Seminar/Jean Monnet Programme

The Returns Directive:
Central Themes, Problem Issues and Implementation

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1. LACK OF TRANSPOSITION

Italy has not transposed the Directive. The only act enacted has been a circular issued by the Home Office. This is not a provision which can fulfil the obligation to implement EU law. ECJ has clearly stated that it is not necessary to adopt a law (*Commissione c. Italia*, 1987, causa 363/85; *Commissione c. Italia*, 1998, C-512/08), but also that "*10 As regards the various circulars produced by the Italian Republic, it is sufficient to observe that it is settled case-law that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty (see, in particular, Case C-316/96 Commission v Italy [1997] ECR I-7231, paragraph 16).*" (*Commissione c. Italia*, 1999, C-315/98).

Moreover this circular does not ask the police to change effectively its praxis, the ways the interviews are made or to consider the situation of foreigners case by case. Indeed it asks the police to change the motivations of the decisions of expulsion in order "to neutralize the effects of judicial remedies" referred invoking the direct effects of the Directive. Those motivations must show that there is a risk of absconding and that it is not possible to remove the alien with no coercive measures, which in the Italian law are almost absent.

2. ART. 2 AND THE CRIME OF ILLEGAL ENTRY AND STAY

While Italy has not transposed the directive yet, it has made two major changes to the Aliens Law (T.U. 286/1998) in 2009. The first concerns the maximum length of detention and the second concerns the introduction of the crime of illegal entry and stay.

As far as the first, the Government has increased the maximum period of detention from 60 days (30+30) up to 6 months, inspired by Art. 15, par. 5, of the Directive.

As far as the second change, several problems arises. For the first time in our law illegal entry and stay are qualified as a crime, punishable with a fine that can be changed into an expulsion. This crime has raised a lot of criticism because it is clear that nobody will pay the fine and that everybody will be expelled: from a substantial point of view the effect of the crime is the same of the administrative violation. The major difference is that the workload of the police officials and the judicial system have increased a lot, because aliens must be processed very quickly. Notwithstanding the criticism and the protests Government has kept this crime in force: the Home Office has officially stated that the main reason was to avoid the implementation of the directive, limiting its scope of application according to art. 2, par. 2, lett. b), which allows MS "not to apply the directive to third-country nationals who are subject to return as a criminal sanction or as a consequence of a criminal sanction…"

As Italy has not implemented the Directive yet, the exclusion clause can not apply: it is a choice that the State can make with the law of implementation; a simple declaration by the Home Office can not be sufficient.

Anyway we should take this approach of the Italian Government to consider whether MS may limit the scope of application in all the cases that expulsion is a consequence of the crime of illegal entry or stay. I think they can not, because otherwise the object of the directive will be too little; the directive apply to those staying illegally on the territory: MS could not avoid the application of the directive qualifying the same illegal entry and stay as a crime. This does not rule out the crime "*per se*", but rule out that crime from those recalled by art. 2.2, lett. b). Moreover in the case of Italy, the Government has provided for the crime of illegal entry and stay in order to avoid the implementation of the Directive, while as we know, MS may use the time for transposition to do all their best to implement the directive; here we have exactly the contrary: Italy has not transposed yet but has introduced a crime to avoid the implementation!

By the most recent press releases of the Home Office, it seems that the Government has been persuaded by the Commission that its strategy was not allowed by the Directive. For this reason it is likely that the Government will issue a decree, grounded on urgency and necessity, by the end of this month, to implement the Directive. These kind of decrees have the same force of law but last for 60 days within which time they have to be converted into a law by the Parliament.

3. THE CONFLICT BETWEEN THE DIRECTIVE AND THE ITALIAN LAW ON EXPULSION

National law conflicts with several provisions of the Directive. Very shortly I can say that in Italy expulsion is executed with an invitation to leave the territory only when a foreigner has not renewed the permit to stay, that is in a minority of cases. In all the other cases expulsion is executed by a coercive measure: physical transportation of the foreigner out of the MS or, when it is not possible, the detention in a special centre up to 6 months. When the period of detention has been expired, the alien is released and he is invited to leave the territory within five days. If the alien infringes this obligation he commits a crime punished with the detention from one up to four years and is expelled again, with another proceedings: expulsion, enforced return or detention. The crimes can be reiterated and the detention increased up to five years. Those crimes are all provided for within art. 14 T.U. 286/98, that is the article related to the execution of expulsion.

Another important point is that of the entry ban that is always of ten years, instead in the Directive it is maximum of five years.

