The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?

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ABSTRACT
The inadequacy of EU efforts to address the particular vulnerability to rights abuses faced by irregular migrants has become an article of faith for academics, activists and practitioners involved in the field of EU migration policy. This inadequacy is thrown into sharp relief by the efforts expended by the EU to prevent and reduce irregular migration, and control migration more generally. Despite the emphasis placed on migration control in the common EU migration policy which is being developed since 1999, that same policy and the EU legal order more broadly contain the raw materials out of which a robust human rights protection framework for irregular migrants may be wrought. The entry into force of the Treaty of Lisbon in 2009 increases the chances of the practical realisation of such a framework, the makings of which are already discernible in the recent jurisprudence of the CJEU.

Keywords: irregular migration – EU migration law and policy – migrants’ rights – Return Directive

1. INTRODUCTION
The entry into force of the Amsterdam Treaty in 1999 conferred law-making powers on the EU in the field of migration and provided the legal basis for the realisation of the call by the European Council in the Tampere Conclusions of the same year to develop a common EU asylum and migration policy. This common asylum and migration policy was to be developed as part of the broader project of turning the EU into an area of freedom, security and justice (AFSJ). Efforts to forge this common policy have been pursued in three main policy areas, namely, regular migration,
irregular migration and asylum. The main response of the EU to the issue of irregular migration is to try to prevent the arrival of irregular migrants and to deport those who have managed to enter or remain in the EU. This response, coupled with the EU’s tendency to treat the issue of irregular migration as a law enforcement and security issue, has led to the adoption of legislation aimed at preventing and controlling such migration without having due regard to the protection of the human rights of such migrants. The apparent lack of concern with migrants’ rights in the development of a common EU migration policy is perhaps most starkly illustrated by the aversion at EU level to the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the most comprehensive international document on migration and human rights and the only one of the ten core international human rights instruments not to have been signed or ratified by any of the 28 EU Member States. The criminalisation of irregular migration by the EU has been the subject of strong criticism by academics and civil society, with

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1 See for example Communication from the Commission on Maximising the Development Impact of Migration: The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus COM(2013) 292 final at 6.

2 The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3.

3 For the full list of the ten core international human rights instruments see the website of OHCHR: [http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx) [last accessed 8 September 2015].

some of the measures adopted in the ‘fight’ against irregular migration even drawing censure from governments outside the EU.⁵

In this article I will argue that despite the inherent vulnerability of irregular migrants and the punitive impetus behind EU legislative and policy activity in the field of irregular migration, many of the measures adopted to reduce and prevent such migration also contain provisions which may be exploited to secure greater protection of the rights of irregular migrants. In this regard, the CJEU is leading the way, particularly in recent rulings on the substance of the safeguards contained in the Return Directive. The growth in recent years in the number of judgments from the CJEU concerning irregular migrants’ rights has been facilitated by the entry into force in 2009 by the Treaty of Lisbon which, I argue, has altered the EU human rights landscape to the benefit of migrants in an irregular situation.

2. PREVENTION, DETENTION AND EXPULSION: THE EUROPEAN UNION APPROACH TO IRREGULAR MIGRATION AND THE RIGHTS OF IRREGULAR MIGRANTS

A. Awareness that irregular migrants have rights overshadowed by preoccupation with preventing irregular migration and deporting irregular migrants

The European Commission’s interest in a common approach to irregular migration predates EU legislative competence in this field. Irregular migration in the 1970s, spawned by efforts to restrict migration in the wake of the oil crisis, prompted the Commission to call on Member States to urgently adopt a common approach to deterrent measures.⁶ This was followed by a draft Directive to combat irregular migration and employment which focused on enhanced cooperation between

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Member States, the imposition of penalties and the protection of workers’ rights in relation to work performed.\(^7\) While the Directive was not adopted, it evinced a concern not just with preventing irregular migration but also with protecting the human rights of irregular migrants, a dual approach taken by the UN and ILO during the same decade.\(^8\)

Thus over two decades before EU legislative competence in the field of migration we can identify the issues which continue to dominate the field today, namely, the effort to forge a common European approach to irregular migration and the tension this reveals between the desire to prevent such migration and the requirement that the human rights of irregular migrants be respected.

Subsequently, cooperation between Member States on irregular migration took place on an intergovernmental basis and occurred outside the EU framework.\(^9\) Ministers responsible for migration met to adopt ‘soft-law’ measures and the Schengen Information Agreement, adopted in 1991, stressed the importance of preventing irregular migration.\(^10\) The Maastricht Treaty,\(^11\) which

\(^7\) Proposal for a Council Directive concerning the approximation of the legislation of the Member States in order to combat illegal migration and illegal employment COM(1978) 86 final at para 5. The legal basis for the proposed Directive was Article 94 EC (now Article 115 TFEU) which empowered the Council, acting unanimously on a proposal from the Commission, to issue directives for the approximation of Member State laws which directly affect the functioning of the common market.

\(^8\) See for example, ECOSOC Res 1706(LIII), 28 July 1972; GA Res 2920(XXVII), 15 November 1972; GA Res 3224(XXIX), 6 November 1974; ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).


\(^10\) Ibid. at 131.
formalised intergovernmental cooperation within EU structures, obliged Member States to cooperate on matters relating to Justice and Home Affairs, and identified the fight against irregular migration as an item of common interest.\textsuperscript{12} While the Commission’s dual focus on prevention of irregular migration and protection of irregular migrants’ rights was evident in its 1994 Communication on Immigration and Asylum Policies,\textsuperscript{13} intergovernmental cooperation privileged the former and resulted in the adoption of measures dealing mainly with prevention of unauthorised employment and facilitation of expulsion.\textsuperscript{14}

The entry into force of the Treaty of Amsterdam in 1999 brought the Schengen acquis within the remit of the EU\textsuperscript{15} and conferred competence on the EU over asylum and migration, mandating the progressive establishment of an AFSJ\textsuperscript{16} and facilitating development of a common migration policy by making a number of areas, including irregular migration, subject to measures adopted by the Council.\textsuperscript{17} It is important to note, however, that EU competence over asylum and migration matters was subject for a transitional period of five years to a number of limitations which significantly constrained the development of a common EU policy and perpetuated the prioritisation of control

\textsuperscript{11} Also referred to as the Treaty on European Union (TEU) [1992] OJ C191/1. The TEU is one of the two principal treaties of the EU, the other being the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47

\textsuperscript{12} Former Article K.1(3)(c) TEU.


\textsuperscript{14} Cholewinski, supra n 9 at 132 and 138-165.

\textsuperscript{15} Protocol No. 2 integrating the Schengen acquis into the framework of the European Union, [1997] OJ C340/93.

\textsuperscript{16} Article 61 EC (now 67 TFEU).

\textsuperscript{17} Article 63(3)(b) EC (now 79 TFEU).
over respect for the rights of migrants, the order of precedence which had characterised intergovernmental cooperation in this field. As well as the opt-outs from measures concerning the AFSJ secured by Ireland, the UK and Denmark, the jurisdiction of the CJEU was restricted to consideration of preliminary references from national courts or tribunals of final instance, the roles of the Commission and the European Parliament were circumscribed and the Council, in adopting asylum and migration measures, was required to act unanimously.

The practical realisation of the mandate in the Treaty of Amsterdam to create an AFSJ was discussed in two important policy documents, namely the Vienna Action Plan¹⁸ and the Tampere Conclusions.¹⁹ Both evinced a preoccupation with prevention and reduction of irregular migration which was to be achieved through, inter alia, a coherent EU policy on readmission and return,²⁰ further harmonisation of Member States’ laws on carriers’ liability²¹ and closer cooperation between Member States’ border control services.²²

The Tampere Conclusions was the first multi-annual programme for creating an AFSJ and to that end the Council called for full use to be made of the possibilities offered by the Treaty of Amsterdam.²³ The Tampere Conclusions acknowledged that the freedom which Union citizens take for granted should not be regarded as the exclusive preserve of those citizens, its very existence acting ‘as a draw to many others’ from around the world. Indeed, Europe’s traditions would not

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²⁰ Vienna Action Plan, supra n 18 at para 36(c)(ii).
²¹ Ibid. at para 36(d)(iv).
²² Tampere Conclusions, supra n 19 at para 24.
²³ Ibid. Introduction.
deny ‘such freedom to those whose circumstances lead them justifiably to seek access to our territory’. While this could be interpreted as an appreciation of the need to maintain channels of legal migration and offer protection to migrants in need, the extent to which it has resulted in measures safeguarding the rights of irregular migrants is open to debate. The Tampere Conclusions did note the need to ensure fair treatment of non-EU citizens, the so-called third-country nationals (TCNs), but such treatment was discussed in the context of lawfully present TCNs.

When it comes to treatment of irregular TCNs, however, the Treaty of Amsterdam mandate to create an AFSJ has seen the Commission link irregular migration with crime and security. The Commission has described the fight against irregular migration ‘and criminal activities related to it’ as essential to the security of both Member States’ societies and migrants themselves, as it may be linked with terrorism, trafficking, smuggling, exploitation and other serious crimes which pose a major threat to the EU. This approach of treating irregular migration as a security and law

24 Ibid. at paras 2-3.

25 This is an interpretation suggested by Cholewinski, supra n 9 at 136.

26 The extent to which the goal of fair treatment of lawfully-resident TCNs has been realised is itself questionable. See generally, Storgaard, ‘The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?’ in Guild and Minderhoud (eds), The First Decade of EU Migration and Asylum Law (Leiden: Martinus Nijhoff, 2012) 299-327.


enforcement issue is reflected in the adoption by the Justice and Home Affairs Council in 2010 of 29 measures to reinforce protection of the external borders and combat irregular migration.\(^{29}\)

The European Economic and Social Committee (EESC) has also criticised the failure of action taken with the framework of the Tampere Conclusions to adopt a rights-based approach to legislation in the field of migration.\(^{30}\) Instead of the measures defining minimum standards for the treatment of irregular migrants advocated by the Commission in 1994,\(^ {31}\) this group of migrants has instead been criminalised and penalised, with some agreements concluded by the EU with non-EU countries going so far as to specifically exclude irregular migrants from the scope of protection of certain rights.\(^ {32}\) Casting irregular migration as a security issue and largely a question of law enforcement is a trend which so preoccupies the EU that in its efforts to secure itself against

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\(^{31}\) Irregular migrants ‘are entitled to a fair procedure ensuring full protection of the human rights and fundamental freedoms as provided by International law. To this effect, defining minimum standards will be a necessary step which will equally help ensure the credibility of restrictive policies concerning illegal immigration’. Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies COM(1994) 23 final, at para 109.

\(^{32}\) Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, Article 66 provides that the non-discrimination provisions in Chapter 1 relating to employment and social security ‘shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries’. [1998] OJ L97/2.
irregular migration it has gone as far as outsourcing part of the task to third countries through the external dimension of its migration policy, the Global Approach, by entering into readmission agreements and Mobility Partnerships.

The tendency to securitise irregular migration is exemplified by the inclusion of irregular migrants within the scope of application of Eurodac, an EU-wide fingerprint database established to facilitate a more effective operation of the Dublin Convention which determines the Member State responsible for examining an asylum application. The Eurodac regulation obliges Member States to take the fingerprints of all persons over the age of 14 apprehended in connection with the irregular crossing of an external border for transmission to Eurodac, and permits Member States to transmit fingerprints of persons over the age of 14 found unlawfully within their territory to ascertain whether they have previously claimed asylum in another Member State.33 The approach of criminally penalising unauthorised border-crossers was endorsed by both the Schengen Implementing Agreement34 and the Council.35 A recent example of the extent to which irregular


migration has been securitised and to all intents and purposes criminalised is to be found in the provisions of the Return Directive concerning detention of irregular migrants pending return.36

While the Return Directive provides that TCNs who are the subject of return procedures should be detained for the purposes of effecting return only if other less coercive measures prove to be insufficient, it confers almost unlimited discretion on Member States to detain by specifying that recourse may be had to detention, in particular, where TCNs hamper the return process or constitute a flight risk.37 Thus these are not the only grounds on which TCNs awaiting return may be detained. Furthermore, the latter ground has the potential to justify detention of most irregular migrants as it may be possible to infer a risk of absconding from the very fact of irregular presence in a Member State.38

While detention is cast as a measure of last resort to be employed only while removal arrangements ‘are in progress and executed with due diligence’,39 in keeping with Article 5(1)(f) ECHR, the period of detention permitted by the Directive is problematic from a human rights


37 Ibid. Article 15(1).


39 Return Directive, supra n 36, Article 15(1).
perspective. Member States are empowered to detain irregular TCNs to effect their expulsion for an initial period of up to six months, a period which may be extended by up to a further 12 months where the removal process is hampered owing to lack of cooperation from the TCN or difficulty in obtaining documents from the third country. Thus an individual who has been convicted of no criminal offence may be deprived of her liberty for up to 18 months where her return is hampered by lack of cooperation from her country of origin.

The Directive’s provisions on duration of detention also seem to have encouraged Member States, whose detention periods for irregular migrants subject to return procedures were shorter than that sanctioned by the Directive, to extend such periods. Thus, for example, Spain has extended the maximum period of detention from 40 to 60 days, Italy from two months to six and Greece from three months to 12. The provisions of the Return Directive relating to detention reveal the punitive approach of the EU to irregular migrants who, though convicted of no crime, may be deprived of their liberty for periods longer than many terms of imprisonment which are imposed on convicted criminals. The Directive has facilitated a lowering of standards with Member States increasing the maximum period of detention for those subject to return proceedings. As such the Directive’s

40 Ibid. Article 15(5) and (6).

41 This was criticised by AI and ECRE as being disproportionate, shocking and excessive. See letter to MEPs from AI and ECRE, 6 September 2007, available at http://www.statewatch.org/news/2007/dec/eu-returns-ai-ecre.pdf [last accessed 5 March 2015].


43 Concerns about a ‘race to the bottom’ prompted the Council to issue a statement, to what seems to have been little effect, that ‘the implementation of this Directive should not be used in itself as a
provisions on detention could be seen as yet another example of the criminalisation and
securitisation of the issue of irregular migration in the EU.

The EU has of course also expended significant effort in penalising those who facilitate or
incentivise the presence of irregular migrants. Indeed the Directive defining facilitation of
unauthorised entry takes aim at migrant smuggling, but so broad is its scope that it could be used to
criminalise the action of organisations providing humanitarian assistance to irregular migrants if
Member States do not explicitly exclude such assistance from the application of the Directive.\textsuperscript{44} The
Directive on carriers’ liability requires Member States to provide for dissuasive, effective and
proportionate penalties for carriers\textsuperscript{45} while the Directive on employer sanctions provides for a range
of penalties, and in some cases requires the creation of criminal sanctions, for those who employ
irregular migrants.\textsuperscript{46}

Thus both EU level policy documents such as Commission Communications and legislative
measures adopted in the field of irregular migration betray an emphasis on prevention and
penalisation of irregular migration and the return of irregular migrants to third countries. This
security and law enforcement approach to irregular migration is also a feature of the EU’s external
reason to justify the adoption of provisions less favourable to persons to whom it applies’. Council
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\textsuperscript{44} Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised

4(1).

for minimum standards on sanctions and measures against employers of illegally-staying third-
migration policy, the Global Approach, which seeks cooperation in the field of migration with third countries for the purposes of ensuring, inter alia, that third countries readmit irregular migrants, take effective action to prevent irregular migration to the EU, enhance border management and fight organised crime, including trafficking in human beings and smuggling of migrants.\textsuperscript{47}

The preoccupation so evident in Commission policy statements and related legislative output on the control of migration flows and the return of irregular migrants is underscored by the emphasis placed by the ILO and UN on imposing sanctions on employers and traffickers.\textsuperscript{48} So egregious is the emphasis on control and return in the EU approach to irregular migration that it has even been the subject of criticism at the EU level. The Commission’s approach of associating irregular migration with crime and security has been criticised by the EESC which has noted that ‘[l]inking immigration with security, and separating it from the protection of fundamental rights, sends the wrong political message’.\textsuperscript{49} The more migrant-friendly approach of the European

\textsuperscript{47} Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Communication on Migration COM(2011) 248 final at 17.

\textsuperscript{48} See for example, International Labour Conference, 87\textsuperscript{th} Session, Geneva, June 1999, Report III (1B), Migrant Workers: General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975, at para 338; ICMW 1990, 2220 UNTS 3, Articles 68(1)(b), 68(1)(c) and 68(2).

\textsuperscript{49} Opinion of the European Economic and Social Committee on ‘Respect for fundamental rights in European immigration policies and legislation’ (own-initiative opinion) [2010] OJ C128/06 at 30.
Parliament and EESC is evident in their view of irregular migrants as neither criminals\(^\text{50}\) nor persons without rights.\(^\text{51}\)

The imbalance in the common EU migration policy between the competing imperatives of controlling migration and respecting migrants’ human rights is vividly illustrated by even the most cursory consideration of the ICMW. While the ICMW explicitly acknowledges the right of States to control the entry of non-citizens, it is overwhelmingly concerned with codifying the rights of migrants, including irregular migrants. Indeed, equality of treatment between citizens and migrants is a dominant feature of the ICMW.\(^\text{52}\) Its use as a point of reference in the development of EU migration law and policy would have ensured a more human rights compliant migration framework. Though unsigned and unratified by all 28 EU Member States and largely ignored at the EU level, its very designation as one of the ten core international human rights instruments invites constant unfavourable comparison with EU migration law policy, revealing the extent to which that policy falls short of the minimum standards of international human rights law.\(^\text{53}\)

**B. Raw material for the construction of a common European Union migration policy which respects and vindicates the rights of irregular migrants?**


\(^{52}\) See Articles 18, 25, 28, 30, 43, 44, 45, 54 and 55 of the Convention.

On closer inspection, however, neither the attitude of the Commission nor the EU’s legislative activity in the field of irregular migration is as cut and dried as it might at first appear. The Commission has called for the creation of a genuine migration policy ‘in line with Europe's tradition of hospitality and solidarity’\textsuperscript{54} and shortly after the entry into force of the Treaty of Amsterdam it announced a new approach to migration,\textsuperscript{55} recognising that the EU’s labour shortages and projected population decline meant that the ‘zero’ migration policies of the preceding 30 years were no longer appropriate.\textsuperscript{56}

Amidst its preoccupation with the fight against irregular migration, the Commission does acknowledge the necessity of ensuring that irregular migrants have access to services that are essential to guarantee fundamental human rights such as education of children and basic health care,\textsuperscript{57} and has conceded that the demand for irregular labour migration is created by employers,\textsuperscript{58} thus implicitly recognising that irregular migrants are themselves in many cases only partially responsible for their irregular status. Similarly, the Commission has acknowledged that economic differences between developed and developing regions are amongst the main push and pull factors for international mobility of people\textsuperscript{59} and has insisted that a comprehensive EU migration policy


\textsuperscript{56} Ibid. at 6.

\textsuperscript{57} Communication on A Common Immigration Policy for Europe, supra n 27 at 13.


\textsuperscript{59} Communication on A Common Immigration Policy for Europe, supra n 27 at 2.
must be based on principles including the protection of migrants, particularly women and unaccompanied minors.60

More recently, the Commission has called for a renewed commitment to the development of a common migration policy which involves, inter alia, setting out common measures to effectively tackle irregular migration, including both new arrivals and irregular migrants already present in the EU,61 thus perhaps implicitly recognising that those who have spent time in the EU may have gained rights which prevent their removal.

In the Stockholm Programme, the third set of strategic guidelines for the AFSJ after the Tampere Conclusions and the Hague Programme, the European Council advised that the Treaty of Lisbon should be exploited to strengthen the AFSJ for the benefit of Union citizens.62 The Treaty also, however, offers opportunities to strengthen the same area for the benefit of irregular migrants. Though the Stockholm Programme is animated by a concern with ‘the interests and needs of citizens’, it notes the need to respect the fundamental rights and freedoms of the person while guaranteeing security. Law enforcement measures and measures to safeguard individual rights and the rule of law must be mutually reinforced, with future actions to be centred on Union citizens ‘and others persons for whom the Union has a responsibility’.63 Such actions are to include the


61 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Common Immigration Policy COM(2007) 780 final at 11.


63 Ibid.
development of a comprehensive Union migration policy, based on promotion of citizenship and fundamental rights, with the rights set out in the ECHR and the Charter seen as core values of the AFSJ. Thus EU citizens ‘and other persons must be able to exercise their specific rights to the fullest extent within …the Union’.  

If the AFSJ is to be developed in compliance with the standards contained in the Charter and the ECHR then the EU and its Member States, regardless of the hostility of much of the rhetoric surrounding the discussion of migrants and migration in EU, will be obliged to respect the rights of irregular migrants. Indeed the Commission has acknowledged that the AFSJ ‘must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined’ in the Charter and has undertaken to apply a ‘Zero Tolerance’ approach to violations of the Charter.

The recognition by the Commission of the rights of irregular migrants is reflected in much EU legislation, including that which aims to prevent and reduce irregular migration. The Employer Sanctions Directive is a case in point. Adopted in 2009 in response to the view that one of the key pull factors for irregular migration to the EU is the possibility of obtaining work without a legal status, the Directive obliges Member States to introduce a system of financial penalties and criminal sanctions for employers who hire unlawfully present TCNs. Despite the penal focus of this piece of legislation, however, it also contains a number of important human rights safeguards which, if

64 Ibid.


66 Ibid. at 3.
implemented in a full-blooded manner by Member States, could play a major role in ensuring a high level of rights protection for irregular migrants.

The Directive provides that irregular TCN workers, including those who have left or been removed from the EU, are to be reimbursed any outstanding pay, for the purposes of which an employment relationship of at least three months duration is to be presumed unless the employer or employee can prove otherwise. Member States are obliged both to put in place effective mechanisms for irregularly employed migrants to lodge complaints against their employers, either directly or via third parties, and to provide for the conferral of residence permits of limited duration in situations of particularly exploitative employment conditions.67

With the deadline for transposition of the Employer Sanctions Directive having passed in July 2011, it would appear that Member States have invested the greater part of their efforts in implementing the penalties against wayward employers, with the result that they have so far established ‘weak or non-existing mechanisms to facilitate the enforcement of the irregular migrants’ rights’.68 One of the implications of this approach by Member States to transposition is that both the Commission and civil society have to take measures to ensure a more vigorous application of the safeguards contained in the Directive.

Of the many measures adopted through the years by the EU relating to the detection, expulsion and readmission of irregularly staying TCNs,69 the EU preference for returning irregular migrants is perhaps best exemplified by the aforementioned Return Directive, one of the most

69 Cholewinski, supra n 9 at 157-165.
important pieces of legislation adopted in recent years in the field of irregular migration. The Directive aimed to establish common standards and procedures in Member States for returning unlawfully present TCNs and much of the attention it drew related to its perceived shortcomings across a range of areas, particularly in relation to provisions on prolonged pre-removal detention and mandatory re-entry bans.

While the Return Directive expresses a preference for voluntary over forced return, providing that a return decision allow for a period of voluntary departure of between seven and 30 days, it confers wide discretion on Member States to grant an abridged period for voluntary departure or, indeed, none at all. There is a similar accommodation of Member State discretion in the provision that TCNs shall have the right to appeal decisions relating to return before a competent judicial or administrative or other independent body, which shall have the power to temporarily suspend enforcement, with free legal aid to be provided according to national legislation. This contrasts sharply with the original Commission proposal which provided for a

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70 It should be noted that Member States may exclude from the scope of the Return Directive TCNs who are subject to return as a criminal law sanction and TCNs who are apprehended in connection with the irregular crossing of an external border. The Return Directive does not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code. See Article 2 of the Return Directive.

71 Baldaccini, supra n 38 at 2.


73 Return Directive, Article 7(1).

74 Return Directive, Article 7(4).

75 Return Directive, Article 13(1), (2) and (4).
right of appeal to a judicial authority which would have suspensive effect, as well as the extension of legal aid to those who lack sufficient resources to obtain such aid.\textsuperscript{76}

The Return Directive may thus justifiably be criticised for leaving too much discretion in the hands of the Member States, thereby undermining the harmonisation at which EU legislation by its very nature aims. The extent to which the original Commission proposal was watered down\textsuperscript{77} underlines not just a punitive intent but also the difficulty inherent in a law-making process which requires the approval of both the EU institutional actors and 28 sovereign States.

But despite the deficiencies which have led the Directive to be characterised as codifying an expulsion regime which is lacking from a rights perspective,\textsuperscript{78} it simultaneously allows for the ultimate vindication of the rights of individual irregular migrants, namely, the conferral of a legal status. While the punitive bias of the legislation cannot be gainsaid, it simultaneously gives Member States the option to regularise the stay of irregular migrants instead of deporting them, granting them a right to remain and thereby removing them from the reach of a procedurally punitive return process.

The aspiration of the Return Directive to eliminate the presence of irregular migrants in the EU is evidenced by the fact that Member States are required to issue a return decision to any unlawfully staying TCN.\textsuperscript{79} The Commission has observed that the Directive ‘ensures that a person

\textsuperscript{76} Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM(2005) 391 final, Article 12(1), (2) and (3).

\textsuperscript{77} See generally Acosta, supra n 42 at 179-205.

\textsuperscript{78} Baldaccini, supra n 38 at 2.

\textsuperscript{79} Return Directive, Article 6(1).
is either legally present in the EU or is issued with a return decision’.\textsuperscript{80} Return, however, will not always be possible. Indeed the requirement to issue irregular TCNs with a return decision is located in a Chapter of the Directive entitled Termination of Illegal Stay, an objective which may also be realised by conferring a legal status on an irregular migrant. Thus the same Chapter provides that Member States may at any moment grant an irregular TCN a right to remain for compassionate, humanitarian or other reasons.\textsuperscript{81}

The mechanism by which such regularisation may be effected is left to the discretion of the Member States\textsuperscript{82} but the Directive does offer some guidance as to the reasons which may provide grounds for a right to remain. Member States in their implementation of the Directive are required to take due account of, \textit{inter alia}, family life, the state of health of the TCN in question and the best interests of the child.\textsuperscript{83} Similarly, the Preamble to the Directive identifies the primary considerations of Member States when implementing the Directive as being the best interests of the child, in line with the UN Convention on the Rights of the Child, and the respect for family life, in line with the ECHR.\textsuperscript{84}

Such references to human rights considerations give rise to a far weaker claim to a right to remain than did the original Commission proposal which provided explicitly that no return decision would be issued where Member States were subject to fundamental rights obligations, particularly

\footnotesize{\textsuperscript{80} Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Communication on Migration COM (2011) 248 final at 9.}

\footnotesize{\textsuperscript{81} Return Directive, Article 6(4).}

\footnotesize{\textsuperscript{82} Ibid.}

\footnotesize{\textsuperscript{83} Return Directive, Article 5.}

\footnotesize{\textsuperscript{84} Return Directive, at para 22 Preamble.}
those resulting from the ECHR such as the right to education and the right to family unity. Nonetheless, the Return Directive places no restriction on Member States in terms of regularising irregular TCNs, and recognises that regularisation may trump return where certain factors such as family life and children are present.

It is important to note, however, that the Return Directive does not envisage any circumstances in which there is a strict obligation on Member States to grant a right to remain to irregular TCNs and a decision not to issue a return decision, or to withdraw one, is not equivalent to conferring a legal status. Such an obligation may nonetheless be inferred from both the Directive’s aspiration to eliminate the presence of irregular migrants as well as its explicit reference to specific human rights considerations such as the best interests of the child which are to be primary considerations for the Member States in their implementation of the Directive.

An example of EU legislation which does not have its legal basis in Article 79 TFEU (ex. Article 63(3)(b) EC) and is not directly related to EU migration policy but which nonetheless could make a significant contribution to the protection and advancement of the rights of irregular migrants is the Victims of Crime Directive, the deadline for transposition of which was November 2015. Article 1 of the Directive states that its objective is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Crucially, it provides that the rights set out in the Directive apply to victims regardless of their residence status.


Amongst the many obligations imposed on Member States by the Directive are the requirement that victims of crime can understand and be understood from their first contact with the competent authority, that particularly vulnerable victims are offered specific protection measures and that the police, judges and other professionals are trained to deal with victims in a sensitive and appropriate manner.\textsuperscript{87} Given that the very status of irregular migrants makes them particularly vulnerable to becoming victims of crime, the potential that this Directive holds for such migrants is significant.

The feature of the lives of irregular migrants which would make them such significant beneficiaries of the Directive also, however, has the potential to vitiate the Directive’s safeguards for such migrants. The risk and fear of deportation which accompanies every encounter with State authorities make irregular migrants wary of coming into contact such authorities. It will be necessary therefore for Member States when transposing the Directive to institute a policy of not using information gathered during the whole victim support process for migration control purposes. Arguably, such an approach will be required so as to ensure the effectiveness of the Directive and the attainment of its goals.

Some of this legislation, along with EU legislation in other fields and the Treaties themselves, have been interpreted in recent years by the CJEU to the distinct advantage of irregular migrants from a rights-protection perspective. Before analysing the activities of the Court, however, it is first worth providing an outline of the changes to the EU legal landscape wrought by the Treaty of Lisbon which have created an environment far more conducive to the vindication of the rights of irregular migrants than that which obtained prior to December 2009.\textsuperscript{88}

\textsuperscript{87} Ibid. Articles 3, 22, 23 and 25.

\textsuperscript{88} For the argument that the changes wrought by the Treaty of Lisbon form part of wider developments in the field of international human rights law which have created a more favourable environment in which to seek ratification of the ICMW in the EU, see Desmond, ‘The Triangle that Could Square the Circle? The UN International Convention on the Protection of the Rights of All
3. THE EU LEGAL LANDSCAPE AFTER THE TREATY OF LISBON: MORE RESPECT FOR THE RIGHTS OF IRREGULAR MIGRANTS?

The entry into force of the Treaty of Lisbon effected a number of important institutional and legislative changes which are of particular relevance for the AFSJ and the field of migration and asylum. The Council is no longer required to act unanimously in this field and the ordinary legislative procedure has been extended beyond measures concerning asylum and borders to include legal and labour migration, transforming the European Parliament into co-legislator. In addition, the CJEU can now give preliminary rulings to any national court or tribunal on the validity of acts in the AFSJ by EU institutions. The Treaty of Lisbon also imposed an obligation on the EU to accede to the ECHR and made the Charter of Fundamental Rights legally binding on the EU.

These changes have been interpreted as a move away from intergovernmentalism toward Europeanisation in the AFSJ, with one consequence being that the JHA Council may no longer unilaterally decide policy priorities and legislative outputs. They are certainly changes which advance the development of common migration law and policy, as well as enhancing the recognition and vindication of irregular migrants’ rights and increasing the chances of a rights-based approach being taken to legislation in the field of migration.

Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review’ (2015) 17(1) European Journal of Migration and Law 39.

89 Articles 77 – 79, TFEU, Consolidated Versions of the TEU and the TFEU [2010] OJ C83/01.

90 Article 19 TEU and Article 267 TFEU, Consolidated Versions of the TEU and the TFEU [2010] OJ C83/01.

91 Article 6(2) TEU.

92 Article 6(1) TEU.

The twin developments of the post-Lisbon competence of all national judges to seek preliminary rulings from the CJEU\textsuperscript{94} and the urgent procedure for preliminary rulings agreed in 2008\textsuperscript{95} have already occasioned changes in the field of irregular migration which indicate that the paucity of questions referred by national judges on migration matters prior to the entry into force of the Treaty of Lisbon may be a trend that has been consigned to the past.\textsuperscript{96} The combined total of such questions in the five years pre-Lisbon was six,\textsuperscript{97} with almost the same number again being referred in the first year after the entry into force of the Treaty,\textsuperscript{98} and 17 preliminary references concerning migration matters being made in 2011.\textsuperscript{99} This spike in the number of preliminary references concerning migration issues provides the CJEU with more opportunities to flesh out the substance of the human rights protections enjoyed by migrants in EU law. The rulings delivered in response to such preliminary references are of course binding on all 28 Member States, contributing to the development of common EU law and policy in the migration realm.

\textsuperscript{94} Article 267 TFEU.


\textsuperscript{96} For more on this issue see Diego Acosta and Andrew Geddes, ‘The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy’ (2013) 51(2) Journal of Common Market Studies 179-193.

\textsuperscript{97} Ibid. at 180.

\textsuperscript{98} Ibid. at 181.

\textsuperscript{99} Ibid.
Another impact of the Treaty of Lisbon, that of extending the competence of the comparatively migrant-friendly European Parliament as co-legislator to include measures on labour and legal migration, has also yielded important results from the perspective of the protection of migrants’ rights. Despite the criticisms sustained by the Parliament for its endorsement of the Return Directive, its involvement in the legislative process did ensure some important safeguards against expulsion\(^\text{100}\) and it has since shown its willingness to take an independent stand where it views EU measures as coming up short from a human rights perspective.\(^\text{101}\) Indeed, the involvement of the Parliament in the negotiations over the Seasonal Workers Directive\(^\text{102}\) ensured the inclusion of important safeguards from exploitation for seasonal workers as well as equal treatment with nationals in a number of areas.\(^\text{103}\)

**A. The Charter**

Adopted by the Parliament, Council and Commission in 2000 and proclaimed in 2007, the Charter of Fundamental Rights gained binding legal effect with the entry into force of the Treaty of Lisbon in December 2009.\(^\text{104}\) The Charter has been described as a Bill of Rights for EU citizens which has transformed the relationship between the individual and the State due to the fact that it provides a

\(^{100}\) Baldaccini, supra n 38 at 2.


\(^{104}\) Article 6(1) TEU.
set of rights and entitlements while being neither nation-state constitution nor international human rights treaty.\textsuperscript{105}

Enjoyment of the rights codified in the Charter is not, however, restricted exclusively to EU citizens. While there are some limitations in the Charter concerning the rights of migrants in an irregular situation,\textsuperscript{106} only one of the Charter’s seven Chapters, namely, Chapter V on Citizens’ Rights, contains provisions with a citizenship limitation and even then that Chapter’s provision on the right to good administration is applicable to all persons, and not just citizens.\textsuperscript{107}

The scope of the Charter is not the only feature of the document which endows it with the potential to make a significant impact in the field of migration. While it is not intended to expand EU competence or the scope of EU law,\textsuperscript{108} the Charter has been characterised by the Presidents of the ECtHR and the CJEU as the reference text and starting point for the CJEU’s assessment of the rights it contains,\textsuperscript{109} and it recognises a number of migration-related rights not explicitly enumerated in the ECHR such as the right to asylum,\textsuperscript{110} the rights of the child\textsuperscript{111} and the right to an effective remedy against all decisions of national authorities applying EU migration measures.\textsuperscript{112} The Charter

\textsuperscript{105} Guild, \textit{The European Union after the Treaty of Lisbon: Fundamental Rights and EU Citizenship} (Brussels: CEPS, 2010) at 1.

\textsuperscript{106} For example Article 34 of the Charter on social security and social assistance.

\textsuperscript{107} Article 41 of the Charter.

\textsuperscript{108} Article 51(2) of the Charter.

\textsuperscript{109} Joint Communication from Presidents Costa and Skouris, press release no. 75 issued by the Registrar of the ECtHR on 27 January 2011.

\textsuperscript{110} Article 18 of the Charter.

\textsuperscript{111} Article 24 of the Charter.

\textsuperscript{112} Article 47 of the Charter.
thus reveals the extent to which many aspects of EU migration law are now rights-based and no longer discretionary.\textsuperscript{113}

The Charter, however, sets out a minimum level of rights protection and expressly permits the EU and individual Member States to provide greater rights protections than those contained in the Charter and the ECHR.\textsuperscript{114} Where the Charter sets out rights which correspond to rights guaranteed by the ECHR, the meaning and scope of such rights are to be the same as those laid down by the ECHR.\textsuperscript{115} Thus, for example, Article 4 of the Charter which corresponds to Article 3 ECHR is to be interpreted and applied in line with Article 4 principles and jurisprudence.

**B. Accession of the European Union to the European Convention on Human Rights**

Over the past decade the status of the ECHR in the EU legal order has been bolstered, with the CJEU holding that the ECHR is an integral part of the general principles of law whose observance the Court ensures,\textsuperscript{116} and the Charter suggesting the use of the ECHR as a minimum standard of protection.\textsuperscript{117} The Treaty of Lisbon further entrenched the position of the ECHR in the EU legal order by obliging the EU to accede to the Convention.\textsuperscript{118} Although the recent Opinion of the CJEU on the incompatibility of the accession agreement with the Treaty on European Union seems to


\textsuperscript{114} Articles 52(3) and 53 of the Charter.

\textsuperscript{115} Article 52(3) of the Charter.

\textsuperscript{116} C-540/03 *European Parliament v Council* [2006] ECR I-5769

\textsuperscript{117} Article 52(3) of the Charter.

\textsuperscript{118} Article 6(2) TEU.
have brought to nought the accession obligation,\textsuperscript{119} the EU if it does eventually accede will be in the same position as Member States vis-à-vis the ECHR, with the rights enshrined therein becoming binding on the EU and its institutions, and individuals, including irregular migrants, enjoying the right to bring a complaint about infringement of ECHR rights by the EU before the ECtHR.\textsuperscript{120}

Given the increased and increasing importance of ECtHR case law in the EU legal order following the entry into force of the Treaty of Lisbon and the Charter, the evolving case law of the ECtHR concerning irregular migrants may be used to further advance the protection of such migrants’ rights within the EU legal framework. In particular, the recent cases of the ECtHR finding that deportation from the EU of irregular migrants would constitute a violation of the right to respect for private life and family life enshrined in Article 8 ECHR may come into play to the advantage of migrants in CJEU rulings on Article 7 of the Charter and in decisions taken by Member States pursuant to the Return Directive to return or regularise unlawfully present TCNs.

\section*{4. THE CJEU AND IRREGULAR MIGRANTS}

\textbf{A. Irregular Migrant Family Members of European Union Citizens}

The CJEU has delivered two landmark rulings in which it essentially accepted that the family ties of

\textsuperscript{119} See \textit{Opinion of the CJEU that the agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) TEU or with Protocol 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms Opinion 2/13 of the Court 18 December 2014}.

irregular migrants to EU citizens obliged Member States to confer a legal status on such migrants, allowing them to reside lawfully in the EU. It may not be too fanciful to suggest that this represents the most powerful vindication of irregular migrants’ rights, sanctioning their right to remain in the EU and removing the ever-present threat of deportation. In *Metock*\(^\text{121}\) four non-EU citizens who had unsuccessfully applied for asylum in Ireland went on to marry citizens of other EU Member States who were resident in Ireland. The four TCNs applied for residence cards as spouses of EU citizens but the applications were refused by the Irish authorities on the grounds that the applicants had not satisfied the requirement in Irish law of prior lawful residence in another EU Member State. Metock and the other three applicants challenged this refusal in the Irish High Court which, having found that all the marriages in question were genuine, sought clarification from the CJEU concerning EU legislation on the right to movement and residence within the EU of EU citizens and their family members. In a groundbreaking judgment, the CJEU held that a Member State cannot prevent the entry or continued stay of a TCN spouse of an EU citizen who is exercising his or her right of free movement, regardless both of when and where the marriage took place and of how the TCN spouse first entered the host Member State.

In *Zambrano*,\(^\text{122}\) a source of much controversy because of its extension of the protection of EU citizenship to non-moving Union citizens, the CJEU found that national measures are unlawful if they have the effect of depriving EU citizens of the genuine enjoyment of the substance of their rights as EU citizens. The finding was made on the basis of EU citizenship as enshrined in Article 20 TFEU. Article 20 TFEU confers EU citizenship on everyone who is a citizen of an EU Member


State. The Zambrano case concerned a couple from Colombia who had unsuccessfully sought asylum in Belgium. Despite refusing to recognise the couple as refugees, Belgium did not return them to Colombia because of the ongoing civil war. In 2003 and 2005 the couple had children who acquired Belgian citizenship, which meant that by virtue of Article 20 TFEU they also held EU citizenship. The Zambrano couple sought to have their situation regularised and take up residence in Belgium as the parents of Belgian citizens, the refusal of which by the Belgian authorities led to a request for clarification from the CJEU concerning the application of the EU citizenship provisions of Article 20 TFEU to the case of the Zambrano children.

The CJEU acknowledged that refusing the Zambrano couple a right to remain in Belgium could also result in their EU citizen children having to leave Belgium. This kind of forced departure of EU citizens was obviated by the Court’s finding that the genuine enjoyment of the substance of the children’s rights as EU citizens entailed an obligation on the EU Member State in question to grant both a right of residence and an employment permit to the unlawfully present Zambrano parents. If forced to leave the territory of the EU because of the expulsion or impoverishment of their parents, the Zambrano children would be unable to exercise the substance of the rights conferred on them as EU citizens.123 Though the Court in Zambrano and subsequent cases narrowed the scope of application of the judgment to the parents of minor dependent EU citizen children,124 it nonetheless had significant implications. The judgment not only prevented the expulsion from EU Member States of migrants in an irregular situation who had EU citizen children but also, in some cases, required Member States to allow re-entry of migrant parents of EU citizens who had already been expelled.125

123 Ibid. at paras 43-44.

124 Ibid. at para 45.

125 Duncan, ‘Over 850 non-EU parents get residency’, The Irish Times, 24 January 2012
Zambrano exemplifies the potential of the CJEU to oblige States to confer a legal status on migrants in an irregular situation on account of their connection with EU citizens. In the subsequent cases of *McCarthy*\textsuperscript{126} and *Dereci*\textsuperscript{127} the Court had the opportunity to extend the regularising effect of that connection beyond the irregular migrant parents of minor dependent EU citizen children to the non-EU spouses and parents of adult, non-dependent EU citizens, but passed up the opportunity, no doubt alive to the political implications of such a potentially far-reaching decision. This of course does not preclude such a development in the future.

\textbf{B. Irregular Migrants and European Union Employment Law}

More recently, in the case of *Tümer*\textsuperscript{128} the CJEU confirmed the applicability of EU employment law to all TCNs, regardless of their migration status. The case concerned a Turkish citizen unlawfully resident in the Netherlands who, after the company for which he worked was declared insolvent, sought to recover unpaid wages in accordance with the EU Directive protecting employees in the event of employer insolvency.\textsuperscript{129} Dutch legislation governing unemployment, however, provided


\textsuperscript{128} C-311/13 O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen 5 November 2014.

that an unlawfully resident TCN is not to be regarded as an employee and thus is not entitled to insolvency benefit. The Netherlands government and the Employee Insurance authority argued that the Directive could not be relied upon by an unlawfully resident migrant as, firstly, the legal basis in the Treaties for its adoption\(^{130}\) did not cover TCNs and, secondly, application of the Directive to Mr. Tümer would be contrary to EU migration policy, particularly the Directive on long-term residence which only confers a right to equal treatment on lawfully resident TCNs.\(^{131}\)

The CJEU ruled, however, that the legal basis provided by the Treaties for the adoption of the employer insolvency Directive does not expressly restrict the scope of application of measures adopted thereunder to EU citizens. Furthermore, the fact that the Directive on long-term residence conferred a right to equal treatment only on lawfully resident TCNs does not in any way prevent the EU from adopting other acts which confer rights on TCNs for the purpose of achieving the individual objectives of such acts.\(^{132}\)

The Court noted that the act in question in the instant case, the employer insolvency Directive, does not in any way exclude TCNs from its scope. Neither does it permit Member States to make such an exclusion. While accepting that the Directive afforded discretion to the Member State in defining the term ‘employee’, the Court went on to note that the social objective of the Directive was to secure a minimum level of protection to employees in the event of employer insolvency and that disqualifying irregular TCNs from qualifying as employees would be contrary to this objective. The Court thus held that the Directive precludes national legislation which does not entitle

\(^{130}\) Article 137(2) EC (now 153 TFEU).

\(^{131}\) Tümer supra n 128 at para 31.

\(^{132}\) Ibid. at paras 32-33.
unlawfully present TCNs to be regarded as employees with the right to insolvency benefit.133

Like Metock and Zambrano, Tümer thus provides a salient illustration of the potential of EU law to secure the rights of irregular migrants in the absence of sufficiently robust protection regimes at the Member State level. Tümer also opens up a vista of positive possible future developments in the field of EU law protection of irregular migrants’ rights. The two key elements to which the Court had regard in its judgment were that the legislation in question did not expressly exclude TCNs from its scope, nor permit Member States to do, and that such an exclusion would be contrary to the social objective of the legislation. These are conditions which are likely to be satisfied by a very wide variety of EU acts in various fields of EU law with the result that TCNs, regardless of their migration status, may successfully rely on them for the protection of their rights.

C. Codification of Irregular Migrants’ Rights through the Case Law of the Court of Justice of the European Union on the Return Directive

The Return Directive has given rise to a significant body of case law in which the CJEU has clarified the scope and substance of the rights and safeguards conferred on irregular migrants by this signature piece of EU legislation. Since the entry into force of the Directive in January 2009 the CJEU has delivered over a dozen judgments interpreting its provisions, with a further four rulings pending at the beginning of 2015. What follows is not an exhaustive catalogue of CJEU jurisprudence concerning the Directive, but rather an illustration of how the Court has in some cases interpreted the provisions of the Directive so as to defend and advance the rights of irregular migrants while significantly restricting the scope of Member State activity in detaining and criminalising such migrants.

133 Ibid. at paras 35-36 and 42-46.
(i) Safeguards for irregular migrants in detention pending removal

The first decision of the CJEU concerning the Return Directive dealt with detention under Article 15 of the Directive and was delivered in the Kadzoev case in accordance with the urgent preliminary ruling procedure. Kadzoev, a Chechen, was apprehended by Bulgarian law enforcement officials near the border with Turkey in October 2006. Shortly afterwards, a deportation order was issued against him and he was placed in detention pending the obtainment of travel documents. This gave rise to a request for preliminary reference from the administrative court in Sofia in 2009 concerning Mr. Kadzoev’s continued detention. In its ruling the CJEU, sitting as a Grand Chamber, held that a TCN who is in detention pending removal must be immediately released once there is no reasonable prospect of removing him,134 and that there are no circumstances which justify detention beyond the maximum period sanctioned by the Directive, not even where the TCN ‘is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and not accommodation or means supplied by the Member State for that purpose’.135 This is certainly an important confirmation of safeguards for unlawfully present TCNs, but the ruling in Kadzoev also gives rise to questions as to what should happen once a TCN whose expulsion cannot be effected is released from detention. The judgment, however, is silent on this point.

If upon release from detention the TCN is still subject to return then certain safeguards will continue to apply, including provision of emergency health care and respect of family unity with

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134 C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov) [2009] ECR I – 11189 at para 63 (This of course is simply a re-statement of the requirement that is clearly contained in Article 15(4) of the Return Directive).

135 Ibid. at para 68.
family members present on the territory of the Member State.\textsuperscript{136} While Member States may at any
time regularise the stay of such TCNs according to Article 6(4), such a decision would seem to be entirely at the discretion of Member States. It is thus conceivable that a Member State may decide that, while there is no reasonable prospect of removal in the immediate future, the situation is likely to change such as to allow removal at some future point. The Member State may therefore prefer to maintain the removal order, which entails certain minimal safeguards, rather than regularising the status of the TCN in accordance with Article 6(4).

The more recent \textit{Mahdi}\textsuperscript{137} ruling was also delivered in response to a request from a Bulgarian administrative court concerning Article 15 of the Directive and was similarly processed in accordance with the urgent preliminary ruling procedure. Mr. Mahdi was a Sudanese national who following his arrest in Bulgaria for failure to produce valid identity documents was issued with a deportation order and placed in detention pending removal. The CJEU re-iterated its statement in \textit{Kadzoev} that the absence of a reasonable prospect of removal requires a TCN to be immediately released,\textsuperscript{138} and similarly failed to indicate what should happen to a migrant who recovers her liberty in this way.\textsuperscript{139} The Court noted that the purpose of the Directive is not to regulate the conditions of residence of irregular migrants in respect of whom it has not been possible to implement a return decision.\textsuperscript{140} This means that Member States in some cases are obliged to allow irregular migrants remain at liberty on their territory but are not required to grant them an authorisation conferring a right to stay, leaving such migrants in a precarious and unsatisfactory

\textsuperscript{136} Return Directive, Article 14.

\textsuperscript{137} C-146/14 PPU \textit{Bashir Mohamed Ali Mahdi} 5 June 2014.

\textsuperscript{138} Ibid. at para 59.

\textsuperscript{139} Ibid. at para 89.

\textsuperscript{140} Ibid. at para 87.
state of legal limbo.

Given the implicit aim of the Directive to eliminate the presence of irregular migrants in the EU, it is surely not too fanciful to argue that Member States are under an obligation to either return or regularise unlawfully resident migrants. The release from detention of non-removable irregular migrants who have no migration status could be argued to undermine the effectiveness of the Directive. This is a line of argument that the CJEU may be asked to consider in future cases, with an endorsement by the Court having an impact on the situation of irregular migrants that would be difficult to overstate.

*Mahdi* did, however, see the Court engage in the substance of judicial review of detention under the Directive. The Directive allows Member States to detain irregular migrants pending removal on the order of administrative or judicial authorities, when no other less coercive measures would be effective, for an initial maximum period of six months. This period of detention may be extended for a further period of a maximum of 12 months when removal cannot be effected due to a lack of cooperation by the migrant in question concerned, or due to delays in obtaining the necessary documentation from third countries, but such extension must be subject to the supervision of judicial authorities, and not an administrative authority.

The Court in *Mahdi* ruled that when considering an application for extension of the initial period of detention, the judicial authority must engage in an in-depth case-by-case examination as to whether detention should be extended or instead replaced with a less coercive measure or, indeed, whether the TCN concerned should be released. The judicial authority also has ‘power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be
submitted to the judicial authority in the course of the proceedings’. Thus the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned.

The CJEU also found that the Directive precluded the Bulgarian legislation allowing the initial six-month period of detention to be extended solely because the migrant in question has no identity documents. It is necessary instead for the judicial authority to undertake an individual assessment of the case to ascertain whether a less coercive measure may be applied effectively to the TCN or whether there is a risk of him absconding.

While the Directive provides that the initial period of detention can be prolonged only in the event of lack of cooperation by the migrant in question or due to delays in obtaining the necessary documentation from third countries, the CJEU held that an absence of identity documents does not in and of itself constitute such a ‘lack of cooperation’ justifying extension of the period of detention. It is instead for the national judicial authority to determine whether the TCN’s conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct.

Any decision concerning the extension of the detention period must, as in the case of the initial detention order, be in writing, with reasons being given in fact and in law so as to allow the

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141 Ibid. at para 64.
142 Ibid. at para 62.
143 Ibid. at para 74.
144 Ibid. at para 85.
judicial authority to effectively carry out the review of the legality of the decision.\textsuperscript{145} \textit{Mahdi} thus mandated a robust judicial supervision of the ability of Member States to extend the detention of irregular migrants subject to a removal order beyond the initial period of six months.

(ii) Curbing the criminalisation of irregular migrants

The CJEU has interpreted the Directive in a number of rulings in a way which severely limited efforts at the Member State level to criminalise irregular migration. \textit{El Dridi},\textsuperscript{146} the second ruling from the CJEU on the Return Directive, concerned a TCN who unlawfully entered and remained in Italy. When an order requiring his removal was issued there were no available places for him at a detention facility and so he was required to leave Italy within five days. Following his failure to depart from Italy a one-year prison sentenced was imposed on El Dridi pursuant to Italian legislation. The CJEU subsequently found that Member States may not provide for a custodial sentence solely on the ground that an unlawfully staying TCN has not complied with an order to leave the national territory within the time limit specified in the order. Such a penalty would be at variance with the Return Directive’s objective of establishing an effective policy of removal and repatriation of unlawfully present TCNs as it would delay enforcement of the return decision. Thus rather than imposing criminal penalties, Member States must seek to effect the return decision.\textsuperscript{147} Such penalties would also be at odds with Article 4(3) TEU, to which the CJEU adverted, which provides that pursuant to the principle of sincere cooperation, Member States shall take any appropriate measure to ensure fulfilment of the obligations resulting from Directives and refrain

\textsuperscript{145} Ibid. at paras 44-45.

\textsuperscript{146} C-61/11 PPU \textit{Hasen El Dridi} [2011] ECR I-3015

\textsuperscript{147} Ibid. at paras 58-59.
from any measure which could jeopardise the attainment of the objectives pursued by Directives.\textsuperscript{148}

Invoking the principles of effectiveness and sincere cooperation, the Court thus held that Member States may not impose a criminal prison sentence on an irregularly staying TCN during the return procedure solely on the basis of unlawful stay. However, where application of the removal measures mandated by the Return Directive have not led to the removal of the TCN against whom they were issued then Member States are free to adopt criminal law measures aimed inter alia at dissuading such migrants from remaining unlawfully on those States’ territory.\textsuperscript{149}

The CJEU continued to resist the criminalisation of irregular migrants in the next ruling it delivered on the provisions of the Return Directive. In Achughbabian,\textsuperscript{150} which concerned an Armenian citizen who had was issued with an expulsion order by the French authorities, the Court re-iterated and elaborated on the counter-criminalisation principles articulated in El Dridi. In Achughbabian the German and Estonian governments had argued that while, as is clear from El Dridi, a term of imprisonment may not be imposed during the removal procedure, Member States may in fact sentence an irregularly staying TCN to a term of imprisonment before carrying out the removal of that person in accordance with the Directive.\textsuperscript{151} The CJEU did hold that TCNs may be detained for the purpose of determining whether their stay is lawful, but such detention may last only for a brief period and once irregular stay is determined a return decision must be adopted.\textsuperscript{152} The Court rejected the argument of the Estonian and German governments, however, as national

\textsuperscript{148} Ibid. at para 56.

\textsuperscript{149} Ibid. at paras 52 and 60.

\textsuperscript{150} C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne [2011] ECR I-0000.

\textsuperscript{151} Ibid. at para 44.

\textsuperscript{152} Ibid. at para 31.
legislation imposing criminal sanctions on TCNs prior to the return procedure solely on the basis of unlawful entry or stay, as such sanctions would delay removal and thus undermine the effectiveness of the Directive.\textsuperscript{153} The Court did hold that criminal sanctions may be imposed, subject to compliance with fundamental rights, on TCNs to whom the Directive’s return procedure has been applied and who nonetheless continue to stay unlawfully in the territory of a Member State without any justified ground for non-return.\textsuperscript{154}

Thus Member States may criminally penalise irregular migrants whose removal has not been effected by application of the full rigours of the Return Directive, namely the coercive measures mandated by Article 8 of the Directive and the maximum period of pre-removal detention sanctioned by Article 15 of the Directive, where there is no justification for non-return of the TCN in question.

The Court, however, provides no guidance as to what may or may not constitute a justified ground for non-return. Presumably, if non-return is a direct result of lack of cooperation of the TCN in question, then there is no justified ground for non-return and criminal sanctions may be imposed. But in cases where non-return results from a lack of cooperation with a country of origin or transit, the non-return of the TCN is presumably justified and criminal sanctions may not be imposed on her solely on the ground of her continued unlawful stay. Member States may, in such situations, regularise the status of such immigrants, but are under no obligation to do so and the Court so far has provided little guidance as to the treatment to be accorded to irregular migrants for whom there are justified grounds for non-return.

\textsuperscript{153} Ibid. at para 45.

\textsuperscript{154} Ibid. at paras 48-49.
(iii) Upholding the requirement of specialised detention facilities for irregular migrants facing expulsion

The CJEU, sitting as a Grand Chamber, interpreted the Directive’s provisions concerning the conditions of detention for the first time in the cases of Bero and Bouzalmate\textsuperscript{155} and Pham.\textsuperscript{156} Article 16(1) provides that detention shall take place in specialised detention facilities. By way of derogation, where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, TCNs are to be kept separated from ordinary prisoners. Ms. Bero, Mr. Bouzalmate and Ms. Pham, however, were detained in prisons in different parts of Germany, with only Mr. Bouzalmate being kept separated from ordinary prisoners.

In Germany migration detention for the purposes of removal comes within the remit of the 16 individual federated states, or Länder, and the referring court asked whether the fact of the absence of specialised detention facilities in the Länder responsible for Ms Bero and Mr. Bouzalmate could justify their detention in ordinary prisons pending their removal. The CJEU ruled that the derogation contained in Article 16(1), concerning situations where Member States cannot provide accommodation in a specialised detention facility, must be interpreted strictly and was not applicable in the instant case: irregular TCNs who are being detained pending their removal must be kept in a specialised detention facility even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.\textsuperscript{157}

\textsuperscript{155} C-473/13 and C-514/13 Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve 17 July 2014.

\textsuperscript{156} C-474/13 Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik 17 July 2014.

\textsuperscript{157} Bero and Bouzalmate supra n 155 at para 32.
In the case of Ms. Pham, who had consented to being accommodated in a prison together with ordinary prisoners in order to have contact with her compatriots, the Court held the obligation requiring irregular TCNs to be kept separated from ordinary prisoners constitutes a substantive condition for that detention which must be observed in order for detention to be consistent with the Directive.\textsuperscript{158}

While these rulings concerning Article 16(1) leave open the question as to when a Member State might successfully claim it cannot provide accommodation in a specialised detention facility, thus legitimately invoking the derogation to resort to prison accommodation,\textsuperscript{159} the CJEU has clearly articulated a staunch defence of the specific detention conditions which are owed to irregular migrants facing deportation. The judgments bring into focus the Member States whose legislation does not require a separation of migrant detainees and ordinary prisoners\textsuperscript{160} and highlight once again the capacity and potential for EU law and the CJEU to roundly vindicate the rights of irregular migrants.

More generally, the jurisprudence of the CJEU concerning the Return Directive illustrates a number of important developments in relation to EU migration policy and the AFSJ more broadly. Firstly, migration is one of the policy fields of the AFSJ which has benefited from the urgent

\textsuperscript{158} Pham supra n 156 at para 21.

\textsuperscript{159} For more on this see the Opinion of Advocate General Bot in C-473/13 and C-514/13 Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve 30 April 2014, at paras 127-136.

\textsuperscript{160} Communication from the Commission to the Council and the European Parliament on EU Return Policy (COM)2014 199 final at 18.
preliminary ruling procedure, with the procedure being used in the Kadzoev, El Dridi and Mahdi cases. A number of the rulings concerning the Return Directive were delivered in response to a request for a preliminary ruling from a non-last instance court, evidencing the impact of the Treaty of Lisbon on the protection of the rights of irregular migrants. Finally, the case law developing around the application of the Return Directive provides an illustration of how the CJEU is constraining domestic migration law – often to the benefit of irregular migrants - and contributing to the ever greater movement toward a common EU migration policy.

5. CONCLUSION

Irregular migrants are amongst the most vulnerable people in the EU. Their very presence in the host Member State makes them liable to expulsion. The Damoclean sword of deportation which shapes and structures their lives renders them particularly susceptible to exploitation. They will often be afraid to approach the relevant State authorities and services if they fall victim to crime or require medical treatment. By the same token, they may be slow to seek redress through official channels if they are underpaid, unpaid or otherwise exploited or abused by unscrupulous employers. The laws and policies put in place to control migration often have the effect of curtailing access to justice for irregular migrants, leading to an inevitable diminution in the protection of their rights. In the context of the continued refusal of EU Member States to ratify the ICMW, and the concomitant lack of support at the EU level for ratification of this core international human rights instrument, the rights framework sketched in the preceding paragraphs can go some distance to improving the

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situation for the vast majority of migrants who are in an irregular situation in the EU if its enforcement is pursued at the EU and Member State levels.

The examination of EU policy, legislation and case law makes it clear that despite the EU fixation with preventing and reducing irregular migration the EU legal order contains many rights protection provisions for irregular migrants. Furthermore, the entry into force of the Treaty of Lisbon in 2009 has produced a legal landscape which is arguably more conducive than ever before to the protection of irregular migrants’ rights. These features of the AFSJ, coupled with the rights-vindicating rulings increasingly being delivered by the CJEU, illustrate the potential for forging a common EU migration policy which contains a robust regime of rights protection for irregular migrants. Such a policy is essential to the creation of an AFSJ where all people, including migrants, benefit from the effective respect of the fundamental rights enshrined in the Charter.

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