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Has the CJEU Made the First Step to Put a Stop to the Criminalisation of Migration? Commentary to the Judgement in the Case of JZ in the Context of the COVID-19 Pandemic

Abstract: The paper presents a critical discussion of the CJEU judgment in the JZ case (C 806/18), in which the Court interpreted Article 11 of Directive 2008/115 that regulates entry ban issuance. The author asks a question of whether an entry ban as a measure limiting the right to free movement has a moral and legal ground in international law and EU law. Moreover, the author focuses on the problem of the criminalisation of irregular migration – both in the context of the established line of the Court's case law and in the case of a vague national law standard that penalizes illegal stays – the possibility to apply the criminal law concept of error in law and thus exclusion of criminal liability of an illegal migrant.
Keywords: COVID-19 pandemic, criminalisation of migration, Directive 2008/115, entry ban, irregular migration, return policy

Introduction

In the JZ judgement[1] that is the subject matter of this commentary, the Court of Justice of the European Union (hereinafter the Court) interpreted Article 11 of Directive 2008/115[2]. Governance of irregular migration is a particular challenge for

1 Judgment of CJEU of 17 September 2020 in the case of criminal proceedings against JZ, C806/18; hereinafter the JZ judgement, judgment in C 806/18.

2 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

the Member States of the European Union (EU), which on the one hand are obliged to respect guarantees of human rights that result from acts of international law and the EU law alike[3], and on the other are trying to mitigate the threats for the security of the host country likely to be brought by flows of irregular migrants.

Ethical and moral problems resulting from governance of illegal migration are reflected in the semantics of the language of the law and the legal language as well as the semantics of the scholarly human rights discourse that is carried out parallel to the implementation of return law standards – Directive 2008/115 is sometimes called a "directive of shame"[4] by scholars and NGOs' representatives. In turn, terms such as "unwanted migrants" or "illegal migrants" used to denote third-country nationals that stay in the territory of Member States (MS) in breach of the law do not encourage a positive attitude towards such migration flows either[5].

Therefore, can the case law of the Court of Justice of the European Union and the opinions of Advocates General provide an advocacy mainstream in the context of the need to ensure special protection of, and sensitivity to, the rights of a group which in administrative and court proceedings is unquestionably particularly vulnerable to violations?

1. EU Law Analysed

In the judgement that is the subject matter of this commentary, the Court interpreted Article 11 of the Return Directive. According to Article 11(1) of this directive:

> *Return decisions shall be accompanied by an entry ban:*
> *a) if no period for voluntary departure has been granted, or*
> *b) if the obligation to return has not been complied with.*
> *In other cases, return decisions may be accompanied by an entry ban.*

An entry ban was defined in Article 3 of the Directive, and pursuant to point 6 it means "an administrative or judicial decision or act prohibiting entry into and stay

nationals (O.J. L 348, 24.12.2008, p. 98–107); hereinafter Directive 2008/115, Return Directive, Directive.

3 These guarantees result, in particular, from Articles 18 and 19 of the Charter of Fundamental Rights of the European Union, hereinafter as Charter (O.J. C 202, 7.06.2016, p. 389–405).

4 A. Crosby, The Political Potential of the Return Directive, "Laws" 2014, no. 3, p. 7, www.mdpi.com/journal/laws/ (12.03.2021).

5 T.G. Eule, L. M. Borrelli, A. Lindberg, A. Wyss, Migrants Before the Law. Contested Migration Control in Europe, London, and Basingstoke 2019, pp. 25–26. The authors of the research introduce an interesting term "migrants with precarious legal status" which does not seem to have pejorative undertones. See also H. Motomura, Immigration Outside the Law, New York 2014, pp. 21–22.

on the territory of the Member States for a specified period, accompanying a return decision". Moreover, Article 11 of the Directive stipulates that an entry ban shall not in principle exceed five years, but if the third-country national represents a serious threat to public security, national security, or public policy this period may be longer. An entry ban may be withdrawn or suspended (upon a discretionary decision of a Member State) where a third-country national demonstrates that he or she has left the territory of a Member State and thus fully complied with a return decision[6].

