national authorities and of the European Border and Coast Guard Agency (Art. 3(1));
- Definition of "European border management" (Art. 4);
- The principle of "shared responsibility of the Agency and of the national authorities" in terms of European integrated border management (Art. 5);
- Capacity-building of the Agency (Art. 8), including:
  - its role monitoring migratory flows and carrying out risk analysis at the external borders of the Union (Art. 11), ensured by an obligation to exchange information with the member states (Art. 10), and liaison officers in member states (Art. 12);
  - the assessment of "vulnerability", i.e. "the capacity and readiness of member states to face [...] challenges at the external borders", and of the necessary corrective measures (Art. 13), before intervention by the EU Council and Commission (Art. 19 and Schengen Borders Code, Art. 29);
  - the creation of a permanent "rapid reaction pool" of at least 1,500 coast guards (Art. 20);
  - the new operational mission of the European Border and Coast Guard teams, within the context of the "migration management support teams" deployed at hotspots and coordinated by the Commission (Art. 18);
  - the extension of the Agency's coordination and assistance capacities in relation to returns (Arts. 27 to 33);
  - the coordination of joint operations between member states and third countries, including on the territory of those countries (Art. 54);
  - development of the scale of personal data collected and its use by the Agency (Arts. 46 to 49);
  - the creation of an administrative mechanism for complaints of "fundamental rights violations" by individuals during operations covered by the regulation, in cooperation with the fundamental rights officer (Art. 72).

## 2. IMPORTANT ASPECTS IN TERMS OF FUNDAMENTAL RIGHTS

The regulation, which repeatedly refers to the human rights obligations of member states and European institutions, raises alarms for legal practitioners. Article 1 reiterates the fact that the European Border and Coast Guard's mission must be achieved in full respect of fundamental rights. Under Article 34, the Agency is bound to develop and implement a strategy for protecting fundamental rights, including an effective mechanism for monitoring compliance with those obligations<sup>13</sup>.

Indeed, the activities of the European Border and Coast Guard are likely to infringe on the fundamental rights of foreign nationals, such as the right to asylum and the principle of non-refoulement. Joint operations between Member States, coordinated by Frontex, aim to monitor migratory movements at the EU's external borders. As a result, they lead to interceptions and barriers all along the path of people who may be eligible for international protection or who may risk inhuman or degrading treatment in the event of their return.

Additionally, these coercive measures are often implemented in international waters or on the territory of third countries, which engenders a lack of transparency, as well as an absence of democratic and judicial control over any unlawful behaviour.

Moreover, new issues arise, like personal data protection. Under the regulation, this is addressed from the perspective of the Agency's competencies alone (Arts. 44 to 50); none of the provisions restricts the data that can be exploited by national coast guards.

Naturally, anyone can invoke the text's safeguards and additional protections under Union law<sup>14</sup>, but in the case where removal has already taken place it becomes difficult to establish that a violation has occurred.

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11 [Regulation \(EU\) 2016/1624](#) of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJEU L 251, 16 September 2016, pp. 1-76.

12 [Council Regulation \(EC\) No 2007/2004](#) of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union, OJEU L 349, 25 November 2004, amended four times by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007, OJEU L 199, 31 February 2007, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 22 October 2013, OJEU L 304, 22 November 2011, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014, OJEU L 189, 27 June 2014.

