Chapter 4
After Entry: Criminalisation as Risk Management, Detention and Removal

4.1 Introduction

In addition to the use of substantive criminal law to enable the prosecution of immigration-related offences, a key strand of the criminalisation of migration is the emphasis on the exclusion of migrants from the legal safeguards applicable in the jurisdiction once they have entered the territory and the strong priority for the EU and its Member States of the removal of irregular migrants from their territory. Exclusion and removal have far-reaching negative human rights and rule of law implications for migrants, especially in cases where the latter are considered to be high-risk. This chapter will analyse the implications of the criminalisation of migration in the context of exclusion and deportation by focusing on two main aspects of criminalisation. The first part will focus specifically on the exclusion and removal of asylum-seekers, either via their exclusion from refugee status or via mechanisms whereby EU Member States have attempted to shield their jurisdiction from the responsibility of examining asylum applications via the transfer of asylum seekers either to other European Union Member States (under the system established by the Dublin Regulation) or, in accordance with the provisions of the asylum procedures Directive, to countries outside the European Union considered to be 'safe'. Attempts by the European Union and Member States to prevent asylum seekers from reaching the EU external border analysed in Chap. 2 are here thus coupled with attempts to evade legal responsibilities with regard to the examination of asylum claims in cases where asylum seekers have made it into the European Union. The second part will examine criminalisation in the context of removal, by focusing in particular on the evolution and provisions of the EU Returns Directive. Following the analysis of the impact of the Court's case-law on using the Returns Directive to limit national criminalisation powers in Chap. 3, this chapter will focus on the impact of the case-law of the Court of Justice in interpreting and shaping the

V. Mitsilegas, *The Criminalisation of Migration in Europe*,
SpringerBriefs in Law, DOI 10.1007/978-3-319-12658-6_4

provisions of the Directive in the light of human rights law. The chapter will focus in particular on the interpretation by the Court of Justice of the provisions of the Returns Directive on the detention of migrants and examine the extent to which the Court has placed limits to the criminalisation of migration such detention powers entail.

4.2 The Exclusion of Asylum-Seekers

The development of the Common European Asylum System has been marked by efforts to disassociate the legal systems of EU Member States from obligations to examine in detail asylum claims in instances where such claims are deemed to be undeserving. There are three main examples of this trend: the inclusion in European asylum law of provisions allowing for exclusion from refugee status of individuals deemed as posing a security risk to EU Member States under the refugee qualification Directive; the refusal to examine an asylum application combined with the automatic transfer of an asylum seeker to another EU Member State under the system established by the Dublin Regulation; and the treatment of asylum applications in an accelerated procedure in cases involving inter alia asylum seekers who are deemed to be high risk or uncooperative and the non-examination of asylum applications if applicants can be transferred to third countries outside the European Union which are considered to be safe under the system put forward by the asylum procedures Directive. These elements of European asylum law have survived the move from the post-Amsterdam minimum standards in asylum law to the post-Lisbon measures entailing a higher level of harmonisation and leading to a Common European Asylum System. What all these instances have in common is the criminalisation of the asylum seeker on the basis of the perception of the latter and the asylum claims submitted as a security risk, abusive, or posing an unreasonable burden to the asylum system of EU Member States. What all these three instances have in common is the exclusion of the asylum seeker from the asylum determination system of EU Member States, with the Dublin Regulation and the safe third country provisions of the asylum procedures Directive ultimately aiming to remove asylum seekers and their claims to the responsibility of other countries, inside or outside the European Union. While preventive immigration control as analysed in Chap. 2 aims at shielding the territory and jurisdiction of Member States from the very arrival of asylum seekers *before* entry, the measures analysed in this chapter complete this picture of deflection by aiming to exclude asylum seekers from the jurisdiction of Member States and expel them from their territory *after* these asylum seekers have managed to gain entry into the European Union.

4.2.1 Exclusion from Refugee Status

Like the minimum standards Directive it has replaced,[1] the post-Lisbon refugee qualification Directive has maintained the possibility for Member States to exclude third-country nationals from refugee status.[2] Exclusion is linked primarily with the perception of the asylum seeker as a risk to society and to the political system of Member States. While provisions on exclusion from refugee status do exist in international refugee law,[3] efforts to exclude third country nationals from being refugees have intensified post-9/11, within the emergence of a general climate of securitisation of migration and stigmatisation of foreigners.[4] This securitisation of asylum seekers has also been reflected in the adoption of counter-terrorism Resolutions by the United Nations Security Council.[5] According to the refugee qualification Directive, a third-country national is excluded from being a refugee inter alia where there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee[6] and if he or she has been guilty of acts contrary to the purposes and principles of the United Nations.[7] The Directive further provides for the exclusion of third-country nationals from subsidiary protection, adding that exclusion can happen if the third country national constitutes a danger to the community or to the security of the Member State in which he or she is present[8] or if, without further specification in the text, he or she has committed a serious crime.[9] The consideration of third country nationals as a security risk may also lead to the revocation of refugee status. Member States may inter alia revoke, end or refuse to renew refugee status when here are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present[10] and when the third country national having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.[11] As Guild and Garlick have noted, exclusion and revocation on

[1] Council Directive 2004/83/EC of 29.4.2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, OJ L304, 30.9.2004, p. 12.

[2] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9, 20.12.2011.

[3] For an overview see Guild and Garlick (2011).

[4] For an overview, see Goodwin-Gill (2008).

[5] See Mathew (2008).

[6] Article 12(2)(b).

[7] Article 12(2)(c).

[8] Article 17(1)(d).

[9] Article 17(1)(b).

[10] Article 14(4)(a).

[11] Article 14(4)(b).

grounds of the third country national constituting a security threat relate not to the past acts of an asylum seeker, but to prospective and hypothetical future acts.[12] The text of the Directive appears to leave open the exclusion of asylum seekers from refugee status on the basis of subjective assessments by the State of them constituting a security risk. This subjectivity and potential exclusion on the basis of labelling third-country nationals as security risks poses significant challenges to human rights and the rule of law, in particular when such assessments are made in a blanket and automatic way without being based on concrete evidence or on the assessment of individual cases.

The rule of law challenges arising from the provisions on exclusion from refugee status have been addressed by the Court of Justice in its ruling in *B and D.*[13] The Court was asked to interpret the exclusion criteria set out in the first refugee qualification Directive in cases where third country nationals were considered to fall under the exclusion grounds falling currently under Article 12(2)(c) of the new refugee qualification Directive on the basis of their membership of an organisation which has been prescribed as a terrorist group under a separate listing EU Common Position. The Court found that the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 which implemented Security Council Resolution 1373 (2001), and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that person has committed a serious non-political crime or acts contrary to the purposes or principles of the United Nations. It added that the finding in such a context that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on *an assessment on a case-by-case basis of the specific facts*, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether *individual responsibility for carrying out those acts can be attributed to the person concerned*, regard being had to the standard of proof required under Article 12(2) of the directive.[14] The Court's ruling thus introduces important rule of law safeguards. While the Court has accepted that the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension[15] it went on to stress that the mere fact that the person concerned was a member of such an organisation cannot automatically mean that person must be excluded from refugee

[12] Guild and Garlick, *call-out*, p. 74.

[13] Joined Cases C-57/09 and C-101/09, *B and D*, judgment of 9 November 2010. For a recent commentary, see Drywood (2014).

[14] Paragraph 99. Emphasis added.