2. Facts and Domestic Proceedings

Domestic proceedings in the discussed case were carried out before the Supreme Court of the Netherlands. Mr JZ, born in Algeria in 1969, was the party to the proceedings. Mr JZ was staying in the territory of the Netherlands when he was declared "undesirable" in a 2000 decision. Following the implementation of the Return Directive in the Netherlands, a relevant national law on foreign nationals was amended on 31 December 2011. On this basis Mr JZ requested that the declaration of undesirability should be lifted, and the State Secretary for Security and Justice decided in favour of the applicant. However, by order of 19 March 2013, the applicant was obliged to leave the territory of the host country and a five-year entry ban was also issued with respect to him[7]. The reasons for the entry ban for Mr JZ included *i.a.*, the fact that he had been previously convicted of various offences. It is worth emphasizing that pursuant to Dutch law (A4/3.3 Vreemdelingencirculaire 2000 – Circular on Foreign Nationals) "any suspicion or conviction in respect of an offence constitutes a danger to public order"[8] – thus Mr JZ constituted a threat to public order in the light of the national law. In turn, pursuant to the Vw law (Article 66a(4)(b)) a foreign national who represents a threat to public policy and who is subject to an entry ban may not, under any circumstances, be lawfully resident in the territory of the Netherlands[9].

Mr JZ was arrested in 2015 in Amsterdam. Because he did not leave the Netherlands immediately after a decision imposing an entry ban was ordered against him, it was determined that he stayed in the territory of the Netherlands illegally. Thus, the national authorities concluded that there were grounds for applying

6 Article 11(3) sentence 1 of Directive 2008/115. Moreover, "Member States may refrain from issuing, withdraw, or suspend an entry ban in individual cases for humanitarian reasons. Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons".

7 Judgment in C 806/18, para. 17; Opinion of Advocate General – Opinion of Advocate General Szpunar, delivered on 23 April 2020, C 806/18, JZ, hereinafter as Opinion of Advocate General in C 806/18.

8 Opinion of Advocate General in C 806/18, para. 16.

9 *Ibidem*, para. 12.

criminal sanctions under Article 197 of the Code of Criminal Law (hereinafter CCL) against Mr JZ. Pursuant to this provision "a third-country national who remains in the Kingdom of the Netherlands while knowing, or having serious reason to suspect, that he has been declared 'undesirable' pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw is, *inter alia*, liable to be sentenced to a term of imprisonment not exceeding six months".[10] On this basis Mr JZ was sentenced to a term of imprisonment of 2 months[11].

In his appeal Mr JZ asserted that a breach of an entry ban cannot be penalized where a third-country national did not leave the territory of a Member State as such a ban only takes effect upon leaving a Member State[12]. Thus, Mr JZ concluded that he committed no crime.

The national court that heard the case in the next instance, the Supreme Court of the Netherlands, had doubts as to the legal assessment of a breach of an entry ban if a third-country national has never left the host country. Therefore, pursuant to Article 267 of the Treaty on the Functioning of the European Union[13], the Supreme Court, as the court of final instance for hearing this case, decided to stay the proceedings and referred a question for a preliminary ruling to the Court of Justice of the EU[14].

3. Questions Referred and the Court's Rulings

The national court requested that the CJEU should examine compliance of the Dutch criminal statute (namely Article 197 of the aforementioned Code of Criminal Law) with Article 11 of Directive 2008/115. The national court wished to determine whether a criminal sanction may be imposed on a third-country national who failed to comply with the return decision and against whom an entry ban was ordered but who did not leave the territory of a Member State, while the criminal act he is accused of is defined as: "an unlawful stay with notice of an entry ban, issued in particular on account of that third-country national's criminal record or the threat he represents to public policy or national security"[15]. The Court, following the doubts presented by the national court, decided to interpret Article 11 of the Directive also in the context of the judgement in the Ouhrami case[16].

10 Judgment in C 806/18, para 15.
11 *Ibidem*, para. 20.
12 Judgment in C 806/18, para. 19.
13 Treaty on the functioning of the European Union (consolidated version O.J. C 202, 7.06.2016, p. 47).
14 Case C 806/18: Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 20 December 2018 — JZ (O.J. C 122, 1.4.2019, p. 8).
15 Judgment in C 806/18, para. 23.
16 Judgment of CJEU of 26 July 2017 in the case of criminal proceedings against Mossa Ouhrami, C 225/16, hereinafter as judgment in C 225/16.

In its preliminary observations the Court emphasized, in line with the established case-law (judgments in Achunghbabian and Sagor)[17], that Member States may qualify an illegal stay as an offence and apply criminal sanctions so as to discourage third-country nationals from irregular stay in the EU. Criminal penalties cannot, however, jeopardise the achievement of the objectives pursued by the Directive or deprive it of its effectiveness[18] – the Directive's main objective is to return third-country nationals to their countries of origin. Thus, criminal penalties may only be applied where all procedural measures for implementation of the return or forcing the third-country national to return stipulated in the Directive have been exhausted[19] – according to the Court, a formula devised in the Achughbabian judgment may be applied and the national solutions criminalising illegal stay that were examined in the case are not contrary to the Directive.

