BlogDUE

A right to stay for medical reasons? Case note to case C-69/21 of the CJEU about the limit to returning a seriously ill and irregularly staying third-country national

Anna Kompatscher (Dottoranda di ricerca in Diritto dell'Unione europea, Europa Universität Flensburg, Germania) – 2 febbraio 2023

SUMMARY: 1. Introduction – 2. The case in front of the CJEU – 3. If return is medically impossible: a right to stay for medical reasons? – 4. Recast of Return Directive: what will change?

1. On November 22, 2022, the Grand Chamber of the Court of Justice of the European Union (hereinafter, the Court or CJEU) ruled the case C-69/21, *X v Staatssecretaris van Justitie en Veiligheid*. The Court interpreted Directive 2008/115/EC (hereinafter "Return Directive") in light of the Charter of Fundamental Rights of the EU (hereinafter "the Charter" or "CFR"). It concluded that no return decision can be taken and no removal order can be issued against "a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness" if the return would lead "to a real risk of a significant, permanent and rapid increase of his or her pain, if he or she were returned, on account of the only effective analgesic treatment being prohibited in that country" (para 66; the judgment has been discussed, by V. SALVATORE, *Non può essere rimpatriato il cittadino di uno Stato terzo il cui soggiorno in uno Stato membro è irregolare qualora ciò possa aggravare il suo stato di salute per l'indisponibilità delle terapie alle quali ha accesso nello Stato ospitante*, on this *Blog*, 22 December 2022).

Does this entail a right to stay for medical reasons, that is a right to get a residence permit because of a bad health condition? This contribution will first examine the single questions the CJEU dealt with in the case and then focus on the consequences of the Court's extensive interpretation. The judgment consolidates the protection from return of sick third-country nationals under some conditions but the EU is still far from having an explicit right to stay for medical reasons.

2. A Russian citizen, X, who irregularly stayed in the Netherlands was affected with a rare form of blood cancer and therefore among other treatments received medical cannabis as pain treatment. This treatment is forbidden in Russia because of which X could not have continued his pain therapy if he were returned to his country of origin. When the Dutch Secretary of State refused to give X a residence permit and issued a return decision ordering X

to leave the country, X acted against this decision in front of the District Court of the Hague (Rechtsbank Den Haag). This Court then sent four preliminary questions to the CJEU.

Firstly, the Dutch court asked if a significant increase in pain intensity due to a lack of medical treatment precluded the enforcement of a removal order under the Return Directive. The Court of Justice of the EU reminds that Art. 5 of the Return Directive obliges the Member States to follow the principle of non-refoulement at all stages of the return procedure (para 55). This principle leads to precluding Member States from returning a third-country national to a country if there are "substantial grounds for believing that, if that decision is implemented" he or she would be exposed to a real risk contrary to the right to asylum enshrined in Art. 18 of the Charter (para 56). Furthermore, the Court underlines that such a return cannot be carried out if it violates Art. 19 (2) of the Charter according to which no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment within the meaning of Art. 4 of the Charter. The Court links the prohibition of torture and inhuman or degrading treatment or punishment to human dignity, protected under Art. 1 CFR (para 57). In EU secondary law, Art. 9(1) of the Return Directive specifies these principles. According to this Article Member States shall postpone removal if, inter alia, it violates the principle of non-refoulement.

The Court of Justice then refers to the case law of the European Court of Human Rights (hereinafter "the ECtHR"). In the case *Paposhvili v. Belgium* (Judgment of the ECtHR of 13 December 2016) a severity threshold was set by the ECtHR if the prohibition of torture under Art. 3 of the European Convention on Human Rights (hereinafter "the ECHR") applies (§ 174 of the judgment). This threshold is attained if the removal of a seriously ill person led (not necessarily to the imminent risk of dying but) to "a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (*Paposhvili v. Belgium*, § 183.) The severity threshold under Art. 4 of the Charter is "equivalent to the severity threshold required, in the same circumstances, under Art. 3 ECHR", confirms the Court of Justice (para 65). Hence, a "real risk of a significant reduction in the life expectancy or a rapid, significant and permanent deterioration in the state of health" as a consequence of the removal of the third-country national precludes a Member State from "adopting a return decision or removing the third-country national who is staying illegally" (para 66 of the ruling)

Linked to the first question, the Dutch court asked, secondly, if Member States are entitled to lay down a strict period within which that deterioration or decline of health must be expected. The answer of the Court is negative: no strict period for such a deterioration is needed to preclude the return decision or the removal order (para 76).