[15] Paragraph 84.

status.[16] Participation in the activities of a terrorist group cannot come necessarily and automatically within the grounds of exclusion laid down in 12(2)(b) and (c) of the Directive.[17] These provisions presuppose a full investigation into all the circumstances of each individual case.[18] Exclusion from (and revocation of) refugee status must thus be based on a full investigation and an assessment on a case-by-case basis of the specific facts which will lead to the attribution of individual responsibility for specific acts to the third country nationals involved. Member States are thus not allowed to exclude third country nationals from refugee status merely by labelling them as 'terrorists.' The EU legislator has attempted to reintroduce this element of subjectivity in the Preamble to the new refugee qualification Directive, which states that the notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.[19] However, this provision must be applied in compliance with the Court's ruling in *B and D* which requires an individual assessment on a case-by-case basis based on specific facts and an individual attribution of responsibility for specific acts.

4.2.2 Intra-EU Transfers of Asylum-Seekers: The Dublin Regulation

EU harmonisation measures on asylum have been accompanied by a cooperative system of intra-EU allocation of responsibility for the examination of asylum claims. Such a system had already been established in public international law shortly after the fall of the Berlin Wall by the 1990 Dublin Convention,[20] which was replaced post-Amsterdam by the Dublin Regulation.[21] Placed in the broader context of the construction of an Area of Freedom, Security and Justice, the Dublin Regulation has been designed to serve not only asylum policy, but also broader border and immigration control objectives. According to the Preamble to the Regulation, 'the progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the [then] Treaty establishing the European Community and the establishment of [the then] Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders,

[16] Paragraph 88.

[17] Paragraph 92.

[18] Paragraph 93.

[19] Preamble, recital 37.

[20] For a background see Blake (2001).

[21] Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25.2.2003.

makes it necessary *to strike a balance between responsibility criteria in a spirit of solidarity*'.[22]

The significance of border control considerations is evident in the formulation of the criteria established by the Regulation to allocate responsibility for the examination of asylum applications by Member States. The Regulation puts forward a hierarchy of criteria to determine responsibility.[23] While on top of this hierarchical list one finds criteria such as the applicant being an unaccompanied minor,[24] family reunification considerations[25] or a legal relationship with an EU Member State (such as the possession of a valid residence document or a visa),[26] following these criteria one finds the criterion of irregular entry into the Union: if it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, this Member State will be responsible for examining the application for asylum.[27] Irregular entry thus triggers state responsibility to examine an asylum claim. The very occurrence of the criteria set out in the Dublin Regulation sets out a system of automatic inter-state cooperation which has been characterised as a system of negative mutual recognition.[28] Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognise the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. The Dublin Regulation thus introduces a high degree of automaticity in inter-state cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria are established to apply, with the only exceptions to this rule (on the basis of the so-called sovereignty clause in Article 3 (2) and the humanitarian clause in Article 15 of the Regulation) being dependent on the action of the Member State which has requested the transfer. As in the case of the application of the principle of mutual recognition in criminal matters,[29] automaticity in interstate cooperation is accompanied with the requirement of speed, which is in this case justified on the need to guarantee effective access to the asylum procedure and the rapid processing of asylum applications.[30]

Notwithstanding the claim of the Dublin Regulation that one of its objectives is to facilitate the processing of asylum applications, it is clear that the Regulation has been drafted primarily with the interests of the state, and not of the asylum seeker, in mind. The Regulation establishes a mechanism of automatic interstate cooperation aiming to link allocation of responsibility for asylum applications with border

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[22] Preamble, recital 8. Emphasis added.

[23] Chapter III of the Regulation, Articles 5–14.

[24] Article 6.

[25] Articles 7 and 8.

[26] Article 9.

[27] Article 10.

[28] Guild (2004).

[29] Mitsilegas (2006).

[30] Article 17(1) and Preamble, recital 4.

controls and in reality to shift responsibility for the examination of asylum claims to Member States situated at the EU external border. The specificity of the position of individual affected asylum seekers is addressed by the Regulation only marginally, with the Regulation containing limited provisions on remedies: a non-suspensive remedy to the asylum seeker with regard to the decision not to examine his or her application[31] and the decision concerning his or her taking back by the Member State responsible to examine the application.[32] The asylum determination system envisaged by the Dublin Regulation has been a system aiming at speed. This objective has recently been confirmed by the Court of Justice which in the case of *Abdullahi*[33] stated that one of the principal objectives of the Dublin Regulation is the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum claims.[34] Privileging the interests of the state in relation to the position of the asylum seeker is linked to the perception that the abolition of internal borders in the Area of Freedom, Security and Justice will lead to the abuse of domestic systems by third-country nationals. The terminology of abuse can be found in cases before the Court of Justice of the European Union, with Advocate General Trstenjak recently stating that the purpose of the hierarchy of criteria in the Dublin Regulation is first to determine responsibility on the basis of objective criteria and to take into account of the objective of preserving the family *and secondly to prevent abuse in the form of multiple simultaneous or consecutive applications for asylum.*[35] In the political discourse, this logic of abuse has been encapsulated in the terminology of 'asylum shopping'. Giving evidence before the House of Lords European Union Committee on the draft Dublin Regulation, the then Home Office Minister Angela Eagle stated that the underlying objectives of the Regulation were 'to avoid asylum shopping by individuals making multiple claims in different Member States and to address the problem known as 'refugees in orbit'…it is in everybody's interests to work together to deal with some of the issues of illegal migration and to get some coherence into the asylum seeking issue across the European Union'.[36] Under this logic of abuse, the Regulation aims largely to automatically remove the unwanted, third-country nationals who are perceived as threats to the societies of the host Member States. The legitimate objective of applying for asylum is thus securitised in the law of the European Union.

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[31] Article 19(2).

[32] Article 20(1)(e).

[33] Case C-394/12, *Abdullahi*, judgment of 10 December 2013.

[34] Paragraph 59.

[35] Opinion of Advocate General Trstenjak Case C-245/11, *K,* Opinion of 27 June 2012, para 26, emphasis added.

[36] House of Lords Select Committee on the European Union (2001–2002) *Asylum Applications—Who Decides?*, 19th Report, session 2001–2002, para 27.

As mentioned above, the system of interstate cooperation established by the Dublin Regulation is based on a system of negative mutual recognition. Mutual recognition creates extraterritoriality[37] and presupposes mutual trust[38]: in a borderless Area of Freedom, Security and Justice, mutual recognition is designed so that the decision of an authority in one Member State can be enforced beyond its territorial legal borders and across this area speedily and with a minimum of formality. As in EU criminal law, in the field of EU asylum law automaticity in the transfer of asylum seekers from one Member State to another is thus justified on the basis of a high level of mutual trust. This high level of mutual trust between the authorities which take part in the system is premised upon the presumption that fundamental rights are respected fully by all EU Member States across the European Union. In asylum law, as evidenced in the Preamble of the Dublin Regulation, such mutual trust is based additionally upon the presumption that all EU Member States respect the principle of *non-refoulement* and can thus be considered as safe countries for third-country nationals.[39] In its extreme, this logic of mutual recognition premised upon mutual trust absolves Member States from the requirement to examine the individual situation of asylum applicants and disregards the fact that fundamental rights and international and European refugee law may not be fully respected at all time in all cases in EU Member States, especially in the light of the increased pressure certain EU Member States are facing because of the emphasis on irregular entry as a criterion for allocating responsibility under the Dublin Regulation. Interstate cooperation resulting to the transfer of asylum seekers from EU Member State to EU Member State thus occurs almost automatically, without many human rights questions being asked by the authorities examining requests for Dublin transfers.