Another key problem appeared in the investigated case, which is the legal qualification of a breach of an entry ban ordered against a third-country national when he did not leave the territory of a Member State. The Court noted that an entry ban order produces effects from the point when the third-country national actually leaves the EU territory, whereas Mr JZ is in a specific unlawful situation which is not a consequence of a breach of an entry ban under Article 11 of the Return Directive, but it results from his initial illegal stay in the territory of the Kingdom of the Netherlands[20]. In domestic proceedings Mr JZ claimed that, since he never left the EU, the criminal penalty for a breach of an entry ban cannot be applied against him. In turn, *a contrario*, the Dutch government claimed that Article 197 of the Code of Criminal Law is intended to penalise any illegal stay of a third-country national with notice that an entry ban has been imposed on him. In the opinion of the Dutch government, it is irrelevant whether that ban was actually breached or not.

The Court believed that a requirement for an offence must be satisfied if the criminal penalty under the law is to be applied. In the case of Mr JZ there are no grounds to believe that he violated the entry ban and thus he cannot be sentenced to deprivation of liberty[21].

However, in the Court's opinion, in cases such as that of Mr JZ a criminal penalty for illegal stay may be imposed on a person who did not breach an entry ban but stayed in the territory of a Member State with notice of an entry ban issued on account of that third-country national's criminal record or the threat he represents to public policy or national security[22].

17 Judgment of CJEU of 6 December 2011 in the case of Alexandre Achughbabian v Préfet du Val-de-Marne, C 329/11; Judgment of CJEU of 6 December 2012 in the case of Md Sagor, C 430/11.

18 Judgment in C 806/18, para. 26.

19 Judgment in C 806/18, para. 27; see also C 329/11.

20 Judgment in C 806/18, para. 33 and 34 of the

21 *Ibidem*, para. 40.

22 *Ibidem*, para. 43.

The Court laid down two conditions for imposing penal sanctions on third-country nationals such as Mr JZ. First, the criminal act the third-country national is accused of subject to penalty cannot be defined by a reference to a breach of an entry ban, but it must have a previous justified ground, when *e.g.*, the third-country national committed criminal acts and was convicted for them by a final judgment. Secondly, the national criminal provision must be compliant with standards of the case-law of the European Court of Human Rights (hereinafter also ECtHR), that is: "any law empowering a court to deprive a person of his or her liberty must be sufficiently accessible, precise, and foreseeable in its application in order to avoid all risk of arbitrariness"[23]. The court decided that it is for the national court to examine if these conditions are met in the case of Mr JZ.

4. Assessment of the Judgement

The ruling at issue should be, in my opinion, analysed in terms of the standards of protection of fundamental rights implemented by the European Union.

Legal scholars and commentators broadly address the problem of unequal protection of migrants in relation to host country nationals[24]. David Miller goes as far as to argue that migrants lose some of their human rights as a result of illegal border crossing[25]. Host countries are obliged to protect migrants' fundamental rights according to their territorial jurisdiction, regardless of whether the foreign nationals stay there legally or not. A host country is responsible for finding a fair balance between protection of its own interests and protection of the rights of an individual.

Therefore, do irregular migrants have only the right to enter or the right to remain too?[26]

4.1. Entry Ban as a Measure Restricting the Right to Free Movement

Freedom of movement as a human right was most comprehensively guaranteed in the Universal Declaration of Human Rights, according to which: "Everyone has the right to freedom of movement and residence within the borders of each state"[27].

23 *Ibidem*, para. 41; see also judgment of ECtHR of 21 October 2013 in the case of Del Río Prada v. Spain, application no. 42750/09.

24 C. Grey, Justice and Authority in Immigration Law, Oxford and Portland, OR 2017, p. 55.

25 D. Miller, Strangers in Our Midst, The Political Philosophy of Immigration, Cambridge, MA 2016, p. 117.

26 S. Grant, The Recognition of Migrants' Rights within the UN Human Rights System: the first 60 years, (in:) M.B. Dembour, T. Kelly (eds.), Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, London 2011, pp. 30–33.

27 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), https://www.un.org/en/

This right is derogable, *i.e.*, it may be removed in specific circumstances stipulated by the legislator. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights provide that the right to free movement is limited to the right to leave one's place of residence, whereas when it comes to the freedom of choice of a place of residence, they stipulate the exercise of this right only when the stay is legal[28]. Moreover, this right is limited due to "national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[29] The Charter guarantees the right to free movement only to EU citizens[30], with a reservation that it may be legally extended to include third-country nationals who legally stay in the EU.

An entry ban stipulated in the Return Directive is thus a measure intended to limit the right to free movement. As noted by Eleonora di Molfetta, a re-entry ban is a form of exclusion, and the migrant himself starts to be treated as *persona non grata*[31] in the EU territory.

