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RETURN DECISIONS AS A MEASURE FOR PROTECTING FREEDOM, SECURITY AND LEGAL SPACE

ATGRIEŠANAS LĒMUMI KĀ BRĪVĪBAS, DROŠĪBAS UN TIESISKUMA TELPAS AIZSARDZĪBAS LĪDZEKLIS

Key words: return decisions, security, protecting freedom, asylum, refugees, Schengen Information System, freedom of movement

Atslēgvārdi: atgriešanas lēmumi, drošība, brīvības aizsardzība, patvērums, bēgļi, Šengenas informācijas sistēma, pārvietošanās brīvība

Summary

In the second quarter of 2023, the total number of non-EU citizens ordered to leave the territory of a European Union Member State was 105 865. This is just the tip of the iceberg. It is almost impossible to determine the exact number of people who no longer have, or even have had, a legal basis to be in the European Union. The Council of the European Union alone adopted the Return Action Programme in 2002, calling on the Member States to cooperate in the practical return process by agreeing on common standards for the adoption of a return decision. The aim of this publication is to examine the legal termination of illegal stay in the European Union, assessing the timeliness of the creation of the legal framework and the possibilities of using the Schengen Information System to protect freedom of movement.

Kopsavilkums

2023. gada otrajā ceturksnī kopējais to trešo valstu pilsoņu skaits, kuriem noteikts pamest kādas Eiropas Savienības dalībvalsts teritoriju, bija 105 865. Un tas ir tikai aisberga redzamā daļa. Precīzi noteikt cilvēku skaitu, kuriem vairs nav vai nemaz nebija tiesiskā pamata atrasties Eiropas Savienībā, gandrīz nav iespējams. Eiropas Savienības Padome vien 2002. gadā pieņēma Atgriešanas rīcības programmu, aicinot dalībvalstis vienoties sadarbībā praktiskās atgriešanas procesā, vienojoties par kopējiem standartiem atgriešanas lēmuma pieņemšanā. Šīs publikācijas mērķis ir izpētīt nelikumīgas uzturēšanās izbeigšanu tiesiskā kārtībā Eiropas Savienībā, izvērtējot tiesiskā regulējuma tapšanas savlaicīgumu un Šengenas informācijas sistēmas izmantošanas iespējas pārvietošanās brīvības aizsardzībā.

Introduction

Return policy is an integral and vital component of the fight against illegal immigration. Trafficking in human beings has become a substantial area of profit for organised crime and, unfortunately, this has been facilitated by the diversity of legal frameworks in the Member States, both in substantive law and procedural law. As a result, the common legal space has for a long time failed to provide for a uniform approach to the return, expulsion, provisional arrest and readmission of illegally staying third-country nationals. This situation was exploited by third-country nationals when they arrived in a European Union country, even admitting that they would try to obtain asylum in another European country if, for example, they were refused asylum in Latvia.¹

The concept of a return decision was introduced into the European Union law in 2008 with the adoption of the Return Directive, in fact recognising an existing threat to one of the four fundamental freedoms. The aim of this publication is to examine the legal termination of illegal stay in the European Union, assessing the timeliness of the creation of the legal framework and the possibilities of using the Schengen Information System to protect freedom of movement. To achieve the aim, the legal framework, case law and expert opinions will be studied. The study addresses the following questions: Are return and expulsion decisions the necessary means to ensure the protection of freedom of movement within the EU, proportionate to the risks? How is the functionality of the Schengen Information System being strengthened in the search for solutions to stop illegal migration?

Freedom of movement within the European Union is one of its greatest achievements, a fundamental value as enshrined in the basic treaties. Today, however, it is increasingly fragile and under threat from the pressure of illegal migration. Nowadays, the causes of illegal migration are not limited to escaping from natural or man-made disasters.

1. Freedom of movement

Freedom of movement has been an integral part of the core values of European economic cooperation, free movement of goods and the development of economic integration since the Treaty of Rome in 1957. Freedom of movement was provided for in Article 3 of the Treaty establishing the European Community. The Treaty on the Functioning of the European Union from 2007 stipulates: “Freedom of movement shall entail the abolition of any discrimination based on nationality between workers in the Member States as regards employment, remuneration and other conditions of work and employment.” Thus, freedom of movement was given

¹ ECHR judgment of 21 July 2015 in Case NASSR ALLAH v Latvia (application No. 66166/13). Available in English: <https://hudoc.echr.coe.int/?i=001-156425> [viewed 08.10.2023.]

a role in economic development. In this Treaty, “freedom of movement” is as one of the fundamental rights and economic freedoms to be ensured by the Member States to promote economic integration and the development of a single market.

