PART IV

Migration and Citizenship

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C-61/11 PPU – *El Dridi*

Criminalisation of Irregular Migration in the EU: The Impact of El Dridi

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I. Introduction – The EU Involvement in the Criminalisation of Irregular Migration

The past decade has witnessed the growing use of substantive criminal law as a method of tackling irregular migration. At the European level, this trend – commonly referred to as the criminalisation of irregular migration or 'crimmigration'[1] – has been fleshed out by both the EU legislator and the Member States individually. In particular, the EU involvement takes place in a twofold manner; directly, through harmonisation of national legislation and indirectly, through the case law of the Court of Justice of the EU (CJEU). In recent years, the EU has adopted substantive criminal law provisions which treat conduct associated with irregular migration flows as crimes and provide for sanctions for the violation of these provisions. The trafficking of human beings is a prime example in that respect, with Directive 2011/36/EU[2] substituting a pre-Lisbon Framework Decision[3] and Directive 2004/81/EC granting (conditional) residence permits rights to victims of trafficking.[4] Human smuggling, or in more neutral EU terms, the facilitation of unauthorised entry, transit or residence, is regulated by a dual legislative framework, which mirrors the former pillar

[1] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) *American University Law Review* 368, 379.

[2] Council Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

[3] Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L203/1.

[4] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19.

structure; a Directive which sets out the definitions for the crimes[5] is accompanied by a Framework Decision criminalising the conduct described in the Directive and setting out sanctions.[6] This set of legal instruments is completed by the Employers' Sanctions Directive,[7] which imposes duties to employers of irregular migrants and provides for sanctions if they fail to comply with these duties or they infringe the prohibition of not employing 'illegally staying third-country nationals'.[8]

The primary focus of these instruments is on individuals who act as facilitators or intermediaries of irregular migration in a broad sense. Conversely, any violations of immigration law by irregular migrants themselves are not dealt with by EU law. However, legislation attributing criminal law sanctions to the violations of immigration law committed by irregular migrants has been put in place in most Member States. Key examples in this context are the treatment of irregular entry and stay as criminal offences with penalties varying from imprisonment to fines and to a lesser extent warnings.[9] The EU is not watching from a distance these parallel national developments and in this sense it indirectly influences national legislations. By using as a motor the Directive on the return of 'illegally staying' third-country nationals ('Return Directive'),[10] the CJEU has placed strict limitations on the Member States' power to enforce criminal sanctions to irregular migrants by differentiating treatment and imposing numerous conditions.

The judgment in *El Dridi*, delivered in April 2011[11] has been the first in a series of cases[12] imposing boundaries to Member States in criminalising irregular migrants and the aim of this commentary is to assess its implications for EU law as it set the foundations for an indirect involvement of the EU in a much controversial and heated topic.[13] In this context, this commentary first provides

[5] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17.

[6] Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1.

[7] Council Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2002] OJ L168/24.

[8] For an overview of the aforementioned measures, see Valsamis Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law' in Maria João Guia, Maartje van der Woude and Joanne van der Leun (eds), *Social Control and Justice* (Eleven International Publishing, 2013) 87.

[9] For an overview of the Member States' policies in criminalising violations of domestic immigration rules, see Fundamental Rights Agency (FRA), 'Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them' (2014) http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them (last accessed 11 March 2019).

[10] 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 [2008] OJ L348/98 ('Return Directive').

[11] Case C-61/11 *El Dridi* [2011] ECR I-03015.

[12] See below (section IV).

[13] See among others Thomas Hammarberg, 'It Is Wrong to Criminalise Migration' [2009] 11 *European Journal of Migration and Law* 383; François Crépeau, 'Report of the Special Rapporteur on the Human Rights of Migrants' (Human Rights Council, Twentieth Session, A/HRC/20/24), available at www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf (last accessed 11 March 2019).

a brief overview of the Return Directive; while an in-depth examination of these issues is beyond the scope of the present commentary, a brief overview will inform the subsequent analysis. Then, the CJEU findings in *El Dridi* will be discussed, followed by an analysis of its impact on EU law and an overview of the case law that has further refined the Court's proclamations.

II. The Return Directive as the Stormy Petrel

The Return Directive is the pan-European legal instrument that has been adopted with the aim of providing common standards on the effective removal and repatriation of 'illegally staying third-country nationals'.[14] In a nutshell, the Directive prescribes that in cases where an irregular migrant is detected on national territory, Member States' authorities are obliged to issue a return decision (Article 6). The addressee is in principle granted a period of voluntary departure ranging between seven and 30 days (Article 7). If that period expires and there is no other sufficient but less coercive measure available, the irregular migrants may be detained pending removal in specialised facilities for a period of up to 18 months (Articles 15–18). According to Article 11(1) of the Return Directive, an entry ban must be issued where a return decision was ordered without a period for voluntary departure being granted, or where the obligation to return has not been complied with. In other cases, an entry ban may be issued.

Much ink has been spilt about the Return Directive, with an array of scholars and practitioners[15] raising significant concerns regarding its restrictive character, particularly as regards the rules on detention and the absence of a clear fundamental rights approach to irregular migrants.[16] Civil organisations have been highly critical of the Directive, to the extent that it has been nicknamed as the 'directive of shame'.[17] At the same time, the controversy surrounding its provisions has meant that the CJEU is repeatedly requested to provide guidance and interpretation on its rules.[18] However, there exists a second type of case that

[14] Art 1 of the Return Directive.