4. THE EFFECTS OF THE DIRECTIVE NOT TRANSPOSED

As the whole system of expulsion is very different from the one provided for by the directive, since the 25th of December lawyers, academics, judges and public prosecutors are dealing with the effects of the directive into national law, despite it has not been implemented yet. The issue of direct effects has been raised and several judges have not applied the Aliens Law, in particular the crimes connected with the expulsion, assuming that they do not comply with the Directive, and in particular with Art. 15 (detention).

We deem that Art. 15 produces direct effects at least where it provides for the maximum length of detention. Similar conclusion can be made as far as the ban of entry, that can not be longer than five years. These provisions concerning maximum periods of time (detention and ban of entry) are sufficiently clear, precise and unconditional to produce direct effects into national law and to require the non application of national law which provides for longer periods.

We should also wonder whether other articles of the directive may produce direct effects; this could be very important also after the implementation of the Directive in case of contrast (Art. 6, par. 5; 9; 10; 11; 13, 1-2-3; 15; 16).

Another crucial point is the relation between the Directive and criminal sanctions linked to expulsion. The Directive does not provide for criminal sanctions. It is true that they are not ruled out but the context of the Directive (included the Council of Europe Guidelines recalled in the preamble, point 5) seems to exclude to use criminal sanctions in order to expel an alien or, at least, to keep him in detention for more than 18 months. In the *Ratti* judgment a national court asked if the State "[…] may prescribe obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive[…]". ECJ has said that "it is a consequence of the system introduced by directive no 73/173 that a member state may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different […]".

Also the *Kadzoev* judgment of 30 November 2009, C-357/09 PPU, could be useful in this regard. First of all the Court has said that "69 It must be pointed out that, as is apparent in particular from paragraphs 37, 54 and 61 above, Article 15(6) of Directive 2008/115 **in no case authorises the maximum period defined in that provision to be exceeded.** 70 The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive. Consequently, the answer to Question 4 is that Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct

is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose".

We could say that criminal sanction regarding aliens who are staying illegally after a decree of expulsion are allowed, but what it is sure that those sanctions have not to be connected with the execution of the expulsion. This is clear from par. 45 and 48 of the *Kadzoev* judgment "45. Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules. […] 48. Consequently, the answer to Question 1(b) is that a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded **as detention for the purpose of removal** within the meaning of Article 15 of Directive 2008/115".

The fact that in the Italian law the crimes are provided for in the Aliens law, and they are written in two paragraphs of Art. 14, named "execution of expulsion", concurs to the conclusion that those crimes are not allowed, because they are crimes connected with the execution of the expulsion. We could have still crimes connected with the violation of the order to leave the territory but they should be structurally different from the expulsion and its enforcement. Moreover they could be proportional and similar to the crimes provided for similar violations. It is not clear why aliens should be condemned to detention while citizens are condemned with fines.

We know that the Government deems the criminal sanctions as in compliance with the Directive. They deem that art. 8, making a distinction between the return decision and the act ordering the removal, could allow for sanctions not provided for in the Directive and concerning the violation of the order of removal. In my opinion this is a paper interpretation, not sufficient to consider the criminal sanctions as not linked with the expulsion process. The proof is that those criminal sanctions come along with new expulsion decisions.

Another issue that has been risen in the debate has been that of the application of the directive to expulsions issued before the time limit for the implementation of the directive has been expired. In *Kadzoev* the Court has said that: "38 Moreover, Article 15(5) and (6) of Directive 2008/115 apply immediately to the future consequences of a situation that arose when the previous rules were in force. 39 The answer to Question 1(a) is therefore that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable".

Similar issue concerns the ban of entry (ten years for the Italian law and five years for the Directive). The provision of the directive can produce direct effects and the national law may be not

applied. It is interesting in this case also to consider what happens with the ban of entry issued before the time limit for transposition has elapsed. Should we apply the *Kadzoev* principle, we could apply the new, shorter, ban of entry to the bans inflicted before the directive become applicable.

Finally, it is interesting to consider if the Directive allows to adopt two, or even more, decrees of expulsion starting new proceedings and so new periods of detention.

5. REFERENCES TO THE COURT OF JUSTICE

To recognise the direct effects of the directive, in the last three weeks three judges have raised a reference for a preliminary ruling to the ECJ on the interpretation of Art. 15. One of them has expressly asked for an urgent preliminary ruling according to Art. 267, par. 4, TFEU and 104.b) ECJ Regulation. It is likely that we will have a decision within the end of March.

Then it will be definitively possible to ascertain if the return directive is the "directive of the shame", as it was likely when it was adopted, or the "directive of the hope", as it has turned to be thanks to its direct application!