Freedom of movement, as one of the fundamental aspects of the agreement, is enshrined in the Schengen Agreement of 14 June 1985. The first signatories of this Agreement were Belgium, Germany, France, Luxembourg and the Netherlands, which agreed to gradually abolish controls at their internal borders and introduce freedom of movement for all citizens of the signatory countries, other European Union Member States and some other countries. The Schengen Information System was developed as a compensatory mechanism for the abolition of border controls.

Freedom of movement is not unconditional and the legal framework provides for the categories of persons for whom it is intended, namely: “...persons enjoying the right of free movement under Union law means:

(a) Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council (1) applies;

(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens.”²

Freedom of movement is a key element in achieving the objectives of the European internal market and the European Union, and it gives citizens the right to live, work and travel in the Member States without discrimination.

Third-country nationals, on the other hand, must comply with border control procedures that guarantee the right of entry. In other situations, the laws and regulations of the Member States and the European Union regulate asylum procedures and temporary or permanent residency procedures. For a long time, there were no uniform rules for the conditions and procedure of granting asylum in the European Union.

For twenty-three years, freedom of movement has been threatened as third-country nationals, voluntarily leaving their countries to resettle in the European Union for economic reasons, have applied for asylum and refugee status. The situation has developed in such a way that an unspecified number of people are currently residing illegally in the European Union.

The presence of a third-country national on the territory of a Member State who does not comply with the entry conditions of the Schengen Borders Code or other conditions for residence or permanent stay in that Member State shall be

² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0399-20190611> [viewed 08.10.2023.]

considered illegal. Residence in a Member State of the European Union is allowed only legally, however, the real situation shows that many third-country nationals are still present in the European Union, even though there is no a legal basis for this anymore, or there has never been any at all.

This could include the following categories of people: persons whose residence permit or visa has expired; persons whose residence permit or visa has been cancelled; rejected asylum seekers; asylum seekers who have received a decision terminating their right to asylum status; persons who have been refused entry at the border; persons apprehended for illegal border crossing; irregular migrants apprehended on the territory of a Member State; persons who have no right of residence in the Member State where they are apprehended; persons staying on the territory of a Member State for a period fixed for voluntary departure; persons whose removal has been suspended.³

In the second quarter of 2023, the total number of non-EU citizens ordered to leave the territory of a European Union Member State was 105 865. It was down by 5% compared with the first quarter of 2023, while an increase of 9% was observed compared with the same period of 2022. Among the European Union Member States, the greatest number was reported by France (34 810 persons), followed by Germany (10 600 persons) and Greece (7 095 persons). These three European Union Member States altogether accounted for almost half (52 505 persons) of all third-country nationals ordered to leave during the second quarter of 2023.⁴

The causes of illegal immigration today are not limited to fleeing natural or man-made disasters, as in some cases people and their fundamental rights are used as a weapon in the hands of others. However, “but only one motive has been singled out to denote a refugee [...] because of a well-founded fear that she or he is being persecuted.”⁵ Therefore, persons such as victims of famine or natural disasters without a reasonable fear of persecution should be excluded from the category of refugees. Unfortunately, it is quite difficult to distinguish between economic and political measures in the migrants’ country of origin, as the present-day geopolitical events make it difficult to clarify the situation and to cooperate.

³ Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338> [viewed 01.11.2023.]

⁴ Returns of irregular migrants – quarterly statistics. Eurostat, 2023. Available in English: https://ec.europa.eu/eurostat/statistics-explained/index.php?title>Returns_of_irregular_migrants_-_quarterly_statistics#Non-EU_citizens_ordered_to_leave [viewed 01.11.2023.]

⁵ Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees. Geneva, 2019. Available in English: <https://www.unhcr.org/sites/default/files/legacy-pdf/5ddfd47.pdf> [viewed 01.11.2023.]

