Radboud University Nijmegen

Centre for migration law

Radboud University Nijmegen

Directive on common standards and procedures in Member States for returning illegally staying third-country nationals 2008/115/CE of December 16, 2008

Report on the implementation of Directive 2008/115/CE in France

Marie-Laure BASILIEN-GAINCHE & Serge SLAMA

Introduction

As in the 20 other Member States late in implementing the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals 2008/115/CE (hereafter the Returns Directive), the transposition of the European text is at the core of French political agenda. The French legislator is currently working on the text drafted by Eric Besson, the former Minister for Immigration, Integration and National identity. The Besson project is supported by the Minister of Home Affairs currently in charge, Brice Hortefeux who was the Minister for Immigration, Integration, and Identity from 2007 to 2009.

The bill has been adopted in fisrt reading by the National Assembly in October 2010 and by the Senate in February 2011. As the position of the two assemblies differ, a second reading is needed. The National Assembly is at the beginning of this second reading.

The Directive had to be transposed before the 24th of December 2010. Therefore, France is already more than 6 months late. The delay should increase insofar as, after the law is passed, decrees - required for a proper implementation of the Directive - have to be adopted and published. That is why Serge Slama wrote a post on this blog on Christmas day, whereby he invited the lawyers to invoke before courts the provisions of the Returns Directive as long as the European provisions are not fully integrated into the French legal order. And even when the Besson project is finally adopted, the direct effect of the Directive provisions should be invoked, in so far as the proposed legislation is far from complying the objectives, principles and provisions of the Returns Directive.

Let us indeed make clear why as an EU norm, the Return Directive can be invoked directly or indirectly against return measures, detention decisions, removal orders. It is the Conseil d'Etat, in its 30 October 2009 Emmanuel Perreux case, who has accepted the possibility of

invoking the unconditional and precise provisions of a Directive. This opens the possibility to invoke the Return Directive provisions in the absence of national legal measure ensuring the implementation of the European text in national legal order (invocability of inclusion); it also confirms the possibility of invoking the objectives of a Directive to repel a general national norm that breaches the text (invocability of exclusion).

Because the invocation of the direct effect of the Return Directive has already proved to be successfull, one can now have some doubts on the capacity of the Home Affairs Minister to fulfill the quantitative objectives stated by President Nicolas Sarkozy: 30 000 removals per year, not including the Roms from Bulgaria and Romania - who are - useless to recall- European citizens.

In this document, we propose to examine how the French legislator is intending to transpose the Return Directive into French law. Six elements of the French law proposal diserve a specific attention:

1) the scope of the text;

2) the organization of removals;

3) the importance given to detention measures;

4) the articulation between the entry ban and return decisions;

5) procedural guarantees granted to concerned Third Country Nationals;

6) the specific protection granted to vulnerable people.

In our opinion, the draft in discussion tends to maintain the overall logic of the French current system, making the Returns Directive implementation fits.

1 - The scope of the Returns Directive

The French project of transposition concerns all the illegally staying Third Country Nationals. But, under the perspective of the Besson project, some situations shall be considered out of the scope of the Directive.

First of all, the draft in discussion considers that returns and removals decided by a court as a penal sanction are out of the scope of the Directive. This creates important consequences because, in France, more than 3000 TCNs are sentenced to prison for illegal entry and stay every year.

Second of all, transfers practiced under the Dublin II Regulation procedure are out of the French draft. It has to be noticed that the issue of the application of the Returns Directive to Dublin transfers has not even been discussed by French MPs, while it is a key issue in many Member States.

Thirdly, and this must be underlined, the French bill does not concern the TCN who are facing a refusal to enter into French territory and who are maintained in waiting areas (following Article L. 213-1 CESEDA). Moreover, the French Government has used the

argument of the Directive transposition to support the creation of *ad hoc waiting areas* specifically created for groups of 10 TCNs (irregular or not) present in a zone of 10 km2. Of course, EU law allows member States to conceive of and apply exceptional mechanisms in order to face exceptional situations of massive influx of migrants. Yet we raise doubt on the fact that the creation of what NGO's calls "rucksack waiting areas" comply with the Directive provisions.

Last, in order to carry out the Government's quantitative removal objectives, the French project shelters provisions that clearly breach EU law. In particular, the return and removal of the Roms from Bulgaria and Rumania are organized by the text. New offences are created (as the abuse of the right to stay, and the abuse in the occupation of a private or public piece of land). Let us remind that these provisions are violating the non-discrimination principle (Article 18 TFUE).

2 - Organization of removal measures

Every year in France, 45000 illegally staying TCNs are concerned by an "*arrêté préfectoral de reconduite à la frontière*" (hereafter APRF), among which 13 000 are carried out. They are are immediately placed in detention (more than 40 000 detention measures per year) and, as a consequence, they do are not granted the period for voluntary departure stated by Article 7 of the Returns Directive.

The inexistence of this period to organise voluntary departure, in French law, has led some Courts to annul APRF in application of Article 7 § 1 of the Returns Directive. In theses cases, the judge has grounded the decision on the direct effect of Article 7§1. As a consequence, return decisions and removal orders have been annuled for not offering a time for voluntary departure. To be true, not all judges in France follow this view. Some of them consider that, as Article 7-1 is not unconditional and precise, it has no direct effect. Yet they consider that because of the Article 7 objective, French law (current Article L.511-1 CESEDA) has to remain unapplied and the individual decisions in case have to be annuled. It must be noted here that the *Conseil d'Etat* is going to present its position on the interpretation of such a provision, as the Montreuil administrative judge asked him to do so.