[15] For detailed analyses of the Return Directive, see among others Diego Acosta Arcarazo, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115 The Returns Directive)' (2009) *European Journal of Migration & Law* 19; Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) *European Journal of Migration & Law* 1.

[16] The Directive is not completely unconcerned with the protection of fundamental rights. See Recital 2.

[17] Anafé, APDHA, Arci, ATMF, La Cimade, Gisti, IPAM, LDH-Belgique, Migreurop, Statewatch, 'The Council of Ministers of the European Union should not Adopt the Outrageous Directive', available at www.migreurop.org/article1333.html (last accessed 11 March 2019). For an optimistic view, see Francesco Maiani, 'Directive de la honte ou instrument de progrès ? Avancées, régressions et *statu quo* en droit des étrangers sous l'influence de la Directive sur le retour' *Annuaire Suisse de Droit Européen 2008/2009* (Stämpfli/Schulthess Bern/Zurich, 2009) 289–315.

[18] Apart from the judgments that are the subject of this commentary, the following cases have been decided: C-357/09 PPU *Kadzoev* [2009] I-11189; C-534/11 *Arslan* ECLI:EU:C:2013:343; C-383/13 PPU

does not directly relate to the interpretation of the Directive's provisions, but engages in the interaction between the Member States' sovereign powers to criminalise violations of national immigration law and the effectiveness of the Return Directive, with the leading case being *El Dridi*.

III. The Judgment in *El Dridi*: A Decisive Step towards the Delimitation of Member States' Power to Criminalise Irregular Migrants

A. Legal and Factual Background

In *El Dridi*, the CJEU was faced with an Italian legislation which assigned criminal sanctions to irregular migrants who had failed to comply with a return decision and remained at the national territory. As is explained by Annoni in the second part of this chapter,[19] the Italian Government had adopted a series of legislative measures, commonly known as the 'Security Package' (*Pacchetto Sicurezza*),[20] including a law that addressed some aspects of the Return Directive. However, the underlying aim was to avoid implementation of the Return Directive[21] by introducing new immigration offences of irregular entry or stay that were punishable with a fine (Art 10 *bis*), whereas failure to comply with a return decision would be sanctioned with imprisonment of one to four years (Article 14.5 *ter* and *quater*). This is because Article 2 of the Return Directive gives leeway to Member States to exclude from its scope persons who have been 'subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law'. By essentially criminalising all irregular migrants, Italy desired to bypass its obligations pursuant to the Directive.

In this context, Mr El Dridi, an Algerian national, had entered Italy irregularly and had never obtained a valid residence permit. In 2004, he was issued an expulsion decree which six years later served as a basis for a deportation order.

G and R ECLI:EU:C:2013:533; C-297/12 *Filev & Osmani* ECLI:EU:C:2013:569; C-146/14 PPU *Mahdi* ECLI:EU:C:2014:1320; C-189/13 *Da Silva* ECLI:EU:C:2014:2043; C-473/13 *Bero* ECLI:EU:C:2014:2095; C-514/13 *Bouzalmate* ECLI:EU:C:2014:2095; C-474/13 *Pham* ECLI:EU:C:2014:2095; C-166/13 *Mukarubega* ECLI:EU:C:2014:2336; C-249/13 *Boujlida* ECLI:EU:C:2014:2431; C-554/13 *Zh and O* ECLI:EU:C:2015:377; C-38/14 *Zaizoune* ECLI:EU:C:2015:260; C-225/16 *Ouhrami* ECLI:EU:C:2017:590; and C-240/17 *E* ECLI:EU:C:2018:8.

[19] See the second part of this chapter entitled 'Reshaping Criminalisation of Irregular Migration in Italy: The Impact of EU Law beyond the El-Dridi Judgment' by Alessandra Annoni.

[20] For an analysis of the 'Security Package' see Alberto di Martino, Fransesca Biondi Dal Monte, Ilaria Boiano and Rosa Rafaellli, *The Criminalization of Irregular Immigration: Law and Practice in Italy* (Pisa University Press, 2013).

[21] Paolo Bonetti, 'La Proroga del Trattenimento e I Reati di Ingresso o Permanenza Irregolare nel Sistema del Diritto degli Stranieri: Profili Constituzionali e Rapporti con la Direttiva Comunitaria sui Rimpranti' [2009] *Diritto Immigrazione e Cittadinanza* 85.

Though he was requested to voluntarily leave the country within five days, in September 2010 he was arrested and sentenced to one year's imprisonment by the District Court of Trento for the crime of failing to comply with a return order on the basis of Article 14.5 ter. Mr El Dridi appealed against that decision before the Appeal Court of Trento. The latter submitted a reference for a preliminary ruling to the CJEU enquiring whether a criminal sanction during administrative procedures concerning his return due to non-compliance with the stages of those procedures complied with the Return Directive, particularly its Articles 15 and 16 on detention.