13 Over and above those two provisions, the concept of "fundamental rights" appears many times in the regulation.

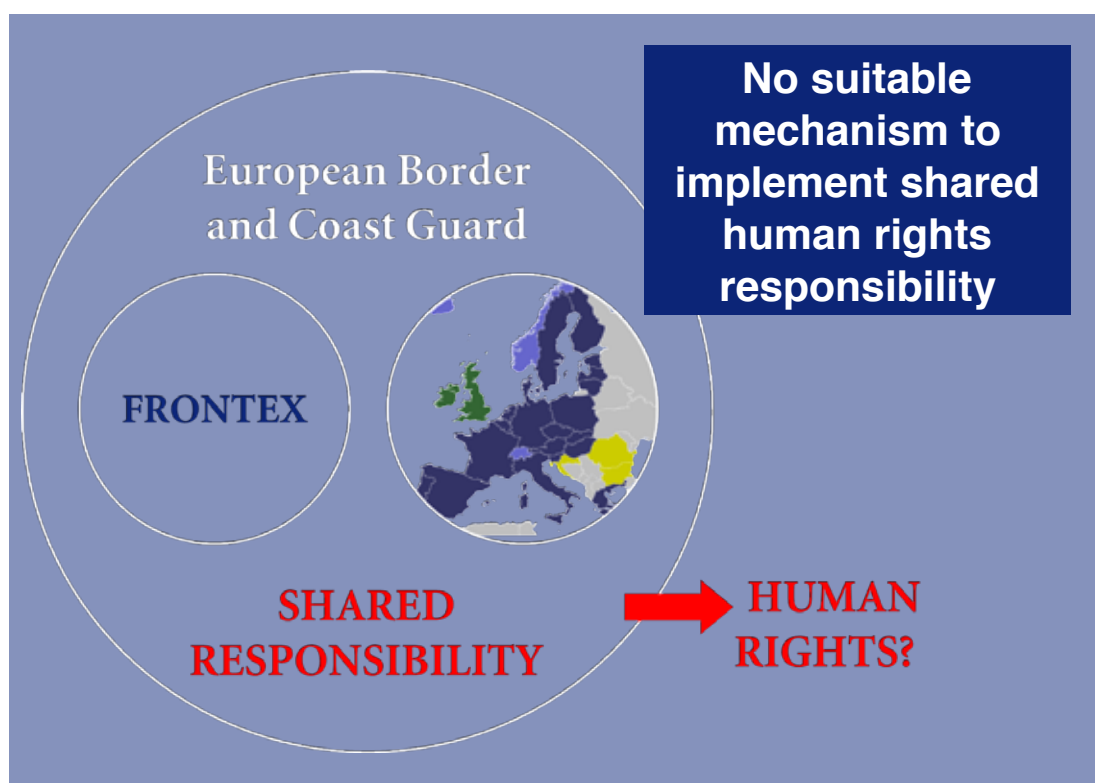
14 See in particular [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

### 3. DIVISION OF RESPONSIBILITIES IN THE EVENT OF A HUMAN RIGHTS VIOLATION

The classic system of responsibility of the State or an EU body for a violation of EU law applies to these activities. Accordingly, three conditions must be met<sup>15</sup>:

1. A law conferring rights on individuals is violated;
2. The violation constitutes a clear and serious misunderstanding of the limitations of the discretion of the Member State or European institution;
3. A causal link exists between the violation and the damage.

Given the number of actors involved in joint operations, assigning responsibility for a violation to one or more actors is problematic. International law and EU law demand effective control in order to assign the unlawful behaviour in question (de jure or de facto control) to a subject of international law. In respect of the EU law, the margin of appreciation accorded to member states in their implementation of external border management policy also needs to be taken into account.



From: *The New European Border and Coast Guard: Shared Human Rights Responsibility?* Presentation by Melanie Fink, Researcher at Leiden University, PICUM Legal Seminar Brussels, 8 June 2017.

<sup>15</sup> See in particular TFEU, Art. 340; EBCG Regulation, Art. 60(3); ECJ, 19 November 1991, *Frankovitch and Bonifaci*, C-6/90 and C-9/90; ECJ, 5 March 1996, *Brasserie du Pêcheur and Factortame*, C-46/93 and 48/93.

Despite the principle of “*shared responsibility*” and the creation of a “*rapid reaction pool*”, the European Border and Coast Guard retains member states as the primary locus of responsibility (Art. 5(1)). As a result, acts of coercion are assumed to be attributable to the Member States’ officers.

As a rule, the host member state, as stipulated by the regulation, governs the assignment of responsibilities between member states participating in operations. The European Border and Coast Guard’s teams act on instructions and in the presence of the host Member State’s officials, or may be authorised to act in the host Member State’s name (Arts. 21 and 40). An

operation’s host Member State is considered responsible in the event of any damage, in accordance with its national law (Art. 42), even though the team members remain subject to their original member state’s disciplinary measures (Arts. 21, 29, 30 and 31). The team members deployed during operations are treated in accordance with the host member state’s national law in the event that criminal liability is implicated (Art. 43).

And yet, the chain of command seems to be less well-established in practice between national officials. Moreover, Frontex personnel are increasingly present on the ground, although they do not have any executive powers, at least not officially.



## 4. MECHANISMS FOR IMPLEMENTING RESPONSIBILITIES

Mechanisms available to individuals that provide recourse for violations of rights under EU law are limited, exposing a gap between law and practice.

The complaints mechanism instituted by the regulation establishing the European Border and Coast Guard only provides for an assessment of the admissibility of individual requests by the Agency's fundamental rights officer, and then for their transmission to the member states or to the Executive Director of Frontex (Art. 72).

This system, which refers to the national law of each state, does not guarantee any harmonisation in terms of sanctions or

reparations. As a result, there does not appear to be any leap forward in the protection of fundamental rights under this new regulation.

Although an action for damages provided for by EU law appears to be better adapted, there is no one court before which an individual could lodge a complaint and invoke that shared responsibility. It would therefore be necessary to present oneself before the courts of each concerned member state, in parallel to a possible action before the CJEU against Frontex.