This system of interstate cooperation based on automaticity and trust in the field of European asylum law was challenged in Luxembourg in the joint cases of *N.S.* and *M.E.*[40] The Court of Justice was asked to rule on two references for preliminary rulings by the English Court of Appeal and the Irish High Court respectively. The referring courts asked for guidance on the extent to which the authority asked to transfer an asylum seeker to another Member State is under a duty to examine the compatibility of such transfer with fundamental rights and, in the affirmative, whether a finding of incompatibility triggers the 'sovereignty clause' in Article 3(2) of the Dublin Regulation. In a seminal ruling, the Court found that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental

[37] Nicolaidis (2007).

[38] Mitsilegas, *call-out* (*The Constitutional Implications of Mutual Recognition*).

[39] Preamble, recital 2.

[40] Joined Cases C-411/10 and C-493/10*, N.S. and M.E.*, judgment of 21 December 2011, hereinafter *N.S.*

rights.[41] Were the Regulation to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.[42] Most importantly, such presumption is rebuttable.[43] If it is ascertained that a Dublin transfer will lead to the breach of fundamental rights as set out in the judgment, Member States must continue to apply the criteria of Article 13 of the Dublin Regulation.[44] The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in the sovereignty clause set out in Article 3(2) of the Regulation.[45] *N.S.* followed the ruling of the European Court of Human Rights in the case of *M.S.S.*[46] In *M.S.S.,* the Strasbourg Court found Dublin transfers from Belgium to Greece incompatible with the Convention and importantly found both the sending and the receiving states in breach of the Convention in this context.[47] *M.S.S.,* which as seen in Chap. 2 has also proven to be influential on subsequent Strasbourg case-law on onward transfers to third countries[48] has contributed to the Court of Justice in opposing the automaticity in the operation of the Dublin Regulation by not accepting the non-rebuttable assumption of compatibility of EU Member States action with fundamental rights.

The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has admittedly been accompanied by the establishment by the Court of Justice of a high threshold of incompatibility with fundamental rights: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State.[49] Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of the Regulation where they cannot be

[41] Paragraph 99.

[42] Paragraph 100.

[43] Paragraph 104.

[44] Paragraphs 95–97.

[45] Paragraph 98.

[46] *M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

[47] Moreno-Lax (2012).

[48] *Hirsi Jamaa*, Application no. 27765/09, concerning the transfer of asylum seekers from Italy to Libya.

[49] Paragraph 85.

unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[50] This high threshold is justified on the basis of the assumption that all Member States respect fundamental rights and by the acceptance of the existence, in principle, of mutual trust between Member States in the context of the operation of the Dublin Regulation. According to the Court, it is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.[51] It cannot be concluded that any infringement of a fundamental right will affect compliance with the Dublin Regulation,[52] as at issue here is the *raison d'etre* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance by other Member States with EU law and in particular fundamental rights.[53] The Court found that it would not be compatible with the aims of the Dublin Regulation were the slightest infringement of other measures in the Common European Asylum System to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible under the Dublin Regulation[54] and reiterated the objectives of the Dublin Regulation to establish a clear and effective method for dealing with asylum applications by allocating responsibility speedily and based on objective criteria.[55]

N.S. constitutes a significant constitutional moment in European Union law and introduces a fundamental change in the development of interstate cooperation in European asylum law. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in interstate cooperation. The end of automaticity operates on two levels. Firstly, national authorities (in particular courts) which are asked to execute a request for a transfer under the Dublin Regulation are now under a duty to examine, on a case-by-case basis, the individual circumstances in each case and the human rights implications of a transfer in each particular case. Automatic transfer of

[50] Paragraph 94.
[51] Paragraph 78.
[52] Paragraph 81.
[53] Paragraph 83.
[54] Paragraph 84.
[55] Paragraphs 84 and 85.

individuals is no longer allowed under EU law. Secondly, national authorities are obliged to refuse to execute such requests when the transfer of the affected individuals will result in the breach of their fundamental rights within the terms of *N.S.* The ruling in *N.S.* has thus introduced a fundamental rights mandatory ground for refusal to transfer an asylum seeker in the system established by the Dublin Regulation.[56] While the Court of Justice in N.S. placed limits to the automaticity in the operation of the Dublin Regulation, it was careful not to condemn the Dublin system as a whole. The requirement for Member States to apply the Regulation in compliance with fundamental rights did not lead to a questioning of the principle behind the system of allocation of responsibility for asylum applications between Member States. There are three main limitations to the Court's reasoning: Firstly, the Court used the discourse of the presumption of the existence of mutual trust between Member States, although as seen above this discourse has been used thus far primarily in the context of cooperation in criminal matters and not in the field of asylum law, where the Dublin Regulation has co-existed with a number of EU instruments granting rights to asylum seekers.[57] Secondly, a careful reading of N.S. also demonstrates a nuanced approach to the sovereignty clause in Article 3(2) of the Regulation: the Court stressed that, prior to Member States assuming responsibility under 3(2), they should examine whether the other hierarchical criteria set out in the Regulation apply. Thirdly, it should be reminded again that the threshold set out by the Court for disapplying the system is high: mere non-implementation of EU asylum law is not sufficient to trigger non-return, systemic deficiencies in the national asylum systems must occur leading to a real risk of breach of fundamental rights.[58]

In addition to its contribution to questioning automaticity in the Dublin system, the Court's ruling in *N.S.* is important in highlighting that the adoption of legislative measures conferring rights to asylum seekers may not be on its own adequate to ensure the effective protection of fundamental rights in the asylum process. *N.S.* has demonstrated that the existence of EU minimum harmonisation on rights may not prevent systemic deficiencies in the protection of fundamental rights in Member States. Monitoring and extensive evaluation of Member States' implementation of European asylum law and their compliance with fundamental rights is essential in this context. In addition to the standard constitutional avenues of monitoring compliance with EU law at the disposal of the European Commission as guardian of the treaties, the Lisbon Treaty includes an additional legal basis in Article 70 TFEU for the adoption of measures laying down the arrangements whereby Member States, in collaboration with the European Commission, conduct objective and impartial evaluation of the Union policies in the field of the Area of Freedom, Security and Justice, in particular in order to facilitate full application of the principle of mutual recognition. The Justice and Home Affairs Council has called

[56] Mitsilegas (2012).

[57] Labayle (2011).

[58] Mitsilegas, *call-out* (*The Limits of Mutual Trust*).

recently for the establishment of evaluation mechanisms in the field of EU asylum law.[59] On the basis of the findings of European courts in *M.S.S.* and *N.S.*, the work of organisations such as the UNHCR and civil society actors must be central in the processes of monitoring the situation of international protection on the ground in EU Member States. However, the question of the value of the findings of civil society organisations and the UNHCR as evidence before national and European authorities remains open. While both the Luxembourg and the Strasbourg Courts have referred to the work of UNHCR in their rulings, the Court of Justice found in a recent ruling[60] that the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chap. III of the Dublin Regulation is in breach of the rules of European Union law on asylum. However, work done by civil society and UNHCR, the transparency their presence creates and the information produced and its use by national and European authorities, including courts, is key in shifting the focus of solidarity towards the asylum seeker and in contributing towards the establishment of evidence-based trust in the Common European Asylum System.

Following the Court's ruling in *N.S.*, the revision of the Dublin Regulation post-Lisbon has been eagerly awaited. The adoption of the new instrument (the so-called 'Dublin III' Regulation)[61] may come as a disappointment to those expecting a radical overhaul of the Dublin system. The Regulation maintains intact the system of allocation of responsibility for the examination of asylum applications by EU Member States under the same list of hierarchically enumerated criteria set out in its pre-Lisbon predecessor.[62] However, the Dublin III Regulation has introduced an important systemic innovation to take into account the Court's ruling in *N.S.*: according to Article 3(2) of the Regulation, second and third indent,

> Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chap. III in order to establish whether another Member State can be designed as responsible.
> Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chap. III or to the first Member State with

[59] 3151st Justice and Home Affairs Council meeting, Brussels, 8 March 2012.