In order to highlight the extent of the challenges of migration in the EU, the author provides a brief overview of the data on asylum applications collected by the European Union Agency for Asylum (EUAA):

- In August 2023, EU+ Norway and Switzerland countries received some 100 000 asylum applications or an 18% increase compared to the same month in 2022.
- Syrians lodged by far the most applications in August 2023: more than 18 000 in total which is up by 53% compared to the same time last year.
- Germany, France, Spain and Italy received two thirds of all applications in the EU+ Norway and Switzerland.
- Cyprus received the most asylum applications in August 2023 – 1 for every 1 000 inhabitants.
- The EU+ Norway and Switzerland recognition rate, the percentage of decisions granting either refugee status or subsidiary protection, increased slightly – to 44%. At the end of August 2023, there were about 4.2 million beneficiaries of temporary protection of persons who fled Ukraine following Russia's full-scale invasion. Czechia hosted the most beneficiaries of temporary protection – 35 for every 1 000 inhabitants.⁶

The data are preliminary, because the increase in illegal migration has necessitated changes to the legal framework⁷ on collecting statistical data. These amendments were introduced only in 2020.

To protect their territory from third-country nationals entering the European Union illegally en masse, the Member States are increasingly exercising the right to reintroduce border controls at internal national borders. Such a decision threatens the common values of the European Union, such as freedom, the rule of law and security. The issue has not arisen today or yesterday, but the lack of consensus among the Member States on asylum issues, as well as different interpretations of the law, have alone complicated the situation. It is clear that the Member States sharing external borders with third countries have long been in an unequal situation with those sharing borders with the Member States of the European Union alone, but the above data show that the most popular countries for asylum seekers are Germany, France, Spain and Italy.

Unlike other countries of the European Union, Latvia only relatively recently has been confronted with the issue of mass attempts to cross its borders illegally. According to publicly disclosed data, the State Border Guard has prevented 13 000 attempts to illegally cross the state border. The situation is protracted and criminal activities are periodically detected. In 2022, 14 criminal proceedings were initiated in Latvia for illegal movement of a person across the state border; five

⁶ Latest Asylum Trends. European Union Agency for asylum, 2023. Available in English: <https://euaa.europa.eu/latest-asylum-trends-asylum> [viewed 01.11.2023.]

⁷ Regulation (EU) 2020/851 of the European Parliament and of the Council of 18 June 2020 amending Regulation (EC) No. 862/2007 on Community statistics on migration and international protection. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0851> [viewed 01.11.2023.]

criminal proceedings were initiated for providing an opportunity to stay illegally in the Republic of Latvia.⁸ The legislator's solution to influence the situation was to improve the provisions of the Criminal Law by establishing harsher penalties.

From 1998 to 2023, 4142 asylum seekers have applied for international protection in Latvia. Refugee status was granted to 521 persons, and subsidiary protection status to 621 persons.⁹

These data and the current situation at the external borders of the European Union show that the number of asylum seekers will not decrease in the near future. In his publication "The Right to International Protection in the Republic of Latvia. Mission Possible", E. Oļševskis points out: "the issue of asylum seekers and refugees is a matter of granting international protection and human rights, the epicentre of which is the human being, not the state".¹⁰ However, this view cannot be fully supported, as migration processes are directly linked to national policies and the ability to ensure internal order and to cooperate with third countries on readmission.

"Millions of people across the world experience forced displacement as a result of violent conflict, persecution, abuse of human rights, natural disasters and deteriorating ecosystems. Recurrent cycles of displacement are frequently explained by the intricate interaction of several underlying causes. Displaced persons may seek refuge for themselves and their families within their home country (internally displaced persons) or by crossing international borders (refugees)."¹¹ Hence, E. Oļševskis states that "... it would be reasonable to argue that a person has the right to claim asylum, not the subjective right to asylum in any situation. It is also justified and legitimate for a state to aim to protect its borders, control migration flows and guarantee security on its territory. [...] Therefore, asylum cases no longer are, and will no longer be an internal [political] matter to be decided exclusively within the Ministry and its subordinate authorities."¹²

2. Termination of illegal stay in the European Union

Before giving explanations what is meant by illegal residence in the European Union, the author refers to the definitions of refugees and asylum seekers

⁸ Kriminālā statistika [Criminal statistics]. Available in Latvian: <https://www.ic.iem.gov.lv/lv/kriminala-statistika> [viewed 11.09.2023.]

⁹ Patvēruma meklētāju statistika līdz 2023. gadam [Statistics of asylum seekers until 2023]. Available in Latvian: <https://www.pmlp.gov.lv/lv/patveruma-mekletaju-statistika-lidz-2023-gadam> [viewed 11.09.2023.]