In accordance with ECtHR case law following *Bosphorus*<sup>16</sup>, an individual application alleging unlawful behaviour perpetrated by one or more member states during a Frontex operation can only be brought before the Strasbourg Court if those member states have discretion in how they implement EU law.

### ADDITIONAL RESOURCES

- See also "[European Agenda on Migration: Commission reports on progress in making the new European Border and Coast Guard fully operational](#)", European Commission, 25 January 2017.
- See also "[The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?](#)", a study for the European Parliament's LIBE Committee, 2016.

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16 ECtHR, Grand Chamber, 30 June 2005, *Bosphorus Hava Yollari Turizm Ve Ticared Anonim Sirketi v Ireland*, App. no. 45036/98.

## V. CONCLUSION:

### USING EUROPEAN UNION LAW TO PROTECT THE RIGHTS OF FOREIGN NATIONALS IN EUROPE

The question of foreign nationals' access to justice is of fundamental importance.

Union law on migration is, however, characterised by inadequate implementation by the national authorities. Lawyers are well placed to assert the rights of foreign nationals under Union law before national courts. Bringing about a change in administrative practices, to align them with the European *acquis*, is extremely difficult; however, judicial dialogue between national and European judges can be an effective way to compel national authorities to respect their obligations.

Legal practitioners should harness Union law to more effectively ensure the protection of migrants' rights when contending with national administrations. The present period is marked by increasingly restrictive policies concerning migrants. As a result, advocates for migrants' rights in Europe have considerable work to do to confront a hardening approach to return policy.

Given the abundant legal remedies that characterise the European Union, creativity and the use of every judicial and parajudicial, domestic, regional and international lever may enable significant evolution in the jurisprudence. Multiplying the number of cases will encourage the "cross-fertilisation" of European and national case law. A single lawyer and a single judge are all it takes to bring a preliminary question to the CJEU.

Cases may also be "strategic" when they are part of a long-term vision and when they aim to bring about profound social and legal change. To achieve this, cooperation between lawyers and NGOs is essential.

**Organisations that defend migrants' rights play an important role in raising awareness among the broader public and political decision-makers, in parallel with judicial proceedings. As demonstrated so effectively by the [actions of American organisations](#), as in the case of the "travel ban" and [deportation of the undocumented parents of American children](#), it is important to combine a litigation strategy with advocacy work and a communication strategy to maximise the chances of success.**

The involvement of activists in the work done by lawyers or of activist lawyers can also help to identify the necessary changes based on needs on the ground, and the sometimes circuitous means of achieving them. This can also promote change in the culture of lawyers, who sometimes tend to anticipate the results of cases, causing them to adopt a more cautious posture. The [Zambrano](#) case is instructive: it was thanks to the preliminary referral by a court specialising in social law that a right of residence in the European Union was acknowledged for the parents of children who are European citizens (rather than the more classic path of waiting to challenge a return decision).

Organisations that defend the rights of foreign nationals are vital to collecting and disseminating reliable and precise field information to the judges in charge of cases concerning foreign nationals.

During the *Khlaifia* case, the lawyers travelled to Tunisia to gather evidence and testimony and obtain the right to represent people who were the victims of push-backs. To mount cases relating to Article 4 of Protocol 4 of the Convention and in the hopes of changing the case law of the Strasbourg Court, it is now necessary to encourage legal practitioners to travel to third countries to meet the victims of collective expulsions.

The absence of effective remedies in the field of migration management is commonplace, such that there is also a need to raise legal practitioners' awareness of the possibility of bringing cases directly to the ECtHR, and not only after exhausting domestic remedies<sup>17</sup>.

Lastly, wider sharing of legal knowledge with migrants themselves is essential. A better understanding of their rights can enable the individuals concerned to participate actively in their litigation strategy.

In short, a strategic, pro-active approach on the part of all actors is desirable to better protect migrants' rights under EU law and to compel national authorities to respect the European *acquis* in the areas of detention and deportation.

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<sup>17</sup> However, the rule on exhausting domestic remedies established by Article 35(1) only calls for the exhaustion of "available, appropriate remedies relating to the incriminated violations" that exist "to a sufficient degree of certainty, not only in theory but also in practice". Consequently, the Court considers that, in cases where domestic law does not provide for an effective remedy, it is not necessary to demonstrate the exhaustion of legal proceedings before bringing the matter before the ECtHR. See, amongst many others, ECtHR, Grand Chamber, *Salman v Turkey*, 27 June 2000, App. no. 21986/93, point 81; ECtHR, *Ilhan v Turkey*, 27 June 2000, App. no. 22277/93, point 58; and more recently, ECtHR, 19 January 2017, *I.P. v Bulgaria*, App. no. 72936/14, points 40-49.





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