Entry bans ordered against third-country nationals are issued on the basis of Article 11 of Directive 2008/115. As follows from the Report of the European Migration Network, most Member States issue entry bans on the basis of circumstances foreseen in Article 11(2) of the Directive, while some, such as Hungary, or the Czech Republic, issue entry bans automatically for every return decision[32]. The report also shows that entry bans that exceed 5 years are issued where a third-country national represents a serious threat to public or national security[33]. Therefore, an entry ban enables national administrative measures to have European-wide effects[34].

about-us/universal-declaration-of-human-rights. Moreover, pursuant to Article 13(2): "Everyone has the right to leave any country, including his own, and to return to his country".

28 International Covenant on Civil and Political Rights, 16 December 1966 (United Nations, Treaty Series, vol. 999, p. 171); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 (European Treaty Series – No. 5), hereinafter as Convention.

29 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963 (Council of Europe, European Treaty Series – No. 46), Article 2.

30 Article 45 of the Charter.

31 E. di Molfetta, J. Brouwer, Unravelling the 'Crimmigration Knot': Penal Subjectivities, Punishment, and the Censure Machine, "Criminology & Criminal Justice" 2020, vol. 20, no. 3, pp. 312–313.

32 European Migration Network (EMN), The Effectiveness of Return in EU Member States. Synthesis Report for the EMN Focussed Study, 2017, p. 76, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports_en (12.03.2021).

33 *Ibidem*, p. 79. In such cases, as is seen in the report, some Member States, such as Hungary, or the Netherlands, issue entry bans that are valid for up to 20 years – p. 80.

34 M. Strąk, Polityka Unii Europejskiej w zakresie powrotów. Aspekty prawne, Warsaw 2019, p. 146.

Given the above, a question arises as to whether the judgment in question brings a new light to the application and interpretation of the validity of entry bans. Interpretation of Article 11 of the Directive has an established line of CJEU case-law. The Court has addressed the validity of entry bans in Filev and Osmani,[35] and in Celaj[36]. The most comprehensive interpretation of Article 11 of Directive 2008/115 so far has been delivered in Ouhrami[37], where the Court asserted that an entry ban "must be calculated from the date on which the person concerned actually left the territory of the Member States"[38]. This ruling had a real impact on legislative changes in Member States – according to the aforementioned 2017 European Migration Network report, as a result of the judgment in the Ouhrami case, national legislations in Sweden, and Finland were adjusted to EU standards[39].

In the judgement in question the CJEU upheld the established case-law concluding that an entry ban produces effects only when the third-country national leaves the territory of a MS[40]. In the CJEU's belief, provisions of the Directive should be interpreted strictly – restriction of the freedom of movement by a valid entry ban should depend on meeting the basic requirement for the ban's validity, *i.e.*, the third-country national's leaving the EU territory. Thus, the Court does not leave any room for the interpretation to expand, concluding that all restrictions of personal rights must be clearly rooted in the law – in national laws implementing the Return Directive in this case.

An entry ban that appears in the narrative of reception by irregular migrants themselves as a "message of disapproval"[41] does not constitute violation of the right to freedom of movement, but it is an administrative law consequence of the third-country national's non-compliance with the host country's rules for receiving foreign nationals. However, leaving aside the legal positivism that dominates in the return law, is it worth asking the question of whether the European migration policy should not have an ethical goal to lead the migrants out of the legal limbo instead of prioritising the execution of their return.

35 Judgment of CJEU of 19 September 2013 in the case of criminal proceedings against Gjoko Filev and Adnan Osmani, C 297/12; see para. 44.

36 Judgment of CJEU of 1 October 2015 in the case of criminal proceedings against Skerdjan Celaj, C 290/14.

37 Judgment in C 225/16.

38 *Ibidem*, operative part.

39 EMN, The effectiveness…, *op. cit.,* p. 81. An interesting issue that has surfaced in the discussion on the consequences of the Ouhrami judgment and on ensuring its effectiveness was a question about allocating the burden of proof when the person involved has left the Member State, *i.e.*, whether the burden of proof for leaving a Member State will rest with the third-country national or with the MS bodies. *Ibidem*.

40 Judgment in C 806/18, para. 33; Opinion of Advocate General in C 806/18, para. 27.

41 E. di Molfetta, J. Brouwer, Unravelling…, *op. cit*., pp. 312–313.

4.2. Is there a Future for Criminalisation of Illegal Migration?

In the discussed judgment, with reference to the situation of third-country nationals like Mr JZ's, the Court clearly asserted that a criminal penalty for illegal stay can be imposed when the person in question is undesirable on the MS's territory. In Mr JZ's situation there are no doubts – the return procedure for him was completed and he was previously convicted and sentenced for offences committed on the territory of the host country. However, the Court added that the wording of such a provision, thus the quality of the legislative technique, should meet the standards resulting from the ECtHR case-law in connection with Article 5 of the Convention.