[60] Case C-528/11, *Halaf v Darzhavna agentsia za bezhantiste pri Ministerskia savet,* judgment of 30 May 2013.

[61] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/31, 29.6.2013.

[62] See Chap. III of the Regulation, Articles 7–15.

which the application was lodged, the determining Member State shall become the Member State responsible.

The European legislator has thus attempted to translate the Court's ruling in *N.S.* to establish an exception to the Dublin system. The high threshold adopted by the Court in the specific case has been adopted in Dublin III, with the transfer of an asylum applicant being impossible when there are substantial grounds to believe that there are systemic flaws in the asylum system of the receiving Member State which will result in a risk of specifically inhuman and degrading treatment (and not necessarily as regards the risk of the breach of other fundamental rights). Even when such risk has been established, responsibility does not automatically fall with the determining Member State, which only becomes responsible if no other Dublin criterion enabling the transfer of the applicant to another Member State applies. While it could be argued that the new Dublin Regulation could require expressly a higher level of protection of human rights when designing the Dublin system, the legislative recognition of the *N.S.* principles is important in recognising the end of the automaticity in Dublin transfers and placing national authorities effectively under the obligation to examine the substance of the applicants' relevant human rights claims prior to authorising a transfer. Article 3(2) places thus an end to the automatic presumption of human rights compliance by EU Member States and reconfigures the relationship of mutual trust between national executives.

A greater emphasis on the rights of the asylum seeker is also evident in other, specific, provisions of the new Regulation. The provisions on remedies have been strengthened, in particular as regards their suspensive effect.[63] The rights of minors and family members are highlighted, with the Regulation containing strong provisions on evidence in determining the Dublin criteria[64] and in emphasising the possibility of Member States to make use of the discretionary provision which enables them to assume the examination of an asylum claim (the former 'sovereignty clause in Article 3(2) which has morphed into a 'discretionary clause' in Article 17), in particular when this concerns family reunification.[65] The emphasis on the protection of the rights of family reunification and of minors has also been evident in the case-law of the Court of Justice in relation to the pre-Lisbon Dublin Regulation. In a case involving unaccompanied minors, the Court has held that since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than it is strictly necessary the procedure for determining the Member State responsible which means that, as a rule, unaccompanied minors should not be transferred to another Member State.[66] The Court has also extended the scope of the Dublin criterion of examination of a family asylum application on humanitarian grounds, giving a broad meaning to the humanitarian

[63] Article 27(3).

[64] Article 7(3).

[65] Article 17(2).

[66] Case C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, judgment of 6 June 2013, para 55.

provisions of the Regulation.[67] The interpretation of humanitarian, human rights and family reunification clauses in an extensively protective manner by the Court signifies another inroad to the automaticity in interstate cooperation which the Dublin system aims to promote and reiterates the required emphasis on the examination of the substance of individual claims.

4.2.3 Removal of Asylum-Seekers Outside the EU: From the Management of Risk to the Safe Third Country Concepts

As seen above, the main aim of the Dublin Regulation is to establish a system which shields the asylum systems of EU Member States from examining asylum applications by a great number of third country nationals by ensuring their transfer to another State within the European Union which will assume responsibility for the examination of asylum applications. In addition to this system of intra-EU transfers of asylum-seekers, European asylum law has established an additional layer of rules aiming to absolve Member States from their responsibilities to examine fully asylum applications either by providing that these applications are dealt with by accelerated procedures or by providing that applications will not be examined at all if applicants can be further transferred to so-called safe third countries. This additional system of negating the responsibility of Member States to examine fully asylum applications was firmly established post-Amsterdam by the Directive on minimum standards on asylum procedures[68] and has been maintained in principle—albeit with a number of procedural improvements—post-Lisbon by the new asylum procedures Directive.[69] The Directive allows Member States to put forward accelerated examination procedures and/or procedures conducted at the border or in transit zones.[70] These procedures apply inter alia when the applicant is from a safe country of origin.[71] Moreover, as is the case with the Dublin Regulation, the choice to depart from the ordinary process of examining asylum application here is applicable to a great extent to address applications which are deemed by Member States to be abusive or *mala fide*. Accelerated or border procedures may thus apply

[67] Case C-245/11, *K v Bundesasylamt*, judgment of 6 November 2012.

[68] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, 13.12.2005.

[69] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L180/60, 29.6.2013.

[70] Article 31(8).

[71] Article 31(8)(b). The Directive expands on the concept of safe country of origin in Article 36.

when asylum seeker is deemed to be uncooperative[72] or to be acting in bad faith[73] or in a misleading manner.[74] They may also apply in cases where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.[75] The reference to the applicant being a danger to national security is reminiscent of the grounds for exclusion under the refugee qualifications Directive. The Court's ruling in *B and D*, requiring an assessment on a case-by-case, factual basis, is also applicable in the present context. The requirement for an assessment of whether an application for asylum would fall under an accelerated procedure where a safe country of origin is allegedly involved is also confirmed by the Preamble to the Directive, according to which it is important that, where the applicant shows that there are valid reasons to consider the country not to be safe *in his or her particular circumstances*, the designation of the country as safe can no longer be considered relevant for him or her.[76] Ruling on the legality of accelerated procedures established in the 2005 asylum procedures Directive, the Court of Justice emphasised the requirement that the reasons which led a national authority to examine the merits of the application under such a procedure can be subject to judicial review.[77]

The asylum procedures Directive further provides for cases where Member States are not required to examine asylum applications. This is the case where applications are deemed to be inadmissible,[78] including cases where 'a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38.'[79] Moreover, the Directive allows Member States to undertake no, or no full examination of the application for international protection and of the safety of the applicant in his or her particular circumstances shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a European safe country.[80] The new asylum procedures Directive thus confirms the practice of deflection of asylum seekers from the territory of the European Union

[72] Article 31(8)(h) and (i).

[73] Article 31(8)(d).

[74] Article 31(8)(c).

[75] Article 31(8)(j).

[76] Preamble, recital 42. Emphasis added.

[77] Case C-69/10, *Diouf,* Judgment of 28.7.2011. For a commentary, see Reneman (2014).

[78] Article 33.

[79] Article 33(2)(c).