¹⁰ Oļševskis E. Tiesības uz starptautisko aizsardzību Latvijas Republikā. Misija ir iespējama [The Right to International Protection in the Republic of Latvia. Mission Possible]. *Jurista Vārds*, 28.02.2017., Nr. 9 (963), 18.–24. lpp.

¹¹ Asylum report 2023. Annual Report on the Situation of Asylum in the European Union. European Union Agency for Asylum (EUAA). Available in English: <https://euaa.europa.eu/asylum-report-2023> [viewed 01.10.2023.]

¹² Oļševskis E. 2017, 18.–24. lpp.

formulated in international instruments. Refugee: An individual who has fled a country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Asylum is a legal status or protection granted by a government to individuals who are seeking refuge from persecution or harm in their home country. It is typically offered to those who can demonstrate a well-founded fear of persecution based on factors such as their race, religion, nationality, political opinion, or membership in a particular social group. Asylum allows these individuals to live in the country that grants them asylum and provides a safe haven from the threats they face in their home country. This protection is usually granted to people who are outside their home country and apply for asylum in another country, and it is based on international and national laws and treaties related to refugees and asylum seekers.¹³

Refugee status or asylum may be granted to people who have been persecuted or fear that they will be persecuted on account of race, religion, nationality, and/or membership in a particular social group or holding a political opinion.¹⁴

Irregular migration could certainly be subject to quantitative (number of migrants), geographical (third countries concerned and the Member States affected) and qualitative (motivation for migration) fluctuations.¹⁵

The Schengen Borders Code lays down the conditions for crossing and entering the external borders of the European Union.¹⁶ Under the procedural arrangements, the main condition is that external borders may only be crossed at border crossing points and during certain working hours. Despite the strict border crossing regime, the external borders of the European Union are crossed illegally by sea and land. An unspecified number of people are staying illegally in the Member States.

Taking into account the inability of the Member States to deal separately with the control of legal residence and the growing interest of third-country nationals in entering the European Union illegally, it was necessary to introduce common standards and rules on return conditions and procedures, as diverging practices were not effective in the common legal space. Therefore, there is a clear obligation for the Member States to ensure that the illegal stay of third-country nationals is terminated through fair and transparent procedures.

¹³ Convention and Protocol Relating to the Status of Refugees. Available in English: <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees> [viewed 01.10.2023.]

¹⁴ Refugees and Asylum. Available in English: <https://www.uscis.gov/humanitarian/refugees-asylum> [viewed 11.10.2023.]

¹⁵ Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union. Brussels, 2.3.2017 Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0200> [viewed 11.08.2023.]

¹⁶ Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0399-20190611> [viewed 21.10.2023.]

The concept of return decision was introduced with the adoption of the Return Directive of the European Union 2008/115/EC.¹⁷ This Directive was adopted in 2008 and officially published in the Official Journal of the European Union on 24 July 2008. At the time of its adoption, the concept of return decision and related provisions were incorporated in this Directive and became the legal framework for the return and removal of third-country nationals, respecting fundamental rights, ensuring refugee protection and human rights. The Return Decision thus aims to regulate and provide procedures and guarantees for the return process of irregular migrants in accordance with the common standards of the European Union, with particular respect for human rights.

The need for a Directive was determined by the need for clear, transparent and at the same time fair rules on return, expulsion, coercive measures, provisional arrest and readmission, fully respecting the human rights and fundamental freedoms of the persons concerned. As a result, the Directive lays down the rules that illegal stay must be terminated through a fair and transparent procedure; supports the principle of voluntary return by including a general rule that, in principle, a “time limit for departure” must be set; a harmonised two-stage procedure is established, with the first stage being the adoption of a return decision and, where appropriate, the second stage being a removal order, thus bringing the current divergent systems of the Member States into line to a certain extent. While ensuring respect for fundamental rights, the Directive limits the use of coercive measures, subject to the principle of proportionality, and establishes basic guarantees for the implementation of forced return; limits the use of provisional arrest (maximum period of six months), subject to the principle of proportionality, and lays down basic guarantees for its application.

Without an in-depth analysis of the entire return process, the author draws attention to the stipulation contained in the Directive that the return decision must comply with the following: that each case is dealt with separately; the best interests of the child should be taken into account; family life should be taken into account; the health of the third-country national concerned should be taken into account; the principle of non-refoulement should be respected.