Article 23 of the Law proposal (which modifies Article L.511-1 CESEDA) grants a 30 days period for voluntary departure, that can once be recurred. But following the text, its is possible to suppress the benefit of the 30 days period in various circumstances. In 6 cases, French law considers that there is indeed a risck of absconding: the TCN did not make the application that is needed in order to legally stay on the national territory; the TCN did stay on the French territory beyond the period of validity of his visa or beyond the three months period since his entering France, without asking for legal stay permit; the TCN withdrew from the execution of a removal order; the TCN falsified his identity, travel, or residence, documents; the TCN does not present sufficient guarantees of representation, in particular because he is not in possession of identity documents. In other words, the definition of the risk of absconding exception is very extensive: it can have the consequence that the period for voluntary departure becomes inapplicable or exceptionnal.

We can think that the French government considers the period for voluntary departure as a mechanism that could make the returns decisions and the removal orders less and less effective. Let us recall that the 1998 Chevènement law introduced a type of return decision

that could be suited within 7 days, so that their implementation appeared difficult - even impossible. In practice, less than 1% of the TCNs have been removed.

3 - Detention measures

Since the beginning of the 1980's, detention measures are central in the French system. That is why its compliance with the EU logic is debatable, insofar as the Return Directive clearly states that detention is a means to be used only after other measures failed (Articles 8 and 15 of the Returns Directive).

Of course, other mechanisms than detention exist in French law (mostly house arrest) but these mechanisms are exceptionally used and secondary. In practice, less than 7% of the TCNs under return decision or/and removal order, are not put in detention centers. It appears from the project and debates that the logic is confirmed, despite the opposite approach of the Returns Directive. Detention remains the standard measure to apply in almost all the cases (see the long list of Article L-551-1 CESEDA).

Moreover, the project (Article 30 of the draft) modifies the length of detention measures. Firstly, the draft allows a periof of 5 days (instead of the current 48 hours) before a judicial intervention. There is a serious risk of contradiction with French constitutional jurisprudence (Décision n° 79-109 DC du 09 janvier 1980). Secondly, the duration of detention (currently 32 days) can reach a maimum of 45 days. The added-valued of this provision is challengeable, considering the fact that 84,5 % of removal orders are implemented in the first 17 days (with a peak in the second day of detention). Therefore, we discuss both the necessity and legitimay of the lengthening of the detention period.

It must also be underlined that, on 19 January 2011, the Law commission of the Senate has adopted a Government amendment that allows to maintain in detention during 18 months the TCN who are convicted for behaviors related to terrorist activities - even if they have entirely served their sentence in prison. For many NGO's, this provision is an intrumentalisation of the Returns Directive. Fearing the emergence of a "French Guantanamo", they mostly consider the provision inacceptable because it creates a double punishment.

Last, the question arises of the illegally staying TCNs that have been detained but can not be removed. They are maintained in a limbo situation, and it is plausible that the Directive implementation will increase the number of persons in this case. Let us indeed recall that 80 0000 returns decisions are adopted each year, among which only 15 000 are implemented. The system is thus creating more than 65000 unremovable TCNs who frequently become irregular.

4 - The entry ban

The text in discussion in the French Assemblies seems to comply with the Returns Directive on the issue of entry ban. Yet the banning of re-entering into the EU remains a possibility offered to the administration; it is not considered as an obligation to take an entry ban in relation to a return decision. One can wonder if it is compatible with Article 11 of the Returns Directive that imposes the adoption of an entry ban when no period is granted for a voluntary departure and when the removal order has not been respected.

5 - Legal safeguards and procedural guarantees

As far as the procedural guarantees stated in the Returns Directive are concerned, there is no special comment to make about the French draft. Articles 12 § 2 & § 3 are not implemented, but the provisions will surely be considered in the decrees to be adopted after the law is passed.

The Returns Directive (Article 13 § 2 & § 3) imposes Member States to grant free legal assistance to TCNs who are under removal or detention or entry bans decisions. They must be given the legal possibility to make an action againts these decisions. In adition, the Directive asserts that Member States can guarantee remedies and make sure that appeals have a suspensive effect. As in many cases, the French system does not admit that appeals have a suspensive effect, we doubt that French law is granting and effective right of remedy. And let us recall Jean-Paul Costa's statement, on February 11, 2011. The President of the European Court of Human Rights was dealing with the request for interim measures (Rule 39 of the Rules of Court). He strongly invited the Member States to "*provide national remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk*".

6 - Vulnerable persons / categories

There is another missing element in the French project, - to be ruled by the decrees: the elements stated in Article 16 § 4 & § 5. Surprisingly enough, the French government asserts that the Directive provisions fit the reform recently carried out, whereby the French Government has created a public market for the assistance granted to the TCNs placed in detention centers.

But some French civil judgesseem to have a different opinion. They have made use of Article 16 of the Returns Directive in order to annul returns decisions and detention measures because of the lack of legal information and assistance offered to TCNs in detention centers. Of course, since the beginning of 2011, the invocability of Article 16 of the Directive has been questioned by other judges. But when judges decide to apply Article 16 directly, they mostly make a reference to the lack of communication about procedural rules. This comes from the fact that only one NGO by retention center is allowed to intervene; there is an illegal lack of information about the organizations that can inform and assist the TCNs placed in the retention centers.

Conclusion

In many aspects, the Returns Directive is deceptive; its states minimalist standards for the protection of TCN's in the European Union. This being said, we can expect so-called "*Directive of the shame*" to become a "*Directive of the hope*". In the absence of transposition in 20 Member States, it is - so far- the direct effect of the European act that appears to provide new tools to defend the illegally staying migrants rights before courts.

The Directive on Return Central Themes, Problem Issues, And Implementation in Selected Member States