In my opinion the following issues should be discussed in the light of the judgment in question: firstly, the problem of criminalisation of irregular migration and its moral assessment that recurs in the human rights discourse; secondly, an answer to the question of how this judgment fits within the existing, relatively robust CJEU case-law in matters of criminalisation of migration; thirdly, it is worth addressing the Court's comment on the need to investigate the construct of a criminal regulation (stipulated in national legislation) that allows an illegal stay to be criminalised.

With reference to the first disputed question, it is first and foremost worth noting that third-country nationals with an irregular status should not be regarded as criminals or treated as such[42]. For example, a forced return (deportation) is not considered to be "double punishment". Unfortunately, as seen in practice, the so-called "double criminalisation" trend can be observed in some third countries and third-country nationals removed from the EU risk fines and arrest in their countries of origin[43].

The offence analysed in this case, involving a breach of an entry ban, is criminally penalised in most MSs[44]. The possibility to introduce such criminal penalties results from the division of powers between the EU and Member States stipulated in treaties – MSs have the autonomy in enacting national criminal laws[45]. As Emmanuele Pistoia rightly emphasizes: "Domestic criminal sanctions against illegal migrants on ground of their illegal entry or stay in a Member State surely cover an area where no EU provision is directly applicable"[46]. Thus, the Union cannot adopt common

42 L. Pasquali, La pena de prision para immigrantes irregulares perjudica la politica del retorno de la Union?, "RDCE" 2011, no 39, p. 553, as quoted in: M. Strąk, Polityka…, *op. cit*., p. 93;

43 J. Waasdorp, A. Pahladsingh, Expulsion or Imprisonment? Criminal Law Sanctions for Breaching an Entry Ban in the Light of Crimmigration Law, "Bergen Journal of Criminal Law and Criminal Justice" 2019, vol. 4, no 2, p. 9.

44 EMN, The effectiveness…, *op. cit.,* p. 89.

45 J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 9.

46 E. Pistoia, Unravelling Celaj, "European Papers" 4.05.2016, p. 709, https://www.europeanpapers.eu/en/authors/emanuela-pistoia (2.03.2021).

uniform criminal regulations in this area and Member States' practices in treating third-country nationals may vary and in effect may not guarantee uniform standards of treatment.

Criminalisation of migration is defined by Shahram Khosravi as "a political strategy that redefines a social issue into a crime: acts, positions and even human beings are made criminal by the law"[47].

In its case-law, the Court does not conduct moral inquiries into the validity of criminal sanctions for a breach of stay or entry, but only analyses the national law in force in its consistency with the EU law and with the objectives of the Return Directive. The assessment of the validity of the criminalisation of migration is, therefore, left to scholars. Eleonora di Molfetta and Jelmer Brouwer use the term "crimmigration crisis" to describe a situation in which the boundaries between crime control and migration control have blurred[48]. Crimmigration law, in turn, is defined as regulating the migration process by "immigration – related criminal grounds such as unlawful entry"[49]. These are types of misdemeanours and offences that only immigrants can commit[50].

The status of an undesirable migrant, such as that of Mr JZ in the discussed case, results in fact from a breach of hospitality and violation of principles of the host society – commission of criminal acts which cause harm to the host society. Criminalisation of such acts seems admissible and right in the context of international law – especially in the context of the so-called *ius communicationis* in Francisco de Vittoria's approach, who postulated that "it is not lawful to banish visitors who are innocent of any crime"[51]. Hugo Grotius spoke in a similar tone about *ius communicationis*, emphasizing that the right to remain in a host country is not absolute and may be guaranteed only to third-country nationals who obey the law of that host country[52]. In the context of these reflections, an analysis of criminalisation detached from its social consequences, though raising doubt, on the surface seems to be consistent with the principles of human rights.

Nevertheless, criminalisation of migration has its specific social effects which in turn have their consequences in standards of reception and treatment of migrants.

47 M. Kolankiewicz, M. Sager, Clandestine Migration Facilitation and Border Spectacle: Criminalisation, Solidarity, Contestations, "Mobilities" 2012, vol. 16, p. 4, https://www.tandfonline.com/doi/full/10.1080/17450101.2021.1888628 (12.03.2021).

48 E. di Molfetta, J. Brouwer, Unravelling…, *op. cit*., p. 303.

49 J.P. Stumpf, The Process is the Punishment in Crimmigration Law, (in:) K. Franko Aas, M. Bosworth (eds.), The Borders of Punishment. Migration, Citizenship, and Social Exclusion, Oxford 2013, p. 61. See also – J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 5.

50 J.P. Stumpf, The Process…, *op. cit*., p. 62.

51 V. Chetail, International Migration Law, Oxford 2019, p. 21.

52 *Ibidem*.