[80] Article 39(1). On the criteria for a country to be considered as such see Article 39(2). The country: has ratified and observes the provisions of the Geneva Convention without geographical limitations; has in place an asylum procedure prescribed by law; and has ratified the ECHR and observes its provisions, including the standards relating to effective remedies. According to the Preamble to the Directive, these countries observe 'particularly high human rights and refugee protection standards' (recital 45).

via the use of the concept of safe third countries.[81] The procedural use of the safe third countries concepts in the procedures Directive mirrors the system put forward by the Dublin Regulation: asylum seekers are being transferred to third countries (this time outside the European Union) quasi-automatically on the basis of generalised presumptions of safety. The new procedures Directive has taken a number of steps to address the human rights and rule of law concerns that this automaticity entails. New Article 34 of the procedures Directive introduces special rules on the admissibility review regarding inadmissible applications, including those related to safe third countries. It requires Member States to allow applicants to present their views with regard to the application of the grounds referred to in Article 33 *in their particular circumstances* before the determining authority decides on the admissibility of an application for international protection adding that to that end Member State must conduct a personal interview on the admissibility of the application.[82] Moreover, the application of the concept of a safe third country is subject to a series of rules laid down in national law including inter alia rules requiring a connection with the third country and rules in accordance with international law *allowing an individual examination of whether the third country concerned is safe for a particular applicant*, which as a minimum shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe *in his or her particular circumstances*.[83] The move from generalised to individual assessments of safety is also confirmed in the Preamble to the Directive, according to which Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned.[84]

A similar focus on the provision of remedies to the asylum applicant to challenge the applicability of the safe third country concept in his or her individual circumstances arises in the context of European safe countries. According to new Article 39(3), the applicant must be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances. These developments are coupled with the general Directive provisions on remedies: the right to an effective remedy applies to both categories of safe third country concepts[85] with new stronger rules allowing applicants to remain in the territory of Member States until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy[86] and, in the case of European safe countries, giving the power to courts to rule under

[81] For an analysis of the potential impact of the 2005 asylum procedures Directive in this context, see Costello (2005).

[82] Article 34(1).

[83] Article 38(2), emphasis added. Under a new provision introduced in the 2013 procedures Directive, the applicant must also be allowed to challenge the existence of a connection between him or her and the third country-Ibid.

[84] Preamble, recital 44.

[85] Article 46(1)(a)(ii) and (iv) respectively.

[86] Article 46(5).

certain conditions whether or not the applicant may remain on the territory of the Member State.[87] The strengthening of the Directive's provisions on remedies is coupled by calls to Member States to take into account information provided by expert bodies such as the European Asylum Support Office and the UNHCR when applying safe country concepts on a case-by-case basis or designating countries as safe.[88] This move reflects to some extent the evidence-based approach introduced by European courts in *M.S.S., N.S.* and *Hirsi.* These judgments are extremely important in the development and interpretation of safe third country concepts in European asylum law. Human rights concerns arising from the transfer of asylum seekers within the European Union under the Dublin system are equally, if not more, valid in the context of the transfer of asylum seekers in third, non-EU countries. Developments in European case-law have put an end to automaticity in the transfer of asylum seekers to third countries on the basis of generalised presumptions of safety. Not only must Member States' authorities consider the situation of individual applicants on a case-by-case basis when called to apply the safe third country criteria, but any decision not to examine an asylum application in the jurisdiction of an EU Member State must be based on a detailed assessment of the full and on the ground compliance of the third state in question with European human rights and international and European refugee law.

4.3 Detention, Removal and the Management of Risk Under the Returns Directive

4.3.1 The Returns Directive: Background and Content

The removal of migrants from the territory of the European Union has always been a priority for Member States, either by signing (bilaterally or at EU level) readmission agreements with third states[89] or by applying the principle of mutual recognition to expulsion decisions.[90] However, no EU measure is more emblematic of the priority to deport migrants from the territory of the European Union than the Returns Directive, which constitutes a major development of the European Union *acquis* in relation to immigration enforcement. Two features of the Directive are key in contextualising and analysing its impact on immigration detention in EU law: the first feature is the achievement by the Directive of a high level of

[87] Article 46(6)(d).

[88] Preamble, recital 46.

[89] For an analysis see N. Coleman, *European Readmission Policy,* Nijhoff, 2008. On the relationship between re-admission agreements concluded by Member States and EU law, see Panizzon (2012).

[90] Council Directive 2001/40/EC on the mutual recognition of expulsion decisions of third-country nationals, OJ L149/34, 2.6.2001.

harmonisation of aspects of immigration enforcement at EU level; and the second feature is that the Directive contributes to the criminalisation of migration at EU level, in particular by including specific legal provisions on immigration detention. The high level of harmonisation is evidenced by the very title of the measure in question, a Directive 'on common standards and procedures in Member States for returning illegally staying third-country nationals'[91] and is confirmed by the opening Article of the Directive according to which it sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.[92] Unlike EU measures in the field of granting rights to migrants and in particular asylum seekers, where EU action has taken initially the form of minimum standards, the Returns Directive thus reflects a consensus by EU institutions on the need to adopt common rules on immigration enforcement. This consensus is the outcome of different priorities by the different EU institutions involved in the legislative process leading to the adoption of the Returns Directive. Member States have been traditionally keen to adopt at EU level strong standards on immigration enforcement. In the heavily securitised Hague Programme of 2004, the European Council 'called for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity' and for the start of Council discussions on minimum standards for return procedures including minimum standards to support effective national removal efforts taking into account special concerns with regard to safeguarding public order and security.[93]

The securitised approach on returns by Member States is here evident, and it is noteworthy that the EU legislative outcome has surpassed the initial Council ambition for the adoption of mere minimum standards in the field. The achievement of a high level of harmonisation has been facilitated by the integrationist ambitions of the European Commission and the European Parliament, which acted as a co-legislator in the adoption of the returns Directive.[94] The Commission in its proposal for the returns Directive justified the adoption of common standards by arguing that co-operation among Member States is likely to be successful if it is based on a common understanding on key issues and that common standards should be set in order to facilitate the work of the authorities involved and to allow enhanced co-operation among Member States. According to the Commission, in the long term such standards will provide the ground for adequate and similar treatment of illegally staying third-country nationals, regardless of the Member State which carries

[91] 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, OJ L348/98, 24.12.2008.

[92] Article 1.

[93] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C53/1, 3.3.2005, para 1.6.4. See also recital 2 in the Preamble of the returns Directive.

[94] See Acosta (2009).

out the return procedure.[95] While the common standards set out by the Returns Directive reflect on a number of occasions a draconian policy towards migrants, they can, as will be seen below, act as a limit to further criminalisation of migration by providing clear limits to Member State enforcement action.

Negotiations leading to the adoption of the Directive have proven to be controversial, in view of the different views of the EU institutions involved as regards the content of the Directive and the significant potential consequences of the Directive for the protection of fundamental rights.[96] At the heart of the Directive lies Chap. II which is entitled 'termination of illegal stay' and contains detailed provisions on the return decision, voluntary departure and removal, detention and the relevant safeguards. There are two main areas which underline the criminalisation of migration in the Returns Directive: the combination of a return decision with a re-entry ban, and allowing Member States to detain migrants pending their return. A very broadly worded re-entry ban is set out in Article 11 of the Directive, according to which such a ban is compulsory if no period for voluntary departure has been granted, or if the obligation to return has not been complied with—but Member States may also impose such a ban in other cases.[97] The length of such a ban is also prohibitive and arguably disproportionate—it will in principle not exceed 5 years but this time limit is not absolute—it can exceed 5 years if the third-country national represents a serious threat to public policy, public security or national security.[98] There is a relaxation of the ban under certain conditions for victims of trafficking who co-operate with the authorities under Directive 2004/81/EC[99]and an obligation to apply the provisions on the re-entry ban without prejudice to the right of international protection under EU asylum law.[100] As regards immigrant detention, the key provision signalling the criminalisation of migration is Article 15 of the Directive which confirms detention as an accepted means of enforcing the return of irregular migrants.

However, it must be noted that the Returns Directive places Member States' detention powers under a series of limits. Detention is allowed only for the purposes of removal[101] and only if other sufficient but less coercive measures cannot be applied

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[95] COM (2005) 391 final, Brussels, 1.9.2005.

[96] For an analysis see Baldaccini (2009a), Acosta *call-out*.

[97] Article 11(1).

[98] Article 11(2).

[99] Article 11(3).

[100] Article 11(5).