B. The Judgment

From the outset, the Court highlighted the purpose and character of the Return Directive. It was stressed that according to Recital 2, its aim is 'the establishment of an effective removal and repatriation policy […] *for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity*'.[22] It thus employed a restrictive interpretation of the Directive paving the way on how it should be interpreted at the national level as well.[23] Furthermore, this remark is crucial in the light of the heated debate surrounding the inclusion of fundamental rights references into the Directive.[24] By founding its reasoning on the basis of fundamental rights, the ruling served as a reminder to Member States about the paramount importance of ensuring a high level of fundamental rights protection in the return procedure.

Next, the Court codified the removal process in a series of successive stages. The chronology begins with the issuance of a return decision. Then, the prescription of a period for voluntary departure is prioritised unless particular circumstances dictate otherwise. If the irregular migrant has not voluntarily complied with the decision, national authorities are obliged to carry out the removal by taking all the appropriate measures. However, the principle of proportionality and the respect of fundamental rights must be observed and, therefore, the least coercive measures should be preferred. Deprivation of liberty and detention are allowed after assessing each specific case and only when the enforcement of the return decision in the form of removal risks to be compromised by the conduct of the person at stake. The Court highlighted that the order in which the stages of the return procedure are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision. This means that the measures become more stringent as the procedure

[22] *El Dridi* (n 11), para 31 (emphasis added).
[23] Mitsilegas (n 8) 101.
[24] See Annaliese Baldaccini, 'The EU Directive on Return: Principles and Protests' (2009) *Refugee Survey Quarterly* 125.

evolves from the less restrictive in regards to the individual's liberty (voluntary departure) to the most constraining (detention in a specialised facility).[25]

Having set out the lens through which the Directive should be interpreted, the next step for the CJEU was to determine whether in the absence of national implementation, Articles 15 and 16 of the Directive were directly effective in the specific case. The Court found no difficulty in granting the relevant provisions direct effect; since they are sufficiently clear and precise,[26] Mr El Dridi could rely upon them. The Court thus sent a gentle reminder to Member States that they could not act on their own motion and evade their obligations under EU law. This was precisely the Italian case, with the adopted legislation providing for a return procedure which significantly deviated from the standards of the Directive.[27]

The core of the judgment is preoccupied with the interplay between the Return Directive on the removal of irregular migrants and the enforcement of national rules imposing criminal sanctions for violation of immigration laws. The Grand Chamber started its analysis by recognising a certain degree of discretion to Member States when adopting measures, including criminal law ones, aimed inter alia at dissuading third-country nationals from remaining illegally on their national territory. However, it imposed two significant restrictions; first, these measures may come into play only when all other measures already employed have failed to attain the objective of removal.[28] Second, it reiterated that although criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this area of law is nevertheless affected by EU law.[29] Therefore, although the legal basis of the Directive (and its Lisbon successor) or the Directive itself do not preclude them from having competence in criminal matters in the area of illegal immigration and illegal stays, their legislation must comply with EU law nevertheless.[30] The Court thus justified these limitations on the basis of the principles of effectiveness and loyal cooperation. It prohibited Member States from applying rules, even criminal law ones, which are liable to jeopardise the achievement of the objectives pursued by the Directive and deprive it of its effectiveness. It invoked Article 4(3) of the Treaty on European Union (TEU) which obliges Member States to '[…] refrain from any measure which could jeopardise the attainment of the Union's objectives' and Recital 13 of the Return Directive which makes the use of coercive measures subject to the principles of proportionality and effectiveness.[31]

Consequently, the Grand Chamber opined that Member States may not, in order to remedy their failure of coercive measures adopted during the return procedure, provide for a custodial sentence solely because a third-country national

[25] *El Dridi* (n 11), paras 37–41.
[26] *El Dridi* (n 11), para 47.
[27] *El Dridi* (n 11), para 50.
[28] *El Dridi* (n 11), para 52.
[29] *El Dridi* (n 11), para 53.
[30] *El Dridi* (n 11), para 54.
[31] *El Dridi* (n 11), paras 56.

continues to stay illegally on their territory despite a return decision. Instead, they ought to continue their efforts to enforce the decision, which continues to produce its effects.[32] If a term of imprisonment is imposed, the attainment of the Directive may be compromised because it is liable to frustrate the application of the measures and delay the enforcement of the return decision.[33] Despite these restrictions, the Court recalled Member States that they are still allowed to adopt and employ criminal law provisions in situations when coercive measures did not lead to the removal of an irregular migrant.[34] However, the Court was mindful to note that the adoption of these provisions must occur with respect to the principles and objectives of the Return Directive, which continues to be the benchmark for the adoption of national criminal law.

C. The Value of *El Dridi* for EU Law

El Dridi has made its way in jurisprudential history as a victory for irregular migrants in three main respects. First, the Grand Chamber stressed that the Return Directive must be interpreted in the light of fundamental rights. Thus, notwithstanding the Council's attempts to disassociate the return procedure from the protection of fundamental rights of irregular migrants, the Court succeeded in giving the Preamble a more substantial context and made it clear that references in the Preamble constitute interpretative guides. Second, as regards to Italy's attempt to bypass EU rules, the Court gave a warning to Member States that circumventing the transposition of the instrument and developing an autonomous path in immigration policy will prove extremely hard.