It leads to the creation of the image of migrants as "external enemies"[53] and to "fuelling the threat" of the presence of TCNs in the European Union[54]. It is also worth remembering that consequences of detention are not neutral to the mental state of migrants themselves[55].

Legal arguments also advocate that migration should be decriminalised – Mary Bosworth points out that rights of detained persons are less protected than rights of prisoners-host country nationals, and she calls this "under – criminalization"[56]. In my opinion, Emanuela Pistoia delivers a key argument against criminalisation of irregular migration – deprivation of liberty of a migrant as a result of a criminal judgment delays the process of removal and thus weakens the return policy implemented by the EU[57].

There is no doubt that it would be immensely valuable if the CJEU, when analysing national legislations and not having a real opportunity to rule on criminal law, addressed moral and social consequences of criminalisation of migration, especially in the context of the guarantees of fundamental rights under the Charter and the obligation to respect the dignity of each person[58].

This postulate seems even more valid in the time of the COVID-19 pandemic. The priority in an extraordinary situation such as a pandemic should involve conducting an effective and fastest possible third-country national's return to his country of origin, which in the time of the pandemic is still more difficult[59]. All the more so since criminal law detention of a third-country national with an unregulated status may pose a real risk of quicker an accelerated spread the virus. As results from the *ad hoc* inquiry of the European Migration Network conducted in Member States in 2021, they have come across numerous difficulties in enforcement of returns during the pandemic–*i.a.*, third-country nationals did not have the chance to have face-to-face return and reintegration counselling[60]. The security of a migrant's return

53 M. Bosworth, Human Rights and Immigration Detention in the United Kingdom, (in:) M.B. Dembour, T. Kelly (eds.), Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, London 2011, p. 171.

54 A. Tsoukala, Turning Immigrants into Security Threats: A Multi – Faceted Process, (in:) G. Lazardis (ed.), Security, Insecurity and Migration in Europe, London 2016, p. 188.

55 M. Kox, M. Boone, The Pains of Being Unauthorized in the Netherlands, "Punishment & Society" 2020, vol. 22, no. 4, p. 537.

56 M. Bosworth, Human Rights…, *op. cit*., p. 173.

57 E. Pistoia, Unravelling…, *op. cit*., p. 20.

58 Pursuant to Article 1 of the Charter, "Human dignity is inviolable. It must be respected and protected."

59 G. Sanchez, L. Achilli, Stranded: The Impacts of COVID-19 on Irregular Migration and Migrant Smuggling, "Policy Briefs" 2020, no. 20, p. 4, https://cadmus.eui.eu/bitstream/handle/1814/67069/PB_2020_20_MPC.pdf?sequence=1&isAllowed=y (29.06.2021).

60 *Ad Hoc* Query on 2020.81 Umbrella Inform – Covid-19 and Return – Part 2 (REG Practitioners and NCPs). Requested by COM on 21 December 2020, Document available at: www.ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en (12.03.2021).

to his country of origin in the time of the pandemic should involve limitation of pre-removal detention and instead applying an alternative to detention. Following this postulate, I believe that in the time of the pandemic Member States should also limit the application of criminal law provisions towards irregular migrants.

In answer to the question of how the discussed ruling fits within the existing, relatively robust, CJEU case-law in matters of criminalisation, one must first note that the Court believed in JZ that a breach of an entry ban cannot be criminally penalised where the third-country national did not leave the MS. Nevertheless, a penal sanction can be imposed on a third-country national in a situation such as that of Mr JZ, that is he may be punished for illegal stay. Such a sanction may be applied if it does not deprive the Directive[61] of its effectiveness and when application of national law ensures observance of the EU law – the CJEU invoked the existing case-law here, that is judgments in El Dridi[62], Achughbabian[63] and Sagor[64]. Allowing criminalisation of a breach of an entry ban – as the CJEU rules in, *inter alia,* Celaj[65] – constitutes in fact the EU's indirect involvement in criminalising illegal migration[66]. The Court rightly concluded that the situation of Celaj does not apply to Mr JZ since he is in a situation of initial illegality resulting from non-compliance with a return decision, not from breaching an entry ban and a re-entry.

In the JZ case the CJEU also upheld its findings from Ouhrami that an entry ban produces effects only upon the TCN leaving the MS. In fact, both the AG and the CJEU believe that the so-called the Achughbabian situation may be applied to Mr JZ, according to which an illegal stay may be punished as an offence when the third-country national stays in the EU territory without a well-founded reason for not pursuing a return[67].