[101] According to Article 15(1) of the Directive, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process—in particular when:

(a) there is a risk of absconding or
(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

effectively in a specific case.[102] Most importantly, any detention shall be for as short a period as possible and *only maintained as long as removal arrangements are in progress and executed with due diligence*.[103] The requirement for the existence of a link between detention and a prospect of removal is confirmed by Article 15(4) of the Directive according to which when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in Article 15 (1) of the Directive no longer exist, detention ceases to be justified and the person concerned shall be released immediately. These limits to Member States' power to detain are watered down significantly by the length of detention allowed by the Directive. According to Article 15(5), detention will be maintained for as long a period as the conditions laid down in Article 15(1) are fulfilled and it is necessary to ensure successful removal for a period which may not exceed 6 months. The Directive allows Member States to extend this period for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned, or delays in obtaining the necessary documentation from third countries.[104] The Returns Directive allows thus Member States to detain immigrants for the sole purpose of removal for a period up to 18 months.[105] The limits that this lengthy period of detention places upon the proportionality requirement for detention have been noted[106] and the approach of the Directive on the length of detention has been heavily criticised.[107] Further criticism of the Directive has been voiced by the United Nations Special Rapporteur on the rights of migrants, Francois Crépeau, according to whom the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of EU migration management, despite the lack of any evidence that detention serves as a deterrent, adding that the Directive can be said to have institutionalised detention within the European Union as a viable tool of migration management.[108] The Returns Directive has indeed normalised the detention of irregular migrants and in this manner constitutes another clear example of the criminalisation of migration. However, as will be seen below, safeguards included in the Directive such as the establishment of a clear

[102] Ibid.

[103] Ibid. Emphasis added.

[104] Article 15(6).

[105] The Directive has attempted to introduce common standards in a highly diverse field, with some Member States having established clearly determined and limited periods of detention under their national law, while others not having laid down any maximum time limit for pre-removal detention in their national law—see European Union Agency for Fundamental Rights (2011).

[106] Cornelisse (2012).

[107] Baldaccini (2009b). As Baldaccini eloquently notes, this is an extremely long period for depriving irregular migrants of their liberty for the sole reason of facilitating their removal and preventing them from absconding in the meantime.

[108] United Nations General Assembly, Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau: *Regional Study: Management of the External Borders of the European Union and its impact on the human rights of migrants,* 24 April 2013, para 47.

link between detention and a prospect of removal on the one hand, and the setting out of maximum—albeit lengthy—periods of detention on the other, have proven to be instrumental towards the limitation of national criminalisation practices in the interpretation of the Directive by the Court of Justice.

4.3.2 Detention and Risk Under the Returns Directive—the Case of Kadzoev

The Court of Justice has now had a number of opportunities to clarify the relationship between immigration detention and European Union law in the context of litigation concerning the implementation of the Returns Directive. A key ruling in this context has been the Court's judgment in Kadzoev.[109] The case concerned the prolonged detention in Bulgaria of Mr Kadzoev, who was eventually declared by the Bulgarian authorities to be a stateless person. According to the order for reference, the help centre for survivors of torture, the office of the United Nations High Commissioner for Refugees and Amnesty International found it credible that Mr Kadzoev was the victim of torture and inhuman and degrading treatment in his country of origin. Moreover, and despite the efforts of the Bulgarian authorities, several non-governmental organisations and Mr Kadzoev himself to find a safe third country which could receive him, no agreement was reached, and he had not as yet obtained any travel documents.[110] The reference by the Administrativen sad Sofia-grad has led to the Court of Justice clarifying a number of aspects of the Returns Directive related to immigration detention. Firstly, the Court confirmed that the period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of the Returns Directive. The Court held that, if it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of the Returns Directive, *namely to ensure a maximum duration of detention common to the Member States*.[111] The Court distinguished the maximum period of detention from the situation concerning suspensive appeals in asylum law, stating that the maximum periods laid down in Article 15(5) and (6) of the Returns Directive *serve the purpose of limiting the deprivation of a person's liberty*.[112] This maximum detention limit also applies

[109] C-357/09 PPU, *Said Shamilovich Kadzoev* (*Huchbarov*).

[110] Paragraphs 22–24.

[111] Paragraphs 53–54, emphasis added.

[112] Paragraph 56, emphasis added.

when the affected individual was deemed to be high risk by state authorities. The referring Court asked whether Article 15(4) and (6) of the Returns Directive allow the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.[113] To this the Court reiterated that Article 15(6) of the Returns Directive in no case authorises the maximum period defined in that provision to be exceeded and that the possibility of detaining a person on grounds of public order and public safety cannot be based on the Directive.[114]

The Court stressed further the requirement for immigration detention under the Returns Directive to be linked with a reasonable prospect of removal. According to the Court, it is clear that, where the maximum duration of detention provided for in Article 15(6) of the Directive has been reached, the question whether there is no longer a 'reasonable prospect of removal' within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately. Article 15(4) of the Directive can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired.[115] The Court added that under Article 15(4) of the Returns Directive, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.[116] As is apparent from Article 15(1) and (5) of the Directive, the detention of a person for the purpose of removal *may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal*.[117] It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of the Directive, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.[118] A reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.[119]

Kadzoev is an important judgment as it confirms the limits of detention under the Returns Directive and reiterates the key principles which govern its interpretation. As regards the length of detention, the Court links the achievement of a high level of harmonisation via the adoption of common standards with the imposition of a

[113] Paragraph 68.
[114] Paragraphs 69–70.
[115] Paragraphs 60–61.
[116] Paragraph 63.
[117] Paragraph 64. Emphasis added.
[118] Paragraph 65.
[119] Paragraph 66.

non-negotiable, maximum duration of immigration detention for the purposes of the Directive. Member States are prohibited by EU law to extend immigration detention beyond the time limits set out by the Returns Directive, even in cases where the individual under detention is deemed to be a risk to public order. This restrictive interpretation is inextricably linked with the teleological interpretation espoused by the Court in relation to the objectives of the Directive. In *Kadzoev*, the Court stresses that detention can be justified only if there is a reasonable prospect of removal and if Member States exercise due diligence in relation to the returns procedure. As in its case-law in the *El Dridi* type cases analysed above, the Court emphasises again here that detention is only justified if it serves the key objective of the Returns Directive which is the removal of irregular migrants. What *Kadzoev* also confirms is that the requirements of the existence of a reasonable prospect of removal and of the exercise of due diligence by States exist throughout the returns process and underpin the legality of immigrant detention. This has been confirmed recently by the European Court on Human Rights in its ruling on *Amie v Bulgaria.*[120] The Court avoided to rule specifically on the compatibility of domestic law with the Returns Directive and the maximum detention periods prescribed therein.[121] However, the Court found a breach of Article 5(1)(f) ECHR as it found that the grounds for the first applicant's detention—action taken with a view to his deportation—did not remain valid for the whole period of his detention due to *the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.*[122] The Court also confirmed that the length of detention should not exceed that reasonably required for the purpose pursued.[123]

4.3.3 Detention and Asylum Under the Returns Directive—the Case of Arslan

If *Kadzoev* can be read as a judgment setting limits to risk-based immigration detention, the Court's approach to risk in the context of immigration detention appears to be more nuanced in its more recent ruling in *Arslan*.[124] The case involved a request for a preliminary ruling by the Czech Supreme Administrative Court in proceedings between Mr Arslan, a Turkish national arrested and detained in the Czech Republic with a view to his administrative removal who, during his

[120] Application No 58149/08.

[121] Paragraphs 74–75.

[122] Paragraph 79, emphasis added.

