REDIAL PROJECT

National Synthesis Report – Cyprus

The interpretation of the Return Directive by national courts in Cyprus

By Nicos Trimikliniotis and Corina Demetriou

Abbreviations

CIO	Chief Immigration Officer
CPT	Committee for the Prevention of Torture
ECtHR	European Court of Human Rights
NHRI	National Human Rights Institute
SWS	Social Welfare Services
TCNs	Third country nationals
The Law	Aliens and Immigration Law Cap 105
RoC	Republic of Cyprus
UAMs	Unaccompanied minors
VD	Voluntary departure (s)

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1. Introduction

The Return Directive was transposed in 2011 by incorporating most of its provisions almost verbatim in the existing (and antiquated) immigration law[1] ('the Law') without deleting the older provisions which conflict with the Directive. With few exceptions, the Courts are not prone to rank higher those provisions of the law which transpose the Directive than those which existed in the law prior to transposition. This is the case even where the older national provisions essentially conflict with the provisions transposing the Directive, such as article 6 which gives unfettered discretion to the Chief Immigration Officer to deport non-nationals for a long list of general and vague grounds, many of which contravene the non-criminalisation principle.

The main authority with competence in the field of returns is the Civil Registry and Migration Department (commonly referred to as the Immigration Department) of the Ministry of Interior, with wide powers to grant voluntary return requests, issue return decisions, detention orders and entry bans for all third country nationals (TCNs) deemed to be "illegal" or "unwanted" or "prohibited" immigrants. Judicial review of these decisions is carried out by the Supreme Court through a procedure foreseen in the Constitution (in article 146); however, this procedure does not automatically suspend deportation, even for rejected asylum seekers, nor does it ensure release from detention until its successful outcome. An ECtHR decision against Cyprus on 23 July 2013[2] for the lack of an effective remedy against deportation and detention initially promised to change the picture of how

[1] Aliens and Immigration Law (Ο Περί Αλλοδαπών και Μετανάστευσης Νόμος) Cap.105. Available at www.cylaw.org/nomoi/enop/non-ind/0_105/full.html
[2] *M.A. v. Cyprus*, application no. 41872/10

detention and deportation are carried through by the authorities and how these are challenged through the Courts; however, two years after this ruling the law remains unchanged and deportations are still carried out whilst judicial procedures seeking to overturn the deportation decisions are still in process. In 2015, the ECtHR issued three more rulings against Cyprus[3] condemning the government for violations of Articles 5(1) of the ECHR (right to liberty and security) and Article 5(4) (right to challenge the legality of one's detention). The applicants were all Syrian Kurds who had been arrested and detained for deportation purposes in 2010. In June 2010, the ECtHR had issued interim measures under Rule 39 of the Rules of Procedures of the Court, prohibiting the applicants' deportation until their case is examined by the ECtHR. In all three judgements the ECtHR ruled that the legal system in Cyprus does not provide for an effective remedy against administrative decisions confirming its' previous ruling in the case of *M. A. v Cyprus.*

The judicial review process takes on average 1-2 years to complete, which potentially does not meet the Return Directive's requirement for a speedy review. Administrative review can only take place at the level of the Minister of the Interior who tends not to overturn decisions issued by the immigration authorities.

Cyprus does not have an effective forced-return monitoring system, as required by article 8(6) of the Directive.[4] The Ombudsman was officially appointed as monitoring body for returns by a decision of the Council of Ministers in 2013. However, no budget was allocated to this function and therefore no monitoring activities were ever carried out. When the Ombudsman accepted her appointment as monitoring body, this was expressly done on the condition that funds would be made available by the government in order to hire personnel and cover travelling and other costs in order to accompany returns. This condition was never met by the government. In 2014 the monitoring body applied to the Ministry of Interior for funding under the Returns Fund (EU Solidarity Funds) in order to fulfil this mandate. The application was approved, but it provided for the purchase of services from the private sector instead of the hiring of own personnel, due to a freezing in recruitments in the public sector implemented since 2013 in response to the economic crisis. Although unhappy with this proviso, the Ombudsman invited tenders through a public procurement procedure, as required by the interior ministry. None of the tenders received met the minimum requirements and the procedure was, therefore, cancelled without accepting any tender. The Ombudsman maintains the position that in order to fulfil this mandate, it is necessary to hire own personnel rather than buy services from the private sector, in order to be able to exercise the necessary quality controls and provide adequate supervision and support. The whole issue is being reassessed by the Ministries of Interior and Finance for over a year now. At the time of writing, there was no independent body to monitor the implementation of the Directive.