As much as legal scholars and commentators emphasize that in Filev and Osmani and in Celaj the Court filled a certain legislative gap left by the EU legislator[68], the

61 Judgment in C 806/18, para. 26.

62 See A. Crosby, The Political…, *op. cit*., p. 10.

63 Judgment in C 329/11.

64 Judgment in C 430/11; see judgment in C 806/18, para. 26.

65 Judgment in C 290/14.

66 J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 2. In its judgment in Affum, another entry ban case, the CJEU also specified three situations in which a criminal sanction may be imposed for breaching an entry-ban, *ibidem*, p. 18. See Judgment of CJEU of 7 June 2016 in the case of Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, C 47/15.

67 Judgment in C 806/18, para. 25; Opinion of Advocate General in C 806/18, para 25. The Court issued a similar ruling in Sagor, *op. cit.*

68 A. Pahladsingh, The Legal Requirements of the Entry Ban: The Role of National Courts and Dialogue with the Court of Justice of the European Union, (in:) M. Moraru, G. Cornelisse, Ph. De Bruycker (eds.), Law and the Judicial Dialogue on the Return of Irregular Migrants from the European Union, Oxford 2020, p. 122.

CJEU case-law does not seem to be likely to change as a result of the judgment in JZ. The question of the applicability of a vague criminal standard to the so-called Achughbabian situation (thus also JZ's situation) invoked by the AG, and the CJEU, is much more important in this case.

When it comes to the discussed problem, both the AG, in his opinion, and the CJEU, in its judgment, refer to the questionable quality of the structure of the national criminal regulation that penalizes illegal stay. Pursuant to the afore-mentioned Article 197 of the Dutch Code of Criminal Law, "a third-country national who remains in the Kingdom of the Netherlands while knowing, or having serious reason to suspect, that he has been declared 'undesirable' pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw is, *inter alia*, liable to be sentenced to a term of imprisonment not exceeding six months"[69]. Mr JZ argued in his case that, in his opinion, the legal standard is intended to penalise a breach of an entry ban[70], whereas the Dutch government argued that Article 197 penalizes any illegal stay of a third-country national with notice of an entry ban ordered against him. It is irrelevant whether or not the third-country national has breached an entry ban.[71]

When ruling on the question about the applicability of Article 197 CCL towards Mr JZ, the Court concluded that the national court should assess its compliance with standards resulting from the case law of the ECtHR concerning Article 5 of the Convention. Thus the Court indirectly obliged the national court to examine the consistency of the national legislation with the standards of the Charter, since pursuant to Article 6 TEU "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[72], whereas the so-called horizontal clauses in the Charter guarantee that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"[73].

As emphasized by the CJEU in paragraph 41 of the JZ judgment, a legal standard must be sufficiently accessible, precise, and foreseeable. Article 5 of the Convention guarantees the right to liberty and security of person (parallel guarantees are laid down in Article 6 of the Charter). The ECtHR has ruled numerous times on violation

69 Judgment in C 806/18, para. 15.
70 *Ibidem*, para. 36.
71 *Ibidem*, para. 37.
72 Treaty on European Union (consolidated version O.J. C 202, 7.06.2016, p. 13–46).
73 Article 52(3) of the Charter.

of Article 5 of the Convention in cases brought by third-country nationals – the ECtHR's case-law demonstrates that, *inter alia*, detained illegal migrants are entitled to free legal assistance[74], while the authorities of the Member State should act with care and accuracy when it comes to translation of documents in cases of migrants who do not understand the language of the host country[75].

The national criminal provision should be also interpreted, in my opinion, in the light of the so-called "harm principle" – it must be demonstrated whether a criminal law standard that criminalises migration meets the requirement of this principle in the perception of John Stuart Mill, who emphasized that: "(…)the only purpose for which power can rightfully be exercised over any member of civilised community, against his will, is to prevent harm to others"[76]. Gabriel J. Chin emphasizes that national courts often apply criminal sanctions against undocumented third-country nationals on grounds that they are unsuitable for probation[77].

The Dutch legal norm analysed in the light of the judgment contains a rather blurry expression "an unlawful stay with notice of an entry ban". In the context of this discussion, it is worth attempting to answer the question regarding the degree of legal awareness of third-country nationals. Persons who legally stay in the MS's territory have the opportunity to participate in orientation courses, whereas migrants from the so-called grey zone do not have real opportunities to learn about their rights, especially rights of a party to an administrative procedure and court proceedings. Admittedly, Article 12 of Directive 2008/115 guarantees that:

> *1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.*
>
> *(...)*
>
> *2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.*

74 Report of the Commission of 13 July 1982 in the case of Mohammed Zamir v. United Kingdom, application no. 9174/80. See A. Szklanna, Ochrona prawna cudzoziemca w wietle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 167.

75 Judgment of ECtHR of 12 April 2005 in the case of Shamayev and Others v. Georgia and Russia, application no. 36378/02. See A. Szklanna, …, *op. cit*., p. 167.