Third, the most important contribution of *El Dridi* involves the Member States' power to impose national criminal law provisions to irregular migrants and the overall relationship between EU law and national criminal law. The judgment confirmed that the former places limits on the adoption of and employability of the latter and that Member States are not entirely free to introduce criminal law rules, but are required to comply with their obligations under EU law when exercising their powers to criminalise, in particular obligations deriving from the principles of loyal cooperation and effectiveness. In the case of prosecuting and penalising irregular migrants, the practical impact of that pronouncement was that as long as the removal process is ongoing, the Member States are not allowed to impose a term of imprisonment to third-country nationals whose sole misconduct is their stay on the national territory contrary to a return order.

This was the first time that an EU immigration law instrument was found to have a delimiting effect on the Member States' power to criminalise. In the framework of free movement, as early as in 1981, the CJEU opined that Community

[32] *El Dridi* (n 11), para 58.
[33] *El Dridi* (n 11), para 59.
[34] Nevertheless, the Court does not explicitly refer to criminal law provisions.

law places boundaries to the application of national criminal law with a view to safeguarding the effectiveness of rights related to free movement.[35] In *Casati*, the Court held that although criminal law is presumed to be a matter for which the Member States are responsible, 'Community law sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons'.[36] As a result, the penalties imposed ought to be strictly necessary and not so disproportionate to the gravity of the infringement that they become an obstacle to the exercise of that freedom.[37] This approach was justified in order to prevent the erosion of Community law freedoms by national criminal rules.[38] Although in the end the Italian legislation in question was found compatible with Community law, the Court based its approach on a strict proportionality test.[39] This approach was confirmed in subsequent cases; in *Skanavi and Chryssanthakopoulos*,[40] the Court ruled that a provision sanctioning persons who had failed to convert their driving licences obtained outside Germany within a prescribed period was incompatible with Community law due to 'the effect which the right to drive a motor vehicle has on the actual exercise of the rights relating to the free movement of persons'.[41] Furthermore, in *Placanica, Palazzese and Sorricchio*, regarding criminal sanctions imputed for the organised activity of collecting bets without obtaining a licence or a police authorisation, the Court held a criminal penalty is incompatible with free movement rights, where the defendants were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons.[42] Finally, in *Bickel and Franz*, concerning the language of criminal proceedings, the Court clarified that such specifications may be subject to limitations for the purpose of ensuring non-discrimination as well as free movement rights.[43]

El Dridi must be seen as a consistent application and a successful transplantation of the CJEU's approach in relation to free movement rights. In the present case, the objective pursued shifted from free movement to the establishment of an effective policy of returns of irregular migrants. What is more important is the nature of the instrument the effective implementation of which is safeguarded. Being an enforcement mechanism and arguably the 'black sheep' of EU immigration law, *El Dridi* creates an interesting paradox; the Directive which has been criticised for its restrictive approach and lack of high standards

[35] Case 203/80 *Casati* [1981] ECR 2595.
[36] *Ibid*, para 27.
[37] *Ibid*.
[38] *Ibid*, para 28.
[39] Takis Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford University Press, 2006) 234.
[40] Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.
[41] *Ibid*, para 36.
[42] Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica, Palazzese and Sorricchio* [2007] ECR I-1891.
[43] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

of fundamental rights protection is used by the Court as a buffer to protect irregular migrants from being imprisoned for the sole reason that they have violated domestic immigration laws.

It has been eloquently argued that criminalisation is not banned in its entirety.[44] The judgment left to the Member States a degree of discretion by stating that the latter retain the power to adopt provisions in cases where coercive measures have failed to lead to the removal of a third-country national. However, the Court went on to state that even in these cases the imposition of the measures must occur with respect to the principles and objective of the Directive. Given the wide divergence of national legislations on the issue and the shared competence between Member States and the EU in immigration matters, it seems that the Court attempted to strike a balance between national interests and the protection of irregular migrants. Importantly, despite the judgment's limited scope, it opened Pandora's Box regarding the application of a wide array of Member States' measures criminalising irregular migrants' conducts. A key question in that respect was whether these pronouncements could apply not only when the criminal offence in question related to a violation of a return order, but more broadly with any violation of national criminal law, which could interfere with the return of third-country nationals. The following section summarises the key judgments released by the Court that further elaborate and develop the *El Dridi* rationale.

IV. Subsequent Case Law: A Comprehensive Approach towards Criminalisation of Irregular Migrants?

A. The Good News: Deepening and Expanding the *El Dridi* Logic

Following the release of *El Dridi*, practitioners and judges in different Member States were faced with legal uncertainty as to whether the classification of irregular stay as a criminal offence was in line with the judgment at least when a return decision had been issued. In France, the problem was particularly acute; at that time, French immigration law criminalised irregular stay foreseeing punishment of imprisonment of up to one year and a fine of 3750 Euros.[45] In addition, third-country nationals were placed in police custody (*garde à vue*) by the French police, which would carry out investigations before transferring irregular migrants to an

[44] Henri Labayle and Philippe de Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en Matière d' Asile et d' Immigration' (Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2012) 91.