The principle of non-refoulement means that a Member State may not expel or return a person to its territory in any way if it is likely that the person will be subjected to persecution, the death penalty, torture or other inhuman or degrading treatment or punishment there, even if the person is hypothetically in an irregular migration situation. In the context of asylum, the principle of non-refoulement includes the requirement to ensure the availability of fair and effective asylum procedures to determine whether or not a person should be granted international

¹⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115> [viewed 09.11.2023.]

protection.¹⁸ This is still the most difficult phase, where the discretion of the asylum authority is evident. On the one hand, the strict requirement to respect human rights and, on the other, a fair hearing, as asylum seekers in the Member States are provided with support, social assistance, access to employment. There are still extremely different conditions and circumstances in the Member States.

The Return Directive requires the Member States to ensure respect for human dignity, the rights of the child, as well as respect for family life in the return process. It also requires that access to legal aid and, where necessary, medical care is ensured during return procedures, and that minors have access to basic education, depending on the length of their stay.

Any third-country national staying illegally on the territory of a Member State is subject to a return decision. Article 3(3) of the Return Directive provides for an obligation to return voluntarily or forcibly to:

- 1) a country of origin of the person, or
- 2) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
- 3) another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

The Directive provides that the Member States may adopt individual administrative or judicial decisions or acts providing for expulsion. At the same time, the Member States have a wide margin of discretion as to the manner in which a return decision may be taken. For example, in Latvia Section 41 of Immigration Law¹⁹ stipulates: “If it is established that a foreigner is staying illegally in the Republic of Latvia, the voluntary return decision shall be issued to him or her”.

The Return Directive allows the Member States to detain irregular migrants only under certain conditions and time limits, and it lays down rules on expulsion and removal. There is an important aspect here that is most closely linked to human rights – the restriction of liberty.

Article 15 of the Directive states that third-country nationals subject to return procedures may be kept in detention only “for a short a period as possible” and “maintained as long as removal arrangements are in progress and executed with due diligence” if there is a risk of absconding, or if he or she is avoiding or hampering the preparation of return or the removal process. Third-country nationals held in detention should be treated with humanity and dignity, respecting their fundamental rights under international and national law. Without prejudice to initial detention by law enforcement authorities governed by national law, such detention should normally be carried out in premises specifically designated for that purpose.

¹⁸ Judgment of the Supreme Court of the Republic of Latvia of 28 November 2022 in Case No. SKA-1117/2022. Available in Latvian: <https://www.tiesas.lv/tiesu-nolemumi> [viewed 01.10.2023.]

¹⁹ Immigration law. Available in English: <https://likumi.lv/ta/id/68522-imigracijas-likums> [viewed 01.10.2023.]

The return decision must contain a statement relating to the illegality of stay and the imposition of the obligation to return, and may additionally include elements such as an entry ban, a period for voluntary departure, the designation of the country of return.

3. Legal uncertainty in combating illegal immigration

Although the need for a single asylum system and a coherent approach to combating illegal immigration were already achieved at the Tampere European Council in 1999, the return procedures and coherence of decisions is still being further developed. Despite the adoption of the Return Directive in 2008 and the transposition obligation having been mostly fulfilled already in 2010, there was no system for exchanging information on return decisions issued by the Member States under the provisions of Directive 2008/115/EC. This meant that national authorities were not informed of return decisions issued by other Member States, including when migrants were detained when they were illegally moving within the European Union or crossing the territories of the Member States. Consequently, the Member States were forced to start the return procedure anew, thus prolonging the illegal stay in the Member State.

Migration issues are closely linked to cross-border crime, external border security, counter-terrorism and, given the constant trend towards increased migration, it is of great importance to ensure timely exchange of information to address these challenges. Nowadays, the Schengen Information System is a proven tool for effective cooperation between immigration, police, customs and judicial authorities in the Member States. Given that return decisions are not always carried out voluntarily by and on behalf of the individuals, and that the use of detention is limited, respect for human rights requires that all authorities carrying out checks on individuals have access to information on return decisions.

The Schengen Information System is a compensatory mechanism after the abolition of border controls and a guarantee of freedom of movement between the Member States. The system shall record data on wanted persons, persons who have no right to enter or stay in the Member States, missing persons, missing children and objects that have been stolen, lost or misappropriated, in addition to indicating the necessary action by the competent authorities to identify the person or object concerned. In order to improve the application of the Schengen Information System and strengthen its legal and practical capacity, Regulation (EU) 2018/1862, Regulation (EU) 2018/1861 and Regulation (EU) 2018/1860 were adopted on 28 November 2018. The Regulations lay down rules on the use of the system for border management, police and judicial cooperation in criminal matters and the return of illegally staying third-country nationals. Thus, Regulation (EU) 2018/1860 is binding for the implementation of return decisions and aims to establish the exchange of information on return decisions pursuant to the Directive 2008/115/EC in order to facilitate their enforcement

and to monitor compliance with the return obligation by illegally staying third-country nationals.