Detention emerges as a standard practice in all cases where return decisions are issued, premised largely upon a presumption that there is a high risk of absconding in every case of irregular migrants. This practice precludes the possibility of voluntary departures, as the administration appears reluctant to allow TCNs to organise their own return for fear of absconding and the Courts appear unwilling to interfere with this administrative practice. In spite of recent amendments to the law restricting the situations where TCNs can be criminally prosecuted for illegal entry/stay, it is still possible to prosecute TCNs for immigration related offences and have a prison sentence imposed on them. A TCN serving a prison sentence for whatever reason is automatically an "unwanted" or "prohibited" immigrant against whom a detention/return order is issued, to ensure s/he remains in detention until his/her removal; additionally such a person is deemed to be "subject to return as a criminal law sanction" in accordance with Directive Article 2(2)(b) and as such s/he is removed from the ambit of the Directive and loses all the protection offered by the Directive including the provision of legal aid. For the purposes of challenging a deportation decision, the granting of legal aid is subject to a stringent 'means and merit' test, which essentially has the impact of denying legal aid to the vast majority of returnees.

[3] *K.F v. Cyprus*, Application no. 41858/10, *H.S. and others v. Cyprus* (Application no. 41753/10 and 13 other cases) and *A.H and J.K. v. Cyprus* (Application No 41903/10 41911/10),

[4] See FRA' Overview of Forced Return Monitoring Systems at http://fra.europa.eu/en/theme/asylum-migration-borders/forced-return

Voluntary departures (VD) within the meaning of the Directive are generally not practised or are very scarcely practiced in Cyprus; the Courts themselves regard the communication for voluntary departure as a mere request that cannot be subjected to judicial review.

TCNs apprehended without papers are placed under arrest without an arrest warrant and are, as a matter of standard policy, detained pending deportation. A letter informing them of the return/detention decision and of an entry ban is usually handed to them at some point during their detention or simply presented by a police officer in Court, claiming it had been handed to the detainee from before. The letter mentions no reasons of fact, just a mere invocation of a legal provision (article 6 of the law) upon which all return decisions are premised. The language of this letter, as well as of all other communications between the returnee and the authorities, is English, which is the language that the returnee is presumed to understand; no translation is provided into any national language.

There are stringent requirements to be met in order to be entitled to legal aid to challenge a return decision.[5] The grant of legal aid is discretionary upon the Court and is subject to the financial means of the applicant, as these are assessed by the Social Welfare Services of the Ministry of Labour and Social Insurance. Thus in order for the Court to grant legal aid, it must be satisfied that the economic situation of the applicant, by taking into account his/her income from work and other sources and the basic needs of him/herself and his/her family, is such that s/he is unable to pay for legal advice or representation (the means test). In addition, the Court must be satisfied that the seriousness of the case is such that it is in the interests of justice for legal aid to be granted for the preparation and the handling of the case (the merits test).[6] Practice has shown that although the means test is in most cases easy to satisfy, the merits test is almost impossible to meet, particularly as the applicant must appear before the judge without a lawyer and argue about the merits of his or her case. The stringent application of the merits test has had the result that less than a handful of legal aid applications have been successful since this legal provision was adopted in 2012.

Assistance to unaccompanied minors is offered by the Social Welfare Services of the Ministry of Labour and Social Insurance who step into the shoes of the guardian and perform all tasks and duties of a guardian. This body will strive to ensure that the child's wishes and best interests will be taken into consideration, following the guidelines provided by the UN Convention on the Rights of the Child; there are no special guidelines developed for the purposes of determining a child's best interests in the return procedure, nor are there lawyers to provide them with legal representation. In the event that a child wants to return or to be sent to a country where s/he can be united with a guardian or a relative, the Social Welfare Services will ensure that the child is escorted through the journey and met at destination by a person authorised and competent to receive him/her. Access to education does not appear to be a problem for minors, whether unaccompanied or with a guardian.