[45] Article L-621 of the Code of Entry and Stay of Aliens and Right of Asylum (*Code d' entrée et du sejour des étrangers et du droit d' asile*, CESEDA).

administrative detention centre awaiting their removal.[46] Mr Achughbabian, an Armenian national, was arrested and placed into custody, but his case differed in that he was sanctioned before the return procedure had been set in motion.[47] Therefore, criminalisation of irregular stay took place independently and was not related to the removal process, thus raising the question of whether the Return Directive would apply in the first place.

The CJEU found no difficulty in ascertaining that the case fell within the scope of the Directive. In the Court's view, in order to ensure its effectiveness, national authorities must act with diligence and take a position without delay on the legality, or otherwise of the stay of the person concerned. Upon finding that a third-country national is irregularly staying, in principle a return decision must be issued. Detention is thus inextricably linked with the outcome of the removal of the third-country national concerned.[48] Then, the Grand Chamber compared the return procedures as set out in the Directive and as in French legislation to note the different character of the procedures and conclude that the latter may jeopardise the application of the Directive's rules and thus its effectiveness.[49] The Court went on to dismiss arguments by the French Government regarding the rare imposition of such sanctions unless they had committed another offence apart from their irregular stay;[50] not only such possibility remained open for the courts, but also, the Directive would be deprived of its effectiveness and binding effect as it would be interpreted as making it lawful for Member States not to apply the provisions of the Directive to all third-country nationals whose only crime is their illegal stay.[51] The Court also made it clear that imposing custodial sentences to irregularly staying third-country nationals before carrying out their removal was also not possible;[52] it follows from the duty of loyal cooperation and the principle of effectiveness that once national authorities establish that a third-country national is an irregular migrant they are required to carry out the removal as soon as possible. This will not take place if instead of implementing a return decision (perhaps not even adopting one on time) criminal prosecution is initiated

[46] See Article 62-2 of the French Code of Criminal Procedure. Also see Angela Bolis, 'Ce qui devrait changer avec la fin des gardes à vue des sans papiers' *Le Monde* (7 June 2012) www.lemonde.fr/societe/article/2012/06/07/ce-que-changerait-la-fin-des-gardes-a-vue-des-immigres-sans-papiers_1714475_3224.html (last accessed 11 March 2019. For different views, see Cour d' Appel de Douai, *Ordonnance* (6 May 2011); Cour d' Appel de Toulouse, *Ordonnance* (9 May 2011); Cour d' Appel de Nîmes, *Ordonnance* (6 May 2011). On the other hand, the Ministry of Justice had issued Ministère de la Justice et des Libertés, 'Circulaire du 12 Mai 2011 relative à la portée de l' arrêt de la Cour de justice européenne (CJEU) du 28 avril 2011 portant sur l' interprétation des articles 15 et 16 de la directive 2008/115/CE, dite "directive retour"' (12 May 2011) http://www.gisti.org/IMG/pdf/circ_2011-05-12.pdf; Cour d' Appel d' Aix en Provence, *Ordonnance* (16 May 2011); Cour d' Appel de Paris, *Ordonnance* (7 May 2011).

[47] Mitsilegas (n 8) 106.

[48] *El Dridi* (n 11), para 31.

[49] *El Dridi* (n 11), paras 38–39.

[50] *El Dridi* (n 11), para 40.

[51] *El Dridi* (n 11), paras 41–43.

[52] *El Dridi* (n 11), para 44.

accompanied by a term of imprisonment. This in-between step would delay the removal and besides is not included among the justifications for a postponement of removal as set out in the Directive.[53]

Finally, having in mind the impact of the judgment on national sovereignty and in order to address their concerns as regards the application of national policies to deter and prevent irregular migration, the Court confirmed its finding in *El Dridi* that Member States retain their power to adopt criminal law provisions in situations when the coercive measures did not make it possible to remove the third-country national.[54] However, even in these cases, which are outside the scope of the Directive, the Grand Chamber managed to 'sneak' two further limitations: first, penal sanctions may be imposed in those cases involving a third-country national who has been subjected to a return procedure and is illegally staying in the territory of a Member State 'without there being any justified ground for non-return';[55] and second, the imposition of such penalties must be subjected to full observance of fundamental rights, in particular the European Convention on Human Rights.[56]

Achughbabian is an important follow-up case to *El Dridi*; it clarified that the criminalisation of irregular stay cannot be an aim in itself, but is ultimately linked to the objective of the return of the third-country nationals affected, thus bringing into play the application of EU law. Furthermore, while the Court was careful to leave Member States with a certain degree of flexibility to adopt criminal law in relation to immigration offences, it provided a clearer idea as to the circumstances under which a custodial sentence may be imposed to third-country nationals for violations of domestic immigration laws. In particular, the imposition of a term of imprisonment may take place in cases where the return procedure has been applied but failed and there is no justified ground for non-return. It has been pointed out that the Court seems to refer to two categories of third-country nationals; those whose return is precluded by international law (non-refoulement) and those whose removal cannot take place for reasons outside their sphere of influence. The latter category would include nationals who cannot be returned either because their country of origin does not allow their return (eg by not issuing travel documents) or because the Member State responsible lacks the means for repatriation.[57] Otherwise, it would seem unreasonable to impose and enforce custodial sentences to individuals who – through no fault of their own – cannot be removed. Therefore, irregular migrants could be subjected to imprisonment if their return is obstructed by their

[53] *El Dridi* (n 11), para 45; Article 9 of the Return Directive provides for the reasons for postponing the removal.