76 L. Zedner, Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment, (in:) K. Franko Aas, M. Bosworth (eds.), The Borders of Punishment. Migration, Citizenship, and Social Exclusion, Oxford 2013, p. 51.

77 G.J. Chin, Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process, "UCLA Law Review" 2011, p. 1431, https://www.uclalawreview.org/illegal-entry-as-crime-deportation-as-punishment-immigration-status-and-the-crim[inal-process/ (12.03.2021).

Thus, it may be presumed that the third-country national is aware of the content of the administrative decision ordered against him. However, in the light of Article 12(3) this presumption is not so obvious, as:

> *3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.*
>
> *In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.*

Given the above, it is possible that a third-country national might not be aware of being "undesirable" in the territory of a Member State. The so-called error in law may occur and thus, a situation in which a third-country national will not be aware he has committed an offence of illegal stay due to his poor degree of understanding of the legal provision or due to the offender's mental level – third-country nationals in the grey zone are often less educated and less integrated than economic migrants. In such a situation we may be dealing with a lack of awareness of the unlawfulness of a prohibited act, which excludes the offender's criminal liability. Where national authorities conclude that the error in law was unjustified (*i.e.*, the third-country national on his own wrongly interpreted legal standards rarely applied in a given legislation), there are still measures that allow for this migrant to be treated as part of a vulnerable group and for extraordinary leniency[78].

In my assessment, the standard under Article 197 CCL gives room for arbitrariness towards TCNs who should be classified as a vulnerable group in proceedings before administrative and court authorities, due to their lack of knowledge of the legal culture of the host country. A criminal regulation should not be characterised in such a way, as AG mentioned in his opinion: "Even a benevolent reading of this provision requires intellectual pirouettes"[79].

Thus, perhaps, in the light of scholarly interpretation of the JZ judgment, a review of national legislations of Member States will be necessary to ensure full protection of migrants' rights. I also believe that this judgment opens a door for the elimination of criminalisation of migration in the EU countries. Recognition of absence of the awareness of the unlawfulness of a prohibited act may become an effective instrument that protects migrants against criminal sanctions for illegal stay. Involvement of legal

78 Such a measure is stipulated in Article 30 of the Polish criminal code – the Act of 6 June 1997—Criminal Code (consolidated text Journal of Laws 2020.1444). For the unequal situations of migrants and the so-called "national criminals" see D. Weissbrodt, M. Divine, International human rights of migrants, (in:) B. Opekin, R. Perruchoud, J. Redpath-Cross (eds.), Foundations of International Migration Law, Cambridge 2012, p. 159.

79 Paragraph 40 of the Opinion of Advocate General in C 806/18.

scholars, and commentators, and non-governmental organizations will reinforce it and so will encouragement for such interpretation of provisions that criminalize migration.

Conclusions

To sum up, it seems almost certain that the discussed judgment opens great possibilities for a scholarly discussion on the moral basis of the existence, and possibilities of elimination, of the criminalisation of illegal immigration. The problem of effectiveness of the criminalisation of migration, in the light of the return policy, gains special importance in the time of the COVID-19 pandemic[80] – in my opinion the coronavirus epidemic should encourage effective implementation of returns rather than placement of migrants in prisons, which, unfortunately, are often overcrowded and facilitate transmission of the virus. Another solution for managing illegal migration which is worth discussing is the possibility of implementing regularisation operations (amnesties)[81].

The judgment fits within the human rights discourse on the elimination of the criminalisation of irregular migration. It is worth noting that this is the first CJEU judgment on this phenomenon issued during the COVID-19 pandemic. Given the current social situation, it gains particular significance. Prisons are not safe places during the pandemic, and it is difficult to find arguments for risking the health and lives of third-country nationals, especially where they do not fully realize the nature of the prohibited act committed since they do not know criminal law regulations of the host country. All the more so, since in the light of the Union's law, an effective return is to be a priority with regard to such persons. Complaints filed by prisoners to the Commissioner for Human Rights on the conditions in penitentiaries raise concerns (*i.a.*, guards not applying personal protection measures, or the lack of warm water)[82]. We have nothing but hope that the publicizing of the judgment in question among practitioners, including judges adjudicating in criminal cases concerning third-country nationals, will have a positive impact on at least a partial elimination of the criminalisation of irregular migration.

80 Ad Hoc Query…, *op. cit.*

81 J.H. Carens, The Ethics of Immigration, New York 2013, p. 147.

82 Koronawirus a więzienia. Skargi do RPO – na brak środków ochrony, nieprzestrzeganie zaleceń sanitarnych, dostęp do badań, https://www.rpo.gov.pl/pl/content/koronawirus-a-wiezienia-skargi-rpo-od-osadzonych-i-rodzin (29.05.2021).

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