It is clear that the availability of information to the competent authorities increases the efficiency of return decisions and consequently the likelihood of detention. Regulation (EU) 2018/1860 extends the scope of the Schengen Information System by introducing a new category of alerts on return decisions and establishes new functionalities to create, update and delete return alerts. In addition, a new function is instituted in the system to automatically notify the issuing Member State that the time limit for voluntary departure has expired for the alerts it has entered.

One of the most difficult phases in the return process is the identification of a person, as they dispose of the travel documents with which they have come to the European Union. The lack of documents hinders return and opens the way to another country. The alerts on return decisions entered in the Schengen Information System will make it possible to identify a person more quickly and, accordingly, to establish what decisions have been taken in a particular case.

In transposing the requirements of Directive 2008/115/EC, Latvia exercised its discretion under Article 2(2) and decided not to apply the provisions of Directive 2008/115/EC to the subjects referred to in Article 2(2), it means, not to take return decisions in cases where an alien has been refused entry or detained for irregular crossing of an external border and has not been granted a residence permit in a Member State. This decision was acceptable in the year of transposition of the Directive, however, in the author's opinion, the situation has significantly changed and it would be necessary to enter also the information on persons who do not obtain a residence permit in a Member State in the Schengen Information System in the case of illegal crossing of an external border.

The return alert shall be entered in the Schengen Information System as soon as the return decision has been issued.²⁰

It is provided in the Regulation that the Member States may refrain from entering return alerts in the Schengen Information System where return decisions concern third-country nationals who are detained pending removal. However, if third-country nationals are not detained and are not expelled, the return alert must be entered in the Schengen Information System immediately.

The flexible definition of a return decision does not preclude the adoption of a decision imposing a return obligation as a judgment in criminal matters and in the context of criminal proceedings²¹.

²⁰ Regulation (EU) 2018/1860 of the European Parliament and the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country national. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2018:312:FULL> [viewed 01.10.2023.]

²¹ CJEU judgement of 6 December 2012 in Case No. C-430/11 REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunale di Rovigo (Italy), made by decision of 15 July 2011, received at the Court on 18 August 2011, in the criminal proceedings against Md Sagor.

Finally, it should be noted that the Member States are obliged to ensure an effective system for monitoring forced return.

Conclusions

1. Freedom of movement within the European Union is one of its greatest achievements, a fundamental value as enshrined in the framework treaties. Today, however, it is increasingly fragile and under threat from the pressure of illegal migration. The causes of illegal migration today are not limited to escaping from natural or man-made disasters, but a person is becoming a weapon in the hands of others. In such situations, states have the right to take care of internal security by legal means.
2. Return and expulsion decisions are necessary means adopted to ensure the protection of freedom of movement within the European Union, proportionate to the risks. It also constitutes necessary means of combating illegal migration, where organised crime is actively involved.
3. In the return procedure, particular attention is paid to the protection of human rights, it means that every person subject to a return decision has the right to appeal in accordance with the procedures laid down in the national legal system; detention is a measure of last resort and only for a limited period of time.
4. In the search for solutions to stop irregular migration and to improve the functionality of the Schengen Information System, three Regulations were adopted, one of which sets out the conditions and procedures for entering and processing information on third-country nationals subject to return decisions. As a result, countries also developed legal provisions at national level to identify and return illegally staying third-country nationals, while strictly respecting fundamental rights.
5. The Schengen Information System is an indispensable tool for the exchange of information on return decisions taken in the Member States, which will support the enforcement and control of the return decision, reduce abuses in the processing of a second asylum application in another Member State.
6. Taking into account that a reduction in irregular migration cannot be expected in the nearest future, there is a need to improve transnational cooperation with third countries through readmission programmes and other measures.
7. Together with the European Border and Coast Guard Agency Frontex, other international organisations share responsibility for the enforcement of return decisions and the respect of fundamental rights. However, the biggest challenge is for the competent authorities at national level to identify the persons and implement return operations. The effectiveness of a new initiative will be assessed after a certain period of time, but it is necessary to single out the areas of risk and address the shortcomings today.

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