[54] *El Dridi* (n 11), para 46–47.

[55] *El Dridi* (n 11), para 48.

[56] *El Dridi* (n 11), para 49.

[57] Rosa Rafaelli, 'Case Note: The Achughbabian Case: Impact of the Return Directive on National Criminal Legislation' [2012] *Diritto Penale Contemporaneo* 11.

personal conduct.[58] In addition, although at first sight the legislation in question did not appear to be directly related to the Directive, the Court managed to bring it within the realms of EU law and apply the *El Dridi* logic. By doing so, it made it highly unlikely for Member States to unlink the Directive from the criminalisation of irregular migrants at the national level. As such, the judgment in *El Dridi*, as further refined and elaborated on in *Achughbabian*, had far-reaching implications for Member States' power to impose criminal sanctions to irregular migrants.[59] This is because the vast majority of Member States treat irregular stay as a criminal offence, ten of which prescribe the imposition of a fine and/or imprisonment.[60] In those cases, imposition of a criminal sanction before or during the return process is found to be incompatible with the Return Directive.

The criminal offence of irregular entry is of a similar nature, as it is punishable with imprisonment and/or a fine in 17 Member States. Although *Achughbabian* refers specifically to the criminal offence of irregular stay, excluding irregular entry could lead to unjust results for irregular migrants. The CJEU had the opportunity to clarify this issue in the case of *Affum*,[61] a Ghanaian national, who was intercepted by French authorities at the entrance of the Channel Tunnel, whilst transiting through French territory on a bus from Belgium to the UK. She was detained for illegal entry, but the prosecutor decided to take no further criminal proceedings against her. An Order was issued deciding her transfer to Belgium in accordance with a readmission agreement between France and the Benelux countries, coupled with a decision on her administrative detention pending removal. Upon appeal, the Court of Cassation submitted a reference for a preliminary ruling to the CJEU on the compatibility of the Return Directive with national law allowing the imposition of a term of imprisonment of a third-country national on the basis of illegal entry and stay. The Court asserted that third-country nationals found 'staying illegally on the territory of a Member State' fall within the scope of the Return Directive.[62] After reiterating its findings in *Achughbabian*,[63] the Court confirmed its application also in the case of illegal stay by opining that 'the 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'.[64] As a result, Ms Affum had to be subject to the procedures laid down in the Return Directive for the purpose of her removal and could not be imprisoned merely on account of

[58] *Ibid*.

[59] For the impact of the judgment in France, see Niovi Vavoula, 'The Interplay between EU Immigration Law and National Criminal Law: The Case of the Return Directive' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstantinides (eds), *Research Handbook on European Criminal Law* (Edward Elgar, 2016) 303–304.

[60] FRA (n 9).

[61] Case C-47/15 *Affum* ECLI:EU:C:2016:408.

[62] *Ibid*, paras 45–50.

[63] *Ibid*, paras 51–56.

[64] *Ibid*, para 60.

her illegal entry, resulting in an illegal stay, as this would thwart the application of the Directive and undermine its effectiveness.[65]

B. The Bad News: A Nuanced Approach towards Criminalisation of Irregular Migrants?

The judgments examined above provide a comprehensive approach towards custodial sentences imposed to irregular migrants before or during the return process. However, in numerous Member States, violations of domestic immigration provisions are sanctioned by way of a pecuniary penalty.[66] The extent to which such sanctions could be imposed on third-country nationals was dealt with in the case of Mr Sagor,[67] who was fined after being apprehended for irregularly staying on Italian territory, as prescribed in Italian legislation.[68] The latter further provided that in cases where the third-country national affected could not afford to pay the fine, the fine would be converted to home detention.[69] The judgment in *Sagor* is a faithful application of the *El Dridi* logic, which this time led to the opposite result, as the Court opined that the imposition of a fine as a sanction to irregular migrants is in compliance with the Directive. In particular, the Court contended that a pending criminal prosecution in itself does not delay or otherwise impede the return. This is because the removal of a third-country national can be achieved without requiring that prosecution to have come to an end. Indeed, under the Italian legislation in question, criminal proceedings are discontinued once the national court is informed that the individual concerned has been returned.[70] Similarly, the imposition of a fine does not constitute a hurdle in the procedure, since it does not prevent a return decision from being taken and implemented in full compliance with the Directive. This finding has significant repercussions for a rather large number of Member States that penalise irregular stay with a pecuniary penalty, as such legislation remains applicable throughout the return process. Furthermore, the initiation of a criminal prosecution parallel to the return process also does not jeopardise the attainment of the Directive. Neither an expulsion order without the prescription of a period for voluntary return is forbidden. As a result, the criminalisation of irregular migrants while

[65] *Ibid*, para 63.

[66] FRA (n 9). According to the report, 10 Member States prescribe the imposition of a fine and/or imprisonment, whereas in 15 Member States a fine is only foreseen.

[67] Case C- 430/11 *Sagor* ECLI:EU:C:2012:777.