Thirdly, the Dutch court wanted to know if the Return Directive read in conjunction with several norms of the Charter precludes the Member States from considering the consequences of the removal order on the state of health of the third-country national only to examine if he or she is able to travel. The CJEU underlines that Member States must ensure the state of health not only during removal but also afterwards, i.e. in the receiving country (para 78).

Fourthly, the Dutch court asked if the Return Directive read in light of the Charter obliges Member States to take into account the state of health of a third-country national when assessing if a right of residency on the territory of that Member State must be granted or the removal postponed. The CJEU reminds that the Return Directive does not lay down rules on how to attribute a right to residency (para 84). The EU Court refers to its judgment in case C-82/16, *K.A. and others*, from May 8, 2016, where it had already clarified that the Directive does not "lay down rules concerning how to deal with an application for residence", in the case at hand for the purposes of family reunification (para 45 of that judgment).

Member States do not have to grant a residence right on the basis of Directive 2008/115, as Art. 6(4) of the Directive merely permits Member State to grant a residence right for "compassionate or humanitarian reasons" (para 86 of the ruling *X v. Staatssecretaris van Justitie en Veiligheid*). A residence right cannot be derived based on Art. 7 of the Charter (the right to respect for private and family life) as the Charter may not extend EU law (para 87). Nevertheless, the return policies regulated by the Return Directive must always "fully respect the fundamental rights and dignity of the persons concerned" (para 88). Hence, Member States must respect the fundamental rights protected by the Charter when they implement the Return Directive including the right to respect for private and family life (para 89 and 90). Interestingly, according to the Court, the medical treatment a third-country national receives is part of their private life protected under Art. 7 of the Charter (para 93). The Court here cites the Opinion of Advocate General Pikamäe. In point 114 of the opinion, the Advocate General cited the ECtHR according to which "health must be viewed as a component of private life" (Judgment of the ECtHR of 25 June 2019, *Nicolae Virgiliu Tănase v. Romania*, § 126).

3. Especially the answer of the Court to the fourth question deserves a closer look. The Court adopts a somewhat ambivalent standpoint: on the one side, the Directive cannot be interpreted to oblige Member States to grant a right to stay for any kind of reasons, including health issues. On the other side, the obligation to respect fundamental Charter rights when implementing EU Law including the Return Directive leads to the impossibility to carry out a removal if it violates those fundamental rights. The obligation to respect EU fundamental rights when carrying out a return does not solely stem from the reference to Art. 5 (and also 8) of the Directive, but from the well-consolidated case law of the CJEU as well as Art. 51(1) of the Charter (in this sense and with further references F. SPITALERI, *Il rimpatrio e la detenzione dello*

straniero tra esercizio di prerogative statali e garanzie sovranazionali, Torino, 2017, p. 69). Since returns have been regulated on an EU level with Directive 115/2008, the Member States need to respect the fundamental rights guaranteed by EU law when carrying out returns.

It is not the first time that the CJEU is confronted with the issue of a right to stay for medical reasons. Another case dealing with the suspension of a removal order for medical reasons was the *Abdida* case (Judgment of the CJEU, 18 December 2014, case C-562/13, *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*). In this case, too, the Court only referred to the principle of non-refoulement in Art. 19(2) and not to Art. 35 even though the Advocate General had suggested doing so (see S. ANGELERI, *Healthcare of Undocumented Migrants Framed as a Right to Emergency Treatment? The State of the Art in European and International Law*, in G. NESI (a cura di), *Migrazioni e diritto internazionale. Verso il superamento dell'emergenza*, Napoli, 2018, p. 475).

The right to stay for medical reasons is, hence, derived from Art. 7 and the right to privacy but not Art. 35 of the Charter which foresees a right to healthcare. The Court is reluctant to make use of Art. 35 when it comes to irregular migrants. The right to "preventive health care and the right to benefit from medical treatment" according to the letter of the Charter Article is to be granted to "everyone", albeit "under the conditions established by national laws and practices". To avoid a reference to Art. 35, the Court instead refers to the principle of non-refoulement to prevent the deportation, removal or extradition of people with severe health conditions but does not recognise their right to healthcare as enshrined in Art. 35 of the Charter (see S. ANGELERI, cit., p. 471).