[123] Paragraph 72. The Court noted that a similar point was recently made by the ECJ in relation to Article 15 of the returns directive. It should however be pointed out that unlike that provision Article 5(1)(f) ECHR does not lay down maximum time-limits: the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case.

[124] Case C-534/11, judgment of 30 May 2013.

detention has made an application for international protection and the Czech police. Mr Arslan's detention was extended notwithstanding his lodging of an asylum application as it was deemed that the extension was necessary for preparing for the enforcement of the decision to remove him in view of the fact that the asylum procedure was still ongoing and it was not possible to enforce the removal decision while the asylum application was being considered. The Czech authorities also stated that the application for international protection had been made with the intention of hindering enforcement of the removal decision.[125] In the light of the above facts, the Czech Court asked Luxembourg whether the Returns Directive does not apply to a third country national who has lodged an application for international protection within the meaning of the asylum procedures Directive, and whether, if the Returns Directive does not apply, the detention of a foreigner for the purpose of return must be terminated if he applies for international protection and there are no other reasons to keep him in detention.

The Luxembourg Court appeared to concur in principle with the referring court in finding that the Returns Directive does not apply to a third-country national who has applied for international protection within the meaning of the asylum procedures Directive during the period from the making of the application to the adoption of the decision at first instance on that application or until the outcome of any action brought against that decision is known.[126] However, this prima facie exclusion of the applicability of the Returns Directive does not result in an unqualified protection of the asylum seeker from detention. In answering the second question, the Court of Justice—rather than applying directly the Returns Directive—used this Directive in order to interpret European asylum law. The Court noted that European asylum law (and in particular Article 7(3) of the reception conditions Directive and Article 18 of the asylum procedures Directive) allows Member States to confine an applicant to a particular place in accordance with their national law.[127] The Court further noted that neither the reception conditions nor the procedures Directive carries out currently a harmonisation of the grounds on which the detention of asylum seekers may be ordered —therefore, for the time being it is for Member States to establish, in full compliance with their obligations under international and EU law, the grounds on which an asylum seeker may be detained or kept in detention.[128] According to the Court,

> As regards a situation such as that at issue in the main proceedings, in which, firstly, the third-country national was detained on the basis of Article 15 of Directive 2008/115 on the ground that his conduct gave rise to the concern that, if not detained, he would abscond and frustrate his removal, and, secondly, the application for asylum seems to have been made with the sole intention of delaying or even jeopardising enforcement of the return decision taken against him, such circumstances can indeed justify that national being kept in detention *even after an application for asylum has been made*.[129]

[125] Paragraph 25.

[126] Paragraphs 40–49.

[127] Paragraphs 53 and 54 respectively.

[128] Paragraphs 55–56.

[129] Paragraph 57, emphasis added.

The Court has thus combined the limited harmonisation in European asylum law with the use of the Returns Directive, interpreted in a highly securitised, risk-based approach, in order to justify Member Sates' discretion to detain asylum seeker s for extensive periods of time. The Court justified this approach further by arguing that a national provision which allows, in such circumstances, the detention of an asylum seeker is compatible with Article 18(1) of the asylum procedures Directive, since that detention does not result from the making of the application for asylum but from circumstances characterising the individual behaviour of the applicant before and during the making of that application.[130] Detention under Article 15 of the Returns Directive acts thus as a factor justifying the detention of asylum seekers under European asylum law, based on the pre-supposition that the asylum seeker in question is a high-risk individual. The objectives of the Returns Directive (the effective return of third country nationals) are used here not to protect third country nationals, but to extend detention under this risk-based approach.[131] However, this approach sits uneasily with the Court's constant finding that detention for the purposes of removal governed by the Returns Directive and detention of asylum seekers under the reception and procedures Directives and national law fall under different legal rules.[132] It also results in the criminalisation of asylum seekers, by allowing their extensive detention under national law which is interpreted in the light of the Returns Directive, which provides a high degree of harmonisation on enforcement. Immigration enforcement law is thus also applied in asylum law, although the objectives and scope of these two areas of law are markedly different. This approach, which is based heavily on the acceptance by the Court of governmental perceptions of risk, leads to clearly disproportionate outcomes for the asylum seekers involved. In the case of *Arslan,* the Court's ruling means that the effects of detention are intensified rather than alleviated by the fact that the third country national in question has lodged an asylum application.

4.3.4 Detention and Undocumented Migrants Under the Returns Directive—the Case of Mahdi

The Court of Justice was called to rule on the limits of detention under the Returns Directive with regard to undocumented migrants in the case of *Mahdi.*[133] The Court was asked to assess inter alia whether Article 15(1) and (6) of the Returns Directive must be interpreted as precluding national legislation under which an initial 6-month period of detention may be extended solely because the third country

[130] Paragraph 58.

[131] Paragraph 60.

[132] *Arslan,* para 52. *Kadzoev,* para 45.

[133] Case C-146/14 PPU, *Mahdi*, judgment of 5 June 2014.

national concerned has no identity documents and, accordingly, there is a risk of him absconding.[134] The Court found that the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention under Article 15(6) of the Directive.[135] The Court noted firstly that the concept of 'risk of absconding' is defined in Article 3(7) of the Directive as the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third country national who is the subject of return procedures may abscond.[136] Secondly, the Court reiterated its finding that Article 15(1) of the Directive makes clear that recourse may be had to detention only when other sufficient but less coercive measures cannot be applied effectively in a specific case.[137] The Court went on to reiterate that the extension of detention under Article 15(6) of the Directive may be ordered only if the removal operation is likely to last longer owing either to a lack of cooperation by the third-country national concerned or to delays in obtaining the necessary documentation from third countries, no mention being made of the fact that the person concerned has no identity documents.[138] Any decision to extend detention must be preceded by a re-examination of the substantive conditions which formed the basis for the initial decision to detain the third-country national concerned. That calls for an assessment by the judicial authority, in the course of the examination required under the second sentence of Article 15(3) of the directive, of the circumstances which gave rise to the initial finding that there was a risk of the third-country national absconding.[139] In this context, the Court stressed that any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case and that decisions taken under the directive should be adopted on a case-by-case basis and based on objective criteria.[140]

The application of a proportionality test combined with the emphasis on procedural safeguards and a facts-based assessment on a case-by-case basis[141] have thus led the Court to reject the automatic extension of detention on the basis of a presumption of risk on the sole ground that a third-country national has no identity documents. The Court has further circumscribed the extension of detention by interpreting Article 15(6)(a) of the Returns Directive as meaning that a third-country national who has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention

134 Paragraph 65.
135 Paragraph 73.
136 Paragraph 66.
137 Paragraph 67.
138 Paragraph 68, and reference to para 58.
139 Paragraph 69, and reference to para 61.
140 Paragraph 70.
141 See also para 64 of the judgment.

shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated *because of that conduct*, a matter which falls to be determined by the referring court.[142] Extension of detention can thus take place only if national courts establish a direct and exclusive causal link between the non-cooperative conduct of the third-country national and the lengthening of the removal operation. As the Court has noted, if such removal is taking longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on the part of the third country national can be established.[143] The Court's finding here echoes its' findings concerning the requirement for Member States to contribute to the effective implementation of the returns Directive by respecting the time-limits it has established. However, the Court has stopped short of linking the release of third-country nationals following the expiry of the detention deadlines in the Returns Directive with the granting of residence rights. According to the Court, a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of the Returns Directive—a mere written confirmation of the third-country national's situation is required.[144] This ruling leaves affected migrants in a legal limbo, the consequences of which will have to be addressed in litigation before national and European courts.