[68] Article 10a of Legislative Decree No 286/1998 as amended inter alia, by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI NO 170 of 24 July 2009) and by Decree-Law No 89/2011 of 23 June 2011 (GURI No 144 of 23 June 2011), converted into law by Law No 129 of 2 August 2011 (GURI No 181 of 5 August 2011).

[69] Article 53 of Legislative Decree No 274/2000 on the criminal jurisdiction of the magistrates' court, under Article 14 of Law No 468 of 24 November 1999 (Ordinary Supplement to GURI No 234 of 10 October 2000).

[70] *Sagor* (n 67), para 35.

the return procedure is ongoing is still possible as long as the penalty imposed is restricted to a fine and the overarching objective of removing irregular migrants remains the top priority of national authorities. Unless the CJEU had chosen a different line of reasoning on the basis of the principle of proportionality and the respect of fundamental rights, it would have been difficult to rule otherwise. The Court was thus 'trapped' in its own path of thinking and could not have provided a more protective framework for the third-country nationals affected. However, in relation to the conversion of a fine with home detention, the CJEU reiterated that Member States are obliged to carry out the removal as soon as possible.[71] Thus, home detention does not contribute to the achievement of the removal, namely the physical transportation of the relevant individual outside the Member State's territory. In reasoning similar to *El Dridi*, it noted that home detention also does not constitute a 'measure' or a 'coercive measure' within the meaning of the Return Directive.[72] In this context, it imposed a further limitation to national criminal law provisions. However, once again, the Court was mindful not to make general observations, but to leave room for Member States to adjust their legislation accordingly. It noted that non-compliance arises in particular where the applicable legislation does not provide that the enforcement of a home detention order imposed on an illegally staying third-country national must come to an end as soon as it is possible to effect that person's removal.[73]

The second question that the Court had to tackle involves the extent to which the *El Dridi* logic could also apply in cases of entry ban violations. This was dealt with in the case of *Celaj*,[74] which involved an Albanian national staying illegally in Italy and convicted of attempted robbery. In 2012, he was issued a deportation order accompanied by a three-year entry ban, returned to his country of origin and re-entered the Italian territory in breach of a re-entry ban. However, in February 2014 he was arrested for the criminal offence of breaching an entry ban, which is punishable with imprisonment of up to four years under Italian law.[75] Contrary to the previous judgments and the Opinion of Advocate General Szpunar delivered on that case,[76] it was held that the case did not concern the termination of Celaj's first irregular stay, but his subsequent re-entry in violation of the entry ban issued in the return decision.[77] As such, the circumstances in that case were found to be 'clearly distinct' from previous judgments.[78] The Court

[71] *Sagor* (n 67), para 43.
[72] *Sagor* (n 67), para 44.
[73] *Sagor* (n 67), para 45.
[74] Case C-290/14 *Skerdjan Celaj* ECLI:EU:C:2015:64.
[75] Article 13(13) Decreto legislativo No. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (of the legislative decree No 286 on harmonising the migration laws and concerning the status of third-country nationals) of 25 July 1998 (ordinary supplement to GURI No. 191 of 18 August 1998) (referred to further as Legislative Decree No 286).
[76] Case C-290/14 *Skerdjan Celaj*, Opinion of Advocate General Szpunar delivered on 28 April 2015.
[77] *Celaj* (n 74), para 27.
[78] *Celaj* (n 74), para 28.

supported this view by referring to *Achughbabian*, which, as noted above, permits the imposition of sanctions in cases of failed return procedures which may be impinged on third-country nationals themselves.[79] *Achughbabian* was interpreted in an argument a fortiori[80] – *a minore ad maius* – and the Court concluded that as long as the entry ban is issued in compliance with Article 11 of the Return Directive,[81] the Directive does not preclude the possibility for Member States to impose a custodial sentence for the breach of entry ban. However, it was reiterated that the imposition of such sanction is subject to the full observance of fundamental rights and the Geneva Convention.[82]

Celaj has attracted mixed reviews by legal scholars,[83] not least because it marks the first time that the Court has deviated from pre-existing case law, particularly *El Dridi*, to hold that imprisonment as a criminal law sanction is compatible with the Return Directive irrespective of the existence of a return procedure. As it has been pointed out, the Court seems to suggest that two types of illegal stay can be distinguished; one that has taken place initially and one after the person was removed and returned on national territory. Whereas in the former case, Member States have no choice but to apply the Return Directive, in the latter case a prison sentence may be imposed so as to dissuade the third-country national in question from re-entering the national territory in an irregular manner. That division seems to be ill-conceptualised and so is the justification for abandoning the effectiveness argument and thus derogating from the purpose of the Return Directive. The Court's interpretation of *Achughbabian* as covering situations whereby the person has left the territory and returned, as opposed to a narrow interpretation advocated by the Advocate General which would cover only situations where authorities did not succeed in returning the person concerned who remains on national territory, seems to be overly expansive. In the case of Mr Celaj, the return process as prescribed in the Return Directive was successfully completed leading to his removal, hence the objective of the Directive remains valid. Nevertheless, the Court seems to understand that lack of cooperation on his behalf is extended even after the completion of the return process, throughout the duration of the entry ban. This is a particularly problematic understanding of the nature of the entry ban given that Article 11 of the Return Directive allows Member States wide discretion in issuing and withdrawing entry bans, which in practice may lead to their imposition *en masse* and in a systematic manner. This is more than rhetoric. This discretion is reflected

[79] See above paras 46–48 of the *Achughbabian* judgment. Para 29 of the *Celaj* judgment.

