

Corte di Cassation, Court of Cassation

[Italy]

Case title: Court of Cassation – Section VI

Case number: 12069

Date: 05-06-2014

Subject matters:

- **Less coercive measures** (alternatives to detention) can be applied effectively in a specific case
- Arbitrariness due to the “quality of law”, i.e. the relevant national law is not **sufficiently accessible, precise and foreseeable** in its application
- Accessibility of the remedy
- Judicial review limited to patent errors of law

Case Status

Final

Instance

Cassation (Review)

Subject matters

Proportionality of detention

- **Less coercive measures** (alternatives to detention) can be applied effectively in a specific case

Lawfulness beyond Art. 15 of the Return Directive

- Arbitrariness due to the “quality of law”, i.e. the relevant national law is not **sufficiently accessible, precise and foreseeable** in its application

Right to an effective remedy

- Accessibility of the remedy

Scope of judicial review

- Judicial review limited to patent errors of law

Case summary

The judgment no. 12069/2014 represents the first major change in the case-law of the Supreme Court on the crucial issue of the object and scope of judicial review in validating detention. The Supreme Court heard an appeal against a validation decision of the Justice of the Peace concerning a Ukrainian citizen detained in a Centre for Identification and Expulsion under Article 14 of the Consolidated Text on immigration (Legislative Decree no. 286/1998 and subsequent amendments).

The applicant complained as to the incorrect assessment of a threat to public order which was affirmed by the judge who found that there was a failure to apply a less coercive measure in place of detention in compliance with the principle of proportionality. This first part of the appeal was dismissed by the Court with the argument that the contested decision was adequately considered in all respects. The Supreme Court was also asked to refer to the Court of Justice of the European Union a question as to whether the national legislation provides for cases of administrative expulsion for social danger (art. 13(2) letter. c) TU immigration). The only applicable measure is represented by detention in a CIE is

compatible with EC directive 2008/115 (in particular art. 15). In fact, the consolidated case law of the Supreme Court, even after the entry into force of the Return Directive, has until now strictly distinguished between two levels of control, both conferred to the jurisdiction of the Justice of the Peace: i.e. the expulsion governed by Article 13 of the Consolidated Text and the measure validating detention (art. 14 of the Consolidated Text).

The Supreme Court has applied the decision of the Italian Constitutional Court no. 105/2001 in a way which dismisses the question of the constitutionality of Article 14 of the Consolidated Text, the Court had interpreted the immigration system as recognizing that the competent Court (judging on the merits) was entitled to assess the legality of the decision on which detention was based. With this new judgment the case-law in question was reviewed. The Supreme Court found that such a review is contrary to the right to an effective remedy pursuant to art. 13 of the ECHR as interpreted by the Strasbourg Court in connection with the rule of art. 5(1)(f) of the Convention on the concept of "regular" detention of a person against whom action is being taken with a view to expulsion. The potential contrast between Article 14 Consolidated Text on immigration, as it has been interpreted thus far and the ECHR has been resolved by the recognition of the Court which validates detention "the power to detect incidentally, for the decision falling within its jurisdiction, the manifest illegality of the removal order." However, this opening protection is limited in part because it is stated in the decision that since the judge can only assess cases of manifest illegality of removal (in accordance with the ECHR case-law), the TCN must raise this issue before the Justice of the Peace. Not having complied with this stipulation, the case was finally adjudged to be inadmissible.

Attached file

[See file...](#)