

CORTE di Cassazione - sesta sezione; SUPREME COURT – SIXTH SECTION

[Italy]

Case title: Shalabayeva case

Case number: n. 17407/2014

Date: 30-07-2014

Subject matters:

- Detention in order to **carry out the removal process**
- Risk of **absconding**
- Arbitrariness due to the **violation of relevant procedures**
- Right to compensation in case of unlawful detention

Case Status

Final

Instance

Cassation (Review)

Subject matters

Purpose of Detention

- Detention in order to **carry out the removal process**

Necessity of initial detention

- Risk of **absconding**

Lawfulness beyond Art. 15 of the Return Directive

- Arbitrariness due to the **violation of relevant procedures**

Consequences of unlawful detention

- Right to compensation in case of unlawful detention

Case summary

By the decision no.17407 / 2014 (filed July 30), the Supreme Court issued a ruling on the long-awaited and important case of Ms. Alma Shalabayeva, the wife of an opponent of the regime in Kazakhstan, who had obtained political asylum in the UK and was the subject of an international arrest warrant issued by the authorities of her country. Precisely in order to carry out this action the Italian police raided at night in an apartment near Rome founding inside the opponent's wife and his daughter. Within a few hours they were notified the immediate expulsion order and issued orders of detention at the Centre for Identification and Expulsion of Ponte Galeria (Rome), this measure was validated by the competent Justice of the Peace, and finally it was quickly found an air carrier and Ms. Shalabayeva was returned together with her daughter. The case caused a stir controversy in the media and strong domestic and international critics.

The expulsion order was based on the assumption of the illegal entry of the woman.

As to the validation of the detention in the CIE, it was decisive the fact of holding a false diplomatic passport issued by the Central African Republic, because in the name of Alma Ayan and not Shalabayeva. The explanation submitted by Ms. Shalabayeva that she had , used a different surname to protect herself from political enemies of her husband was not deemed to be a valid justification. In the lawsuit filed by Ms. Shalabayeva against her removal, meanwhile expelled to Kazakhstan, it appeared that she was in possession of two permits of stay issued by countries of the Schengen area so that the competent administrative authorities revoked the expulsion order and the appellate court declared the dispute terminated, without ruling on the applicant's request to declare the illegality of her original expulsion. Ms. Shalabayeva had also appealed to the Supreme Court against the decision of validation of

detention that had restricted her personal freedom.

With a first ground of appeal, the Supreme Court was asked to annul the contested decision because it was issued in violation of Articles 7 and 15 of Directive 115/2008 / EC and based solely (including the denial of a deadline for voluntary return) on an incorrect element (the falsity of diplomatic passports), as it would have been easy to ascertain with a minimum investigation. With a second plea it was alleged the infringement of the principle of non-refoulement, pursuant to art. 22 of the Geneva Convention on the Status of Refugees, art. 5 of Directive 2008/115 / EC in relation to failure to take account of the special situation represented by the risk of political persecution in the country of origin. The Supreme Court has upheld the first ground of appeal.

The decision is interesting in two respects. First it was stated the applicant's interest to a ruling on the validity of detention, despite the revocation of the act of expulsion, because it involved a judgment on the illegality of the original removal, which in the affirmative implied the right to compensation for an unjust restriction of her personal liberty.

Secondly, the Supreme Court, in accordance with the above mentioned other recent decision n. no. 12609/2014, surpassed the previous interpretation (order no. 27331/2013) which did not allow the judge validating detention to assess the illegality of the expulsion (subject to any separate opposition), and limited their power to verify the existence and effectiveness of the same.

Referring to the case law of the ECHR in cases involving Italy (*Hokic and Hrustic v. Italy*, app. no. 3449 2009, and in subsequent *Seferovic v. Italy* (app. no. 12921 2004) and a previous decision (until then neglected) of the Italian Constitutional Court (judgment no. 105/2001), which required a more effective control and understanding of the lawfulness of the expulsion in the context of the validation of the detention, the Supreme Court considered that at least in cases of manifest illegality of the expulsion, the judge who validated detention should intervene.

The rapidity with which the Shalabayeva case had been dealt, even with the denial of the right to seek asylum, showed how the national system and dual protection system (concerning the expulsion order on the one hand and validation of detention on the other) until then practiced did not provide sufficient guarantees. At least in the cases of more manifest unlawfulness, the Supreme Court has deemed more appropriate a system that allows an immediate check on the legality of the expulsion in its review of the detention order. In this leading case, the measure of validation has been quashed since it was retained the original illegality of the measure of expulsion.

Attached file

[See file...](#)