[80] *Celaj* (n 74), para 30. Anna Magdalena Kosińska, 'The Problem of Criminalisation of the Illegal Entry of a Third-Country National in the Case of Breaching an Entry Ban – Commentary on the Judgment of the Court of Justice of 1 October 2015 in Case C 290/14, *Skerdjan Celaj*' [2016] 18 *European Journal of Migration & Law* 243.

[81] *Celaj* (n 74), para 31.

[82] Geneva Convention, Article 31(1).

[83] Kosińska (n 80), who understands the judgment as a clash of values between the effectiveness of the return directive and the rule of law, legal certainty.

in the more recent evaluation of the Return Directive, whereby in no less than 11 Schengen States an entry ban is automatically issued alongside a return decision, whereas in 14 countries irregular migrants are issued with an entry ban on the basis of the criteria set out in Article 11(1).[84] In three states only the entry ban decision is taken on a case-by-case basis.[85] This directly impacts the imposition of criminal sanctions to second-time or repeated irregular migrants, who on the basis of *Celaj*, may be subjected to custodial sentences. However, as highlighted by the Advocate General, imprisonment delays the return process and compromises the purpose and effectiveness of the Return Directive, which was preciously defended in *El Dridi* a few years before. This was hardly discussed by the Court in what is arguably a laconic judgment for the important implications it entails. Overall, the Court seems to tolerate and even support the preventive approach towards the irregular migrants as envisaged by Member States and thus take a significant step back towards protecting national sovereignty[86] in adopting and imposing criminal sanctions against irregular migrants.

V. Conclusion

The aim of this contribution was to highlight the importance attached to the *El Dridi* judgment in delimiting Member States' power to adopt and impose criminal law provisions as a means of tackling irregular migration. The ruling marked the first time that this issue was brought within the auspices of EU law, with the Court utilising the Return Directive to surround irregular migrants with a protective net, while placing significant barriers to the imposition of imprisonment sanctions. The mechanism was old and well-known: Member States are not entirely free to adopt criminal law measures, but are required to comply with their obligations under EU law when exercising their powers to criminalise, in particular obligations stemming from the principles of loyal cooperation and effectiveness. Otherwise, the attainment of the objectives of the Directive and its effective application will be endangered. Thus, by playing the effectiveness card, domestic criminal laws regulating irregular migration are subjected to several limitations and guidelines.

The significance of *El Dridi* should be seen in the context of the subsequent case law that expanded its logic to a wide range of immigration offences. To codify the Court's pronouncements: in principle, the Return Directive does not preclude a Member State from classifying irregular entry and stay as a criminal offence

[84] Commission, 'Evaluation on the application of the Return Directive (2008/115/EC)' (22 October 2013) 165–66. Also see Izabella Mazcher, 'The CJEU's Ruling in Celaj: Criminal Penalties, Entry Bans and the Returns Directive' (*EU Law Analysis*, 6 October 2015), available at http://eulawanalysis.blogspot.co.uk/2015/10/the-cjeus-ruling-in-celaj-criminal.html (last accessed 11 March 2019).

[85] *Ibid*.

[86] Kosińska (n 80) 254.

and attaching penal sanctions to deter and prevent infringement of the national rules on residence. However, criminal provisions may not be applied before or during the return process when their effect would jeopardise the effective removal of the irregular migrant. Nonetheless, as noted in *Sagor*, the effectiveness argument has significant limits, in the cases of pecuniary sanctions and – to a lesser extent – home detention. In cases where coercive measures did not lead to the removal of the person concerned, Member States enjoy a wide degree of discretionary power to impose sanctions. This was concretised in *Achughbabian*, where the CJEU held that penal sanctions may be imposed in cases of third-country nationals to whom the return procedure has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return. In that respect, it was shown that in *Celaj* the Court opted for an expansive reading of this derogation with a view to addressing sovereignty concerns over criminalising repeated violations of immigration laws. This was an unfortunate and controversial change in the mindset of the Court that seems to have forgotten the effectiveness arguments as proclaimed in *El Dridi* in *lieu* of a restrictive approach that required further justification, particularly in the light of the Advocate General's Opinion, who raised more broadly the issue of whether it is a crime to be a foreigner.[87] This change of heart may arguably spark criticism as regards the complicity of the EU in criminalising irregular migrants. A holistic overview of the case law shows that this complicity is a moving target and perhaps the pronouncements in the leading case of *El Dridi* have recently been nuanced and compromised for the sake of protecting national sovereignty. It remains to be seen whether the Return Directive will generate more cases that will further refine or rebut the findings in *El Dridi*. The tenuous relationship between EU immigration law and domestic criminal law is far from being settled and will thus remain in the spotlight.

[87] *Skerdjan Celaj*, Opinion of Advocate General Szpunar (n 76), para 1.