The question now is: does the CJEU recognise a comprehensive right to stay for medical reasons? If the return of a third-country national is impossible because of their health condition, does this lead to an effective right to stay? The Return Directive does not foresee that Member States must issue a residence permit when return is impossible. The Return Directive leaves to Member States the discretion "to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory" (Art. 6 (4) of the Directive) but does not oblige them to do so.

There are Member States who go further than this and explicitly foresee a right to stay for medical reasons, as is the case in Italy, for instance. Art. 19(2) d-bis of the Italian Immigration Act ("Testo unico sull'immigrazione") stipulates that authorities issue a residency permit for medical treatment if non-nationals are in serious psycho-physical conditions or suffering from serious pathologies and a return would determine a significant detriment to their health. This residence permit lasts one year maximum and is renewable as long as the duly certified particularly serious health conditions persist. As a purely national regulation, it is valid only within the national territory. We can see from this example that Member States may grant residence permits for medical reasons but they are not obliged to do so under EU Law.

The question that follows is: is a suspension of removal sufficient to guarantee the fundamental rights of an irregularly staying sick third country national? If there is no provision that foresees a residence permit for medical reasons, this might leave the affected third-country national in a state of legal limbo where he or she can neither be returned nor is granted a right to stay in the given Member State. The Court is not giving a clear answer, probably reluctant to derive legal prerequisites from the Charter in an area of Member States' competence, namely to decide on residence permits.

The CJEU makes a step towards the recognition of a right to stay for medical reasons under some circumstances but the final decision is left to the national judge who has to decide if the conditions apply and if there is a real risk of a significant, permanent and rapid increase of his or her pain. The Member States continue to retain the power to verify if those conditions are given (See F. G. CAPITANI, *La somministrazione terapeutica di cannabis può impedire l'espulsione dello straniero irregolare purchè la patologia sia destinata ad aggravarsi nel paese d'origine*, in *Diritto & Giustizia* 204, 2022). An EU-wide general right to stay for medical reasons needs to be regulated in EU secondary Law, for instance in the Return Directive.

4. The Return Directive is currently being reformed. The recast of the Directive is part of the New Pact on Asylum and Migration presented by the European Commission in September 2020 (commented for AISDUE by R. PALLADINO, *Patto sulla migrazione e l'asilo: verso nuove regole sui rimpatri*, in *I Post di AISDUE*, II, 2020).

The recast focuses mostly on how to render returns more effective. It misses the opportunity to solve the question of irregular migrants who cannot be removed ("unremovable" or "non-returnable" migrants, see I. MAJCHER, *Legislating without Evidence: The Recast of the EU Return Directive*, in *European Journal of Migration and Law*, Vol. 23, 2021, p. 125). Unremovable migrants find themselves in a situation where they have neither a right to stay nor are able to be returned to their country of origin for various reasons: because there are practical hurdles like the lack of readmission agreements with the third country of origin or reasons hindering a return such as their medical condition. The EU does not deal with their difficulties in accessing social rights and the limbo situation they find themselves in (see F. LUTZ, *Non-removable Returnees under Union Law: Status Quo and Possible Developments*, in *European Journal of Migration and Law*, Vol. 2018, pp. 28-52 and P. SCHOUKENS, S. BUTTIENS, *Social protection of non-removable rejected asylum-seekers in the EU: A legal assessment*, in *European Journal of Social Security*, Vol. 19, No. 4, 2017, pp. 313-334).

The fundamental rights of so-called "unremovable migrants" will potentially continue to be violated as long as there is no uniform way of regulating the situation when return is practically impossible. Art. 14 of the Return Directive grants some minimum rights "during the period for voluntary departure in accordance with Art. 7 and during periods for which removal has

been postponed in accordance with Art. 9". But what if they cannot be returned in the long term because of their health condition?

Even after the recent decision of the CJEU, there is no general right to stay for medical reasons for irregular migrants who are very sick. The only pathway to grant a stable situation to the ill third-country national in cases like the one at hand is regularisation under national law on a case-by-case basis. As long as there is no EU legislation on unremovable migrants, Member States should regulate their situation to end the legal limbo they find themselves in. The Italian residence permit described above for medical reasons could be taken as an example.

Nonetheless, this judgment is an important step towards higher protection of the right to healthcare of irregular migrants. The risk of the deterioration of a sick irregular migrant's health condition following a return to the country of origin can lead to a violation of their fundamental rights and is hence incompatible with EU Law.