In the process of removals, coercive measures may be used in order to restrain TCNs who do not cooperate with the authorities. Although information is scant and, in the absence of a monitoring body, the whole process is difficult to monitor, there have been allegations of excessive force, physical violence and use of sedatives to compel unwilling returnees to perform the journey of return (Ombudsman 2013a; 2013b).

The overall picture emerging is that little has changed in the policy and practices following transposition of the Return Directive in 2011, many aspects of which are not implemented.

2. Article 7: Voluntary departure (VD)

The transposition of the Return Directive in 2011 for the first time codified a procedure for voluntary returns, but it is doubtful whether this procedure is used at all. Migrants caught in an irregular situation

[5] It is questionable whether the RoC meets the requirements of art. 13(4) of the Return Directive. Moreover, the practices in the granting of legal aid may contravene Art. 16(3) of Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status which provides that "member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted".

[6] Law on legal aid of 2002 (Ο Περί Νομικής Αρωγής Νόμος του 2002) N.165(I)/2002 as amended, articles 6B and 6C. Available at www.cylaw.org/nomoi/enop/non-ind/2002_1_165/full.html

are, as a matter of standard practice detained until their deportation is organised. In fact detention appears to be the practice even where there is no reasonable prospect for removal.[7] From stakeholders' accounts,[8] it emerges that it is nevertheless possible that the authorities may informally decide not to pursue a forced return in some cases, in order to give the chance to a TCN to return by him/herself, without following any of the procedures foreseen in the law. This tends to involve cases of families with children attending school in Cyprus or persons with health issues, who are allowed to remain until the children finish the particular school year or until the health problem ceases to be critical. This process takes place at an administrative level and has not so far been subjected to judicial scrutiny.

No legal aid is available to challenge administrative decisions regarding voluntary departure and the Courts do not recognise such decisions as being subject to judicial review. A Supreme Court decision of July 2013[9] found that the standard letter which the immigration authorities customarily send to all TCNs in an irregular situation requesting them to depart by themselves does not constitute an executive administrative act but a mere request of no legal consequence and as such it cannot be subjected to judicial review or be suspended through an interim order. In essence, this means that the Court did not recognise the practice of the immigration authorities to request the applicant to depart as a voluntary return decision within the meaning of the Return Directive which, in any case, was not mentioned in the judgement. There was no other reported Cypriot court case seeking to reverse or postpone a VD decision.

There are no incentive schemes in place to encourage voluntary returns. Although EU funding is available through the Return Fund, this was up until recently used only to buy vehicles to transport the returnees to the airport and to pay for their tickets. A recently launched project intended to facilitate voluntary departure involves the provision of counselling and support but not the provision of incentives to depart.[10]

VD and the risk of absconding

When an illegally staying TCN is located by the authorities, it is extremely rare that s/he will be let lose to organise his/her own return: all cases of TCNs are treated both by the authorities and by the courts to contain an inherent risk of absconding. In the case of *Re. Rita Kumah*[11] the court rejected the habeas corpus application of a woman from Ghana seeking her release from detention. In allowing the argument of the administration regarding the applicant's detention, the judge found that detention is necessary for as long as there is a risk of absconding and there is a risk of absconding in this case because the applicant did not have a passport or a residence permit. The judge also concluded that detention is directly connected with the objective of the Directive, perceived to be "the removal of the applicant the soonest possible".

There are no provisions or policies in place for measures to minimize the risk of absconding during a VD period; in practice if there is such a risk (which is presumed in most cases of returnees) the authorities will detain the person in question. The law does not specify a procedure or objective criteria in order to determine the risk of absconding or the other factors that may restrict or condition the voluntary return; practice suggests that the procedure and the criteria fall within the discretion of the CIO.

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[7] In the case *of Mohammad Khosh Soruor v. Republic*, the Supreme Court found that the detention of an Iranian national was lawful despite the fact that the deportation order issued against him had been suspended in light of the fact that he had no travelling documents and there was no reasonable prospect of his removal. Supreme Court Case No. 1723/2011, 8 February 2012.

[8] Consultations: officer, Ombudsman's office; immigration lawyer; UNHCR representation Cyprus; Future Worlds.

[9] *Tatsiana Balashevich v. Republic*, Case No. 5635/2013, judgement delivered on 10 July 2013

[10] Cardet (2015)

[11] *Re the application of Rita Kumah*, Supreme Court, Civil application No. 198/2013, 29 November 2013. Available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2013/1-201311-198-13.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

Voluntary departure period set in law

In law, the return decision issued by the immigration authorities sets out a mandatory time frame for voluntary return ranging between seven and 30 days, subject to:

- a discretionary extension that may be granted by the Chief Immigration Officer (hereinafter 'the CIO') taking into consideration the individual circumstances of the case such the length of the stay, the existence of children attending school or other family or social ties;

- conditions aiming at minimizing the risk of absconding, such as the regular presentations of oneself before the authorities, a monetary deposit, the depositing of documents or the obligation to reside in a specific place (Article 18OTH of the Law)

According to the law, in cases where there is a risk of absconding, or the application for a visa was rejected as manifestly unfounded or fraudulent, or the person poses a risk to public security or public order, the CIO may either refrain from granting a time frame for voluntary return or grant a time frame of under seven days (Article 18OTH[12] of the Law).

The wording of the relevant provision of the Law (Article 18OTH(1)) suggests that all return decisions are issued with a voluntary departure condition. However, this is not always the case and the standard letter communicating the return decision to the affected TCN (the specimen for which is included in the Law) does not automatically assign to its recipient a voluntary departure period; instead the standard wording is that the recipient of the letter is placed under arrest because of the risk of absconding. Essentially, this is a matter falling within the discretion of the CIO. In practice, once the authorities have located the whereabouts of a TCN illegally staying in Cyprus, they will serve him/her with the standard letter which does not grant a voluntary departure period and which places the TCN under arrest, in order to avoid the risk of absconding. In the case of TCNs who are identified as illegally residing in Cyprus but who have not been located, a letter is normally sent to their last known address requesting them to leave Cyprus within a specified period of time.

The decision as to whether a voluntary departure period is to be applied is made by the CIO. None of the stakeholders consulted for the purposes of this report were aware of any voluntary departure periods granted in any case. This confirms the above finding that this measure is used only where the TCN has not been located) so they could not supply information as regards average length of time.

There is no administrative procedure in place to appeal against a negative decision to an application for voluntary departure. In theory, all decisions of the administration can be appealed against, under article 146 of the Constitution. In such a case, however, the voluntary return procedure is not automatically suspended as a result of filing such an action. Also, legal precedent has established that a voluntary return decision does not constitute an administrative act but a mere request and as such it cannot be subjected to judicial review under article 146 of the Constitution.[13]

The Law (article 18OTH) sets a minimum (seven days) and a maximum (30 days) length of the voluntary departure period, granting at the same time considerable discretion to the CIO to either extend this period (article 18OΘ(2)) or to reduce it below the seven days (18OTH(4)). There is no procedure or criteria set in the law as to how the decision on voluntary departure is to be taken. For the purposes of granting an extension, a few criteria are set out in the law (18OTH(2)) such as the schooling arrangements of a child, but these criteria are clearly meant to be indicative rather than exhaustive.

[12] The Law follows a rather odd and archaic system of numbering, using a combination of numbers and letters from the Greek alphabet. Some Greek letters do not precisely correspond to a letter from the Latin alphabet, as is the case with the letter 'Θ' used in this article. To avoid confusion, in order to refer to this article, I have used the a letter or a combination of letters from the Latin alphabet, connoting the sound of the Greek letter, as it was done in the TIPIK study (e.g. 'Θ' = TH, because this is how it is pronounced)

[13] *Tatsiana Balashevich v. Republic*, Supreme Court Case No. 5635/2013, dated 10.07.2013. The applicant's application for suspend execution of a decision of the immigration department (until her appeal on the same matter has been examined) was rejected on the ground that the decision of the authorities was not an administrative act but merely a non-binding request to leave Cyprus the soonest.

There is no case law on this issue.

Extension of VD period

The Law is silent as to the procedure that must be followed in order for a voluntary departure period to be extended; the only criterion mentioned in the Law (article 18OTH(2)) is that the extension is to be granted 'where required' (in Greek: *Εφόσον απαιτείται).* The phrase can be interpreted to mean that an extension should be granted either where this is called for due to the circumstances of the case or where this has been applied for. In practice, extensions are granted only upon request by or on behalf of the TCN affected and not automatically. No case was examined by the Cypriot courts as regards decisions on requests for extensions.

There is no time frame prescribed in the law during which the returnee can apply for voluntary departure, as no procedure is prescribed in the Law or in any policy document for the returnee to apply for voluntary departure.

3. Article 8: Removal

The Supreme Courts monitoring transposition of article 8 and the Practice of Removal

In a number of cases Cypriot Courts have referred to the *El Dridi* and *Achughbabian* cases; however there has been no direct discussion of the terms such as "gradation", or "all necessary measures". We have little case law discussing directly the impact of the Luxembourg case-law on the national criminal law sanctions, under art. 8, para. 1, nor do we have cases that can be used to properly asses how Cypriot courts interpret "proportionality"/"non-excess of reasonable force"/"the dignity and physical integrity" under art. 8, para. 4.

Cypriot Courts note that *El Dridi* and *Achughbabian* have set the legal framework for addressing the criminalisation of irregular migration and the use of national penal law as regard detention, removal and rights of persons relating to the mechanism required by the Return Directive. It is questionable however whether Cypriot Courts have properly enforcing the basic test the CJEU has set: "whilst, in principle, criminal legislation and the rules of criminal procedure fall within the competence of the Member States, this area of law may nevertheless be affected by EU law". When the Return Directive, the *El Dridi* and *Achughbabian* principles are invoked, judges in most cases, tend to distinguish them on the facts, often unjustifiably limiting the scope and ambit of these landmark cases. The key principle of *El Dridi* particular that "states cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness",[14] is not always adhered to. In a number of instances, such as in cases discussed below, Cypriot courts seem rather reluctant to allow for the full effect of the CJEU cases. For instance, often judges appear rather oblivious to *El Dridi*: this case has gone some way in clarifying that criminal provisions providing for a custodial sentence for irregular immigrants merely based on their non-compliance with a return decision are not compatible the EU acquis, since they delay the enforcement of such decision. The CJEU expressly allows for criminal provisions punishing irregular immigrants, but has nonetheless subjected them to a number of limitations and conditions limiting their possible scope of application.[15] In this sense, Cypriot courts have tended to apply these limitations quite restrictively, as it is shown

[14] In *El Dridi* the CJEU it ruled that "notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with EU law. Those States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness (El Dridi, paragraphs 53 to 55 and case-law cited)."

[15] Such criminal provisions may be applied neither before (para. 44 f.) nor during (*El Dridi* judgment) the return procedure.

further down. *El Dridi* was concerned exclusively with criminal provisions providing for a custodial sentence in the course of the return procedure, in *Achughbabian* the Court considered Art. 2(2)(b), which may only be applied to exclude from the scope of application of the directive those third-country nationals who have committed crimes unrelated to their immigration status.[16]

The RoC transposed the Return Directive by copying verbatim its wording into the main immigration law. The immigration authorities however invariably disregard the underlying logic of the two CJEU decisions, despite the fact that the Supreme Court regularly refer and has in certain instances criticised the disregard by immigration authorities of the EU acquis and the CJEU decisions. Nonetheless, Cypriot Supreme Court judges appear reluctant to intervene in immigration authorities decision-making. The discretion relating to immigration control has been historically construed as being tied and interwoven with the exercise of sovereignty, which is exercised by Executive and its administration on behalf of the Cypriot people.[17]

The provisions of Art 8(1) Return Directive appear to be correctly transposed by the Republic of Cyprus,[18] particularly after the amendment in 2013.[19] Following *El Dridi* and *Achughbabian*[20], Article 18ΟΓ of the Aliens and Immigration Act was amended so that illegal entry and/or stay are not punishable by imprisonment. The Cypriot authorities amended the legislation in response to the *Achughbabian,* suggesting that the amendment would remove the possibility of criminal proceedings for illegal stay of certain categories of illegal immigrants.[21] Prohibited immigrants may still be charged with and sentence to imprisonment of a period ranging between 12 months and three years for immigration related offences. Article 12 criminalises and provides prison sentences for: entering or leaving Cyprus through a point other than an approved port; entry into Cyprus by sea without the CIO's permit; entry into Cyprus by air without immediately presenting him/herself to the nearest authority; omission of the sea captain and the pilot of a plane to supply he CIO with true and precise lists of names of all passengers. Article 19 criminalises and provides prison sentences for the following: false statements for the purpose of remaining in Cyprus; issuance of a false certificate of study to a TCN to enable him/her to obtain a student visa; changing a permit issued under this Law;

[16] The Court ruled that Art. 2(2)(b) "clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying" (para. 41)
The two decisions of the Court have clarified the following:
"States may not circumvent the scope of application of the directive by criminalizing irregular immigration – or non-compliance with return orders – and providing for non-custodial sentences (in accordance with the conclusions of the El Dridi decision) merely in order to allow for "criminal" expulsion (not subjected to the procedure set out in the directive): expulsions are only to be considered "criminal" if they are a consequence of a crime unrelated to irregular immigration. Thus, the Court has clarified that criminal sanctions may only be adopted once the return procedure is exhausted, if the adoption of coercive measures did not enable the removal of the immigrant to take place (para. 46), and only in so far as there is no "justified ground for non-return" (para. 48). Finally, the imposition of such sanctions "is subject to full compliance with fundamental rights," and in particular with the rights recognized by the ECHR (para. 49). Return as a criminal law sanction" only includes return and expulsion which is inflicted as a criminal sanction for the violation of criminal provisions different from those relating to irregular immigration.
[17] See Trimikliniotis, 2013; Demetriou, 2013.
[18] TYPIC (2013, p. 31) suggest that there is compliance but "the legal provisions on detention for infringements of the Cyprus law on migration must be discussed in connection with Art 16ff". The same study (TYPIC, 2013, p. 31) suggest as a far legislation is concerned art. 8(2) is in line with El Dridi.
[19] The amendment was passed in with Law 49(I)/2013 on 21 June 2013. The amended law provides that the second subparagraph of Article 18ΟΓ(2) of the basic act be replaced by the following subparagraph: '(2) Without prejudice to the general application of paragraph 1, Article 12 and/or Article 19 shall apply to third country nationals falling within the scope of Articles 18ΟΔ to 18ΠΘ only where: (a) the maximum period of detention of the third-country national concerned under Article 18ΠΣΤ has expired and there is no country, of those referred to in the definition of the term 'return' in Article 18ΟΔ, that will allow the person to enter its territory on the basis of a travel document issued by the authorities either of the country concerned or of the Republic, or(b) the third-country national concerned has left or been removed from the Republic pursuant to Article 14 of the basic act and subsequently entered the Republic illegally or is staying there illegally.'
[20] *Alexandre Achughbabian v Préfet du Val-de-Marne*, 6 December 2011.
[21] See TYPIC 2013

unjustified possession or use of a forged or changed permit; refusal to answer or falsely answering questions put to him/her by the CIO; refusal to give the CIO a document lawfully requested; assists an illegal immigrant in entering or staying in Cyprus; ownership of a boat used to transport illegal immigrants into Cyprus; providing shelter to any person whom s/he knows or suspects to have breached the Law; resists or obstructs the CIO in the execution of his/her duties; fails to comply with a condition of his/her permit; having entered Cyprus as temporary resident remains after the temporary permit expires; refusal to be searched or to have his/her luggage searched; breach of any condition or restriction set by the Law or by the Refugee Law in relation to his/her stay; illegal stay except where the TCN proves that s/he entered Cyprus lawfully before the enactment of the Law or s/he intended to present him/herself to the nearest authorities or had his/her permit expired before s/he had the chance to leave Cyprus. According to this amendment, articles 12 and 19 of the Law, which criminalise and provide prison sentences for certain immigration- related acts will be applied to TCNs covered by the Return Directive on two instances:

> - Where the maximum period of detention foreseen by law has expired and there is no country from those listed in the Law (country of origin, country of transit or country where the TCN wants to go) willing to receive him/her;[22]
>
> - The said TCN left Cyprus through return proceedings and subsequently returned unlawfully or resides unlawfully in Cyprus.

The use of removal as a mechanism to detain and criminalise irregular migrants has been noted by different studies as a violation that undermines the fundamental rights provided by EU law under the return directive.[23] This problem is not confined to Cyprus as some other EU members, such as France and Italy and seem have similar approaches.[24] As Parkin (2013, p.13) notes:

In some national contexts individuals are detained for a matter of days while authorities decide whether they have legitimate grounds to lodge a claim (e.g. Portugal), in others they are detained after they have received a negative decision and their detention serves their removal (Finland) while in countries like Cyprus deprivation of liberty characterises the entