



THE PRAGMATISM OF THE COURT OF JUSTICE ON THE DETENTION OF IRREGULAR MIGRANTS: COMMENT ON *AFFUM*

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ABSTRACT: The recent *Affum* decision (judgment of 7 June 2016, case C-47/15) represents a new step forward in the case law of the Court of Justice on the detention of irregular migrants. The Court, departing from its previous case law in *Achughbabian* and *El Dridi*, adopts a rather pragmatic approach, preferring to stick to a procedural argument (to forbid detention in order to ensure a fast return procedure) rather than indulging in the assessment of the compliance of the detention with fundamental rights. This new approach seems to facilitate the cooperation between the EU level and national administrations. The Court seems, however, driven more by the need to secure the effectiveness of the return procedure rather than the rights of the individuals involved.

KEYWORDS: detention – irregular migrants – fundamental rights – migration – returns – EU.

I. INTRODUCTION

Penalties inflicted over non-EU citizens unlawfully present in the territory of an EU Member State have been for a long time a subject of insurmountable tensions between the EU legal framework and the national administrations in charge of its implementation.¹ Migration policy has been used by various national governments as an instrument to exploit political consensus.² On the other side, it is clear that the recent exac-

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¹ See M. PROVERA, *The Criminalisation of Irregular Migration in the European Union*, in *Centre for European Policy Studies Papers in Liberty and Security*, n. 80, February 2015, www.ceps.eu; V. MITSILEGAS, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, London: Springer, 2014; S. PEERS, *When can irregular migrants be detained in prison?*, in *EU Law Analysis*, 1 May 2014, eulawanalysis.blogspot.it; M. BORRACCETTI, *Il rimpatrio di cittadini irregolari: armonizzazione (blanda) con attenzione (scarsa) ai diritti delle persone*, in *Diritto, Immigrazione e Cittadinanza*, 2010, p. 17 *et seq.*

² See, for instance, the several initiatives on building walls at the external (but sometimes also internal) borders of the EU (Austria, Hungary, and France). More recently, see the referendum proposed in

erbatation of the migration crisis represents a challenge for the current migration policy.³ Cases like *Affum*,⁴ as it frequently occurs in the EU legal order, are the by-product of this tension: on the one hand, restrictions on migration policies have been abused by the national government to build consensus. On the other hand, it is sadly clear that the solutions proposed by the current European Agenda on Migration⁵ are far from reaching the desirable outcome.⁶ As a consequence, it is increasingly difficult for Member States to restrain from the use of conventional deterrence strategies (which have however proved to be ineffective), such as, for instance, imprisonment and detention.⁷

II. THE FACTS OF THE JUDGMENT AND THE CASE-LAW OF THE COURT

Affum is an ordinary story among those of the many non-EU citizens who look for a better life in Europe. Mrs. Affum, a Ghanaian national, has irregularly crossed the border of the EU in a not-well-defined place (most likely, being African, the Mediterranean route), and, as many others, decided to head north, in an attempt to cross the Channel Tunnel. Mrs. Affum was halted by the French authorities on the 22nd of March 2013 in Coquelles, close to the border of the Schengen Area, while travelling on a bus coming from Brussels. She was found without a valid document, consequently apprehended and placed in *garde à vue* by the decision of the local authority under the French legislation in force at the time of the arrest. Such decision was appealed in front of the competent jurisdictions and, ultimately, the French *Cour de Cassation* referred the case to the CJEU for a preliminary ruling.⁸

October 2016 by Viktor Orbán, Prime Minister of the Hungarian Republic, on the acceptance of the relocation plan proposed by the Commission in March 2016.

³ See generally G. CAGGIANO (a cura di), *Scritti sul diritto europeo dell'immigrazione*, Torino: Giappichelli, 2016.

⁴ Court of Justice, judgment of 7 June 2016, case C-471/15, *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai* [GC].

⁵ Communication COM(2015) 240 final of 13 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the European Agenda on Migration.

⁶ On this point, see the considerations in the European Agenda on Migration on the fact that “[t]he EU’s return system [...] works imperfectly” (p. 9). After one year, while some improvement has been reached, the situation remains critical. See generally C. FAVILLI, *La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?*, in *Diritti umani e diritto internazionale*, 2016, p. 405 *et seq.*; G. MORGESE, *Recenti iniziative dell’Unione europea per affrontare la crisi dei rifugiati*, in *Diritto, Immigrazione e Cittadinanza*, 2015, p. 115 *et seq.*

⁷ See the study of the EU Agency for Fundamental Rights, which, considering the ineffectiveness of conventional detention, proposes other solutions. European Union Agency for Fundamental Rights, *Alternatives to detention for asylum seekers and people in return procedures*, 2015, fra.europa.eu.

⁸ According to the information provided for by the Court, Mrs. Affum has been subject to detention for at least 20 days. See *Affum*, cit., para. 31.

The case law of the Court of Justice on the detention of non-EU citizens, albeit recent, is conspicuous.⁹ The first case in which the Court was called to decide on a similar hypothesis of detention was *El Dridi*,¹⁰ in which the Court found the Italian legislation on the criminalization of the illegal stay within the country inconsistent with EU law. Another notable case is *Achughbabian*,¹¹ in which the Court drew similar conclusions about the French legislation establishing criminal sanctions for an irregular stay. In both cases, the Court pointed out in clear terms that a non-EU citizen cannot be imprisoned for the sole fact of being irregularly present in the territory of one of the EU Member States. After these judgments, both Italy and France took the decision to amend their internal legislation. France, however, decided to retain the sanction of detention (*peine d'emprisonnement*) for the irregular crossing of the national border (irregular entry).¹² It is under this rule that Mrs. Affum has been placed under detention, after being apprehended.

III. THE QUESTIONS FOR PRELIMINARY RULING AND THE ARGUMENTS OF THE PARTIES

By its first question the *Cour de Cassation* asked if the situation of a non-EU citizen in transit between two Member States falls under the scope of the Return Directive.¹³ By the second question, the national court asked whether the exception enshrined in Art. 6, para. 3, of the Return Directive, that allows the Member States not to take a return decision if another Member State should take that decision under a bilateral agreement¹⁴ in force before the entrance into force of the Directive in 2009, brings the situation of the non-EU citizen outside the scope of application of the Directive. By the third question, the national court asked in essence whether the sanction of detention for illegal entry provided for by the *Code de l'entrée et du séjour des étrangers et du droit d'asile* complies with EU law

⁹ The Advocate General has summarized the complete list of precedents in his Opinion. See Opinion of the AG Szpunar, delivered on 2 February 2016, case C-47/15, *Affum*, paras 50-58.

¹⁰ Court of Justice, judgment of 28 April 2011, case C-61/11, *Hassen El Dridi, alias Soufi Karim*.

¹¹ Court of Justice, judgment of 6 December 2011, case C-329/11, *Alexandre Achughbabian v. Préfet du Val-de-Marne* [GC].

¹² Art. 621, para. 2, of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*.

¹³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals.

¹⁴ Arrangement between the Government of the French Republic, of the one part, and the Governments of the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, of the other part, concerning the taking charge of persons at the common borders between France and the territory of the Benelux States, signed in Paris on 16 April 1964. The *arrangement* does not appear to be bilateral at first glance. However, the Court, following the interpretation of the Advocate General in his Opinion, seems to consider the Benelux countries as a single entity. See Opinion of AG Szpunar, *Affum*, cit., para. 77.

and with the case law of the Court in *Achughbabian*.¹⁵ The French authorities, on their part, considered that Mrs. Affum was not in an illegal stay within the territory of one of the Member States, but simply *transiting* on a bus and that this was sufficient to escape the application of the Directive. Secondly, they relied on the fact that Mrs. Affum was coming from Belgium. Under an agreement in force between France and the Benelux countries,¹⁶ the State over which the irregular migrant is unlawfully present has the right to send him/her back to the Member State where his/her journey started. According to the interpretation of the French authorities, this agreement was enough to bring the situation outside the scope of application of the Return Directive. Thirdly, the French authorities held that the detention was in compliance with the *Achughbabian* case law as it was a proportionate, dissuasive, and effective penalty for the illegal crossing of the external borders of the EU, pursuant to Art. 2, para. 2, let. a), of the Return Directive and to Art. 4, para. 3, of the Schengen Borders Code.¹⁷ This stance was contrasted by the Commission. In its view, the situation of transit clearly fell under the scope of the Directive, and the agreement in force between Belgium and France did not affect the compliance of the whole return procedure with EU law. The Commission also argued that the Schengen Borders Code was not applicable in this case, as Mrs. Affum was not apprehended while crossing the external border of the EU.

IV. THE REASONING OF THE COURT

IV.1. THE SITUATION OF TRANSIT FALLS UNDER THE SCOPE OF THE RETURN DIRECTIVE

With regard to the first question, concerning the applicability of the Return Directive to situations of transit between two Member States, the CJEU upheld the view of the Commission. The Court apparently found that a different interpretation would not only run counter the purpose of the Directive itself, but it would be sensible to undermine its efficacy, compromising its *effet utile*. The Court also stated that the Directive is applicable regardless of the movement of non-EU citizens, as it applies to every hypothesis of “illegal stay” within the EU territory.¹⁸ This recalls to national authorities that the territorial application of the Return Directive cannot be restricted, as the convergence of national migration policies is a strategic area for the advancing of the process of European integration.

¹⁵ *Affum*, cit., para. 43.

¹⁶ See *supra*, note 14.

¹⁷ Regulation (EC) 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.

¹⁸ *Affum*, cit., paras 47-50.

IV.2. “ILLEGAL ENTRY” AND “ILLEGAL STAY”

The second aspect tackled by the Court deals with the legality, under EU law, of the sanction of detention provided for by Art. 621, para. 2, of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*. After *Achughbadian*, France modified Art. 621, para. 2, in order to delete the crime of “illegal stay” within its territory, but decided to maintain the sanction of detention for the hypothesis of “illegal entry” into French territory.

The Court, however, held that this provision is not compatible with EU law: “[t]he concepts of *illegal stay* and *illegal entry* are closely linked, as such entry is one of the factual circumstances that may result in the third-country national's stay on the territory of the Member State concerned being illegal”.¹⁹ After all, the “illegal stay”, as a condition for applicability of the Return Directive, is a consequence of the “illegal entry”, punished by Art. 621, para. 2, of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*. The Court, however, stated that “illegal entry” and “illegal stay” are the only hypothesis in which the Directive limits the possibility of the Member States to apply certain criminal sanctions: once the return procedure has been concluded, the irregular migrant, who does not comply with the return decision, can be punished, as it happened for instance in the *Celaj* case.²⁰ In this instance, however, it was undisputed that Mrs. Affum was not subject to a return procedure.

IV.3. ART. 2, PARA. 2, LET. A) AND ART. 6, PARA. 3, OF DIRECTIVE 2008/115

Art. 2, para. 2, let. a), of the Return Directive states that Member States can decide not to apply the Directive to persons who are crossing the external border of the European Union. The Court however made it clear that Mrs. Affum has not yet crossed the external border of the EU, as she was apprehended before that border. Accordingly, in the opinion of the Court, the exception of Art. 2, para. 2, let. a), of the Directive cannot be invoked by the French government. Neither could it be argued that the situation was regulated by the agreement in force between France and the Benelux countries. The Court has been clear in stating that the exception in Art. 6, para. 3, of the Return Directive applies only to return decision, and not to the whole procedure. A different interpretation would be considered against the general scope of the Directive, which aims at establishing an effective return procedure, while, on the contrary, the application of the sanction of detention would be likely to slow down the above-mentioned procedure.

¹⁹ *Affum*, cit., para. 60.

²⁰ *Ibidem*, para. 88. See generally E. PISTOIA, *Unravelling Celaj*, in *European Papers*, 2016, p. 705 et seq., www.europeanpapers.eu.

IV.4. ART. 4, PARA. 3, OF THE SCHENGEN BORDERS CODE

One of the most relevant aspects of the decision of the Court in *Affum* is the clarification of the circumstances under which a person can be detained according to Art. 4, para. 3, of the Schengen Borders Code,²¹ thus developing the position previously taken in *Achughbabian*. In the present case, indeed, the Court recalls that the Schengen Borders Code leaves to the Member States the possibility to decide which sanction to apply for the illegal entry inside the territory of the European Union. Detention is not, however, the only option available, and consequently, the Member States cannot rely on this article in order to justify a failure to comply with the Return Directive.²²

V. A NEW PRAGMATISM OF THE COURT?

A relevant development of the *Affum* case is the adoption of a rather pragmatic approach towards the issue of detention of irregular migrants. The Court decided to address the issue of the detention of irregular migrants with a purely procedural argument: among penalties, detention (or imprisonment) is surely the most afflictive for the return procedure, and consequently, it should not be applied to persons who have not committed any violation of the law, except for their own illegal presence within the territory of the Member State. The Court declined to use other arguments: in particular, those based on the EU Charter of Fundamental Rights or on the working documents produced by the EU Fundamental Rights Agency²³ on the use of detention as a last resort.²⁴ The choice seems to indicate that the Court priority was to ensure the fastest implementation of the return procedure. It also seems to suggest that migration policy should become a field in which national authorities should strive for the highest level of cooperation, thus advancing the process of European integration. A good example of the *pragmatism* of the Court can be considered the decision not to quash the clause included in Art. 6, para. 3, of the Directive, that gives priority to agreements in force among MSs before the adoption of the Directive,²⁵ which is an exception to the general approach on the relationship between EU law and agreements concluded before its entry into force.²⁶

²¹ *Affum*, cit., para. 91.

²² *Ibidem*, para. 90.

²³ Report of the Union Agency for Fundamental Rights on *Alternatives to detention for asylum seekers and people in return procedures* (2015). See also European Union Agency for Fundamental Rights Report, *Detention of third-country nationals in return procedures*, 2010, fra.europa.eu.

²⁴ Fundamental rights, for instance, are quoted only once by the Court in the whole judgment. See *Affum*, cit., para. 63. Rather different is the Opinion of the Advocate General. See the Opinion of AG Szpunar, *Affum*, cit., para. 36.

²⁵ Art. 6, para. 3, of the Return Directive: "The Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of

In this sense, the decision of the Court to limit the use of detention to a minimum cannot but be approved. Even if there are time limits for detention, depending on the different national legislations, they can often be protracted much longer than reasonable, affecting the return procedure, while at the same time conditioning the penitentiary system in that State.

While, on one hand, the decision of the Court of Justice not to tackle directly the fundamental rights argument can be welcomed by national administrations, on the other hand, it cannot be excluded that another international human rights jurisdiction will have a say on the very same decision.²⁷ However, in this case, the Court did not seem particularly concerned by this circumstance, as its main priority appears to ensure a fast deployment of the return procedure and to foster the cooperation between national authorities. It is not by chance, perhaps, that this decision was adopted in the middle of the process of adoption of the new Regulation on the European Coastal and Border Guard, which makes a considerable effort in increasing the efficiency of the return procedures.²⁸ The Regulation, which entered into force on the 6th of October 2016, provides for the organization, *inter alia*, of small teams of intervention to be deployed to organize returns.²⁹

entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1”.

²⁶ On this point, see F. CASOLARI, *EU Member States' International Engagements in AFSJ Domain: Between Subordination, Complementarity and Incorporation*, in L.S. ROSSI, C. FLAESH-MOUGIN (dir.), *La dimension extérieure de l'espace de liberté, sécurité et justice de l'Union européenne après le Traité de Lisbonne*, Bruxelles: Bruylant, 2013, p. 27.

²⁷ It cannot be excluded, for instance, that the final decision of the national court will also be brought to the attention of the European Court of Human Rights (once all the internal remedies are exhausted). In this sense, it is important to recall the interaction between the system of protection of fundamental rights of the EU and of the European Convention on Human Rights. While the EU is not a part of the European Convention on Human Rights, the fundamental rights as guaranteed by the Convention constitute, according to Art. 6, para. 3, TEU, general principles of EU law. At the same time, all the 28 EU Member States are also Contracting Parties of the Convention. On this point, see European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 388, where the Strasbourg Court reminds that: “[t]he Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see *Bosphorus*, cit., para. 152). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (*ibid.*, para. 153)”.

²⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC.

²⁹ The European return intervention team, Art. 32 of the new Regulation 2016/1624.

VI. CONCLUSIONS

All in all, *Affum* seems to set the scene on which the many items of the EU agenda ought to be discussed: the reform of the European coastal and border guard; the monitoring of the implementation of the EU – Turkey Statement of 18 March 2016³⁰; the enforcement of the new partnership framework with third countries;³¹ the revision of the Dublin regulation;³² and the new Asylum Agency.³³ Read from this perspective, the Court seems to be ready to take up the challenge proposed by this new framework with an extremely pragmatic approach.³⁴ Will this approach be enough to provide the necessary legal certainty for national authorities as to when the detention of irregular migrants is in compliance with EU law? The judgment seems to bring some light into the picture: while strongly reassuring the duty not to subject irregular migrants to detention before a return decision is issued, it clearly states that detention, under specific and exceptional circumstance, may be admissible; for instance, in the case of a non-EU citizen who refuses to comply with a return decision.

³⁰ European Commission, DG Migration and Home Affairs Report, *Operational implementation of the EU-Turkey Statement*, 2016, ec.europa.eu.

³¹ Communication COM(2016) 385 final of 7 June 2016 from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration.

³² Commission proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final. See also B. NASCIBENE, *Refugees, the European Union and the "Dublin system"*. *The Reasons for a Crisis*, in *European Papers*, 2016, p. 101 *et seq.*, www.europeanpapers.eu.

³³ Commission proposal for a Regulation of the European Parliament and the Council COM(2016) 271 final of 4 May 2016 on the European Union Agency for Asylum and repealing Regulation (EU) no. 439/2010.

³⁴ This pragmatism seems to be confirmed by another recent decision: Court of Justice, judgment of 6 October 2016, case C-218/15, *Gianpaolo Paoletti and Others v. Procura della Repubblica*.