4.3.5 *Detention and Defence Rights Under the Returns Directive—the Case of M.G.*

Another recent judgment which is informed by a restrictive, law enforcement approach is the Court's ruling in *M.G.*[145] In this case, the Court of Justice was asked to examine the impact of a breach of the rights of the defence by a decision by a national authority to prolong detention to the actual detention decision. The Court found that irregularities in the exercise of the rights of the defendant do not trigger automatically the release of the third country national in detention.[146] It is for the national judge to ascertain whether such irregularity could lead to a different

[142] Paragraph 85, emphasis added.

[143] Paragraph 82.

[144] Paragraph 89.

[145] Case C-383/13 PPU, *M.G. and N.R. v Staatsecretaris van Veligheid en Justitie,* judgment of 10 September 2013.

[146] Paragraph 39.

result for the third country national.[147] According to the Court, not recognising a margin of appreciation in this context to the national judge, and ruling that any violation of rights would lead automatically to the annulment of the decision prolonging detention would risk to undermine the effectiveness of the Returns Directive.[148] The Court added that coercive measures taken under the Directive are not only subject to the principle of proportionality, but also to the principle of effectiveness[149] and reiterated that the return of irregularly staying third country nationals is a priority for Member States under the Directive.[150] In this manner, the principle of effectiveness is used here by the Court to strengthen coercive action by the state under the Returns Directive and to nuance the protection of fundamental rights. The Court has thus used effectiveness in the field of procedural law in a markedly different manner to its approach in the *El Dridi* type cases involving criminalisation under substantive national criminal law. The ruling in *M.G.* is also another nod of the Court in favour of state sovereignty in the field of immigration control, most notably by stressing the discretion that national authorities, including courts, have in assessing aspects of the compliance of implementing action with the Returns Directive and EU constitutional law more broadly.

4.3.6 *Detention and Imprisonment Under the Returns Directive—the Cases of Thi Ly Pham and Brero and Bouzalmate*

In what has been perhaps the most blatant manifestation of the link between detention of migrants for the purposes of return and the criminalisation of migration, the Court of Justice was called to rule on two cases involving questions from German Courts on whether it is acceptable for migrants to be detained together with ordinary prisoners in prison accommodation. In the case of *Thi Ly Pham,*[151] the Court rejected firmly such a prospect. The Court noted that it is clear from the wording of Article 16(1) of the Returns Directive that it lays down an unconditional obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners when a Member State cannot provide accommodation for those third-country nationals in specialised detention facilities.[152] This obligation is not coupled with any exception and *constitutes a guarantee of observance of the rights* which have been expressly accorded by the EU legislature to those third-country nationals in the context of the conditions relating to detention in prison

[147] Paragraph 40.
[148] Paragraph 41.
[149] Paragraph 42.
[150] Paragraph 44.
[151] Case C-474/13, *Thi Ly Pham*, judgment of 17 July 2014.
[152] Paragraph 17.

accommodation for the purpose of removal.[153] The Court added that the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1), is more than just a specific procedural rule for carrying out the detention of third country nationals in prison accommodation and *constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive*.[154] Such is the strength of this finding that the Court ruled that the second sentence of Article 16(1) of the Returns Directive must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.[155] In a further judgment issued on the same day, the Court rejected the justification by Germany of the detention of migrants for the purposes of return in prisons on the basis of the particularities of the German federal system.[156] The Court stated unequivocally that Article 16(1) of the Returns Directive must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.[157] The Court has thus sent a clear signal against the legality of the criminalisation of migration in Europe when this takes the form of the imprisonment of migrants for the purposes of removal. Immigration detention is not a criminal penalty. There is a clear separation between immigration law and criminal law. As Advocate General Bot stated in his powerful Opinion in *Bero and Bouzalmate,* by referring to the Court's earlier ruling in *El Dridi*[158]:

> …detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned so that he can, in due course, be reintegrated into society. Any idea of penalising behaviour is, moreover, missing from the rationale forming the legal basis of the detention measure. It must not be overlooked that, at that stage, a migrant awaiting removal is not caught by any criminal statute, or be forgotten that, even in the member state concerned classifies, as the Court recognises it has a legitimate right to do, the act of unlawfully entering its territory as a 'criminal offence', the Court has also held that the potentially criminal nature of that conduct must yield to the priority that must be given to removal.[159]

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[153] Paragraph 19. Emphasis added.

[154] Paragraph 21. Emphasis added.

[155] Paragraph 23.

[156] Joined Cases C-473/13 and C-514/13, *Brero and Bouzamate*, judgment of 17 July 2014.

[157] Paragraph 34.

[158] For an analysis of *El Dridi* see Chap. 3.

[159] Opinion of Advocate General Bot delivered on 30.4.2014, Joined Cases C-473/13 and C-514/13, *Brero and Bouzalmate,* para 92.

4.4 Conclusion

The chapter demonstrated how European Union law has resorted to the criminalisation if migrants after their entry onto the European Union by focusing on their exclusion from the jurisdiction of EU Member States and their removal from EU territory, backed up by a series of provisions on detention. As regards asylum-seekers, the evolution of the Common European Asylum System has maintained provisions on exclusion from refugee status and systems whereby EU Member States absolve themselves from the responsibility of examining or examining fully asylum applications by justifying the removal of asylum seekers to other states within the European Union (under the Dublin system) or outside the Union (applying largely concepts of safe third countries). In both these cases, removal of asylum-seekers to third states is justified largely on presumptions of safety and human rights compliance of these states, and was envisaged to take place quasi-automatically if these presumptions were deemed to apply. In parallel to the evolution of European asylum law, the European Union legislator has continued to place emphasis on measures ensuring the removal of irregular migrants from the territory of the European Union. Removing migrants from the territory of the European Union has perhaps unsurprisingly been a high political priority for EU Member States and governments wishing to be seen to have control over their borders.[160] Nowhere else has this political priority to exclude and remove migrants from the European Union been reflected more clearly than with the adoption of the Returns Directive, which aims at ensuring speedy removal while at the same time legitimises the criminalisation of migration by allowing Member States to detain migrants.

However, as with the instances of criminalisation of migration discussed in the previous chapters of this book, the law in these instances has not remained static. The Court of Justice has again intervened to address the human rights challenges arising from EU legislation in the field. The Court's case-law has introduced a paradigm change in European asylum law: in addition to strong rulings on remedies with regard to the refugee qualification and asylum procedures Directives, the Court has put an end to the automaticity inherent in the Dublin system by affirming first that national authorities are obliged to examine the individual circumstances of each case and the impact of removal for the asylum-seeker concerned and second that the Dublin Regulation will be suspended and removal will not take place if removal will lead to serious human rights violations. Not only is the Court's ruling in *N.S.* applicable in the safe country system established in the asylum procedures Directive, but as has been seen above it has led already to law reform within the EU, with the Court's case-law incorporated within the new Dublin Regulation. The Court of Justice has also made a significant contribution towards upholding fundamental rights in the context of the application of the Returns Directive. In addition to the use of the Directive to place limits on national criminalisation powers examined in

[160] On the symbolic and political functions of removal, see Cornelisse (2010).

Chap. 3, in a series of cases the Court has placed clear limits to the detention of migrants in Member States. It is hoped that the Court's case-law will have a real impact on Member States' practice and implementation of the detention provisions of the Returns Directive, which according to the latest Commission implementation Report shows great variation.[161] The Court of Justice has made decisive steps towards decriminalising migration by emphasising the requirement for a link between detention and a real prospect of removal and by distinguishing clearly between imprisonment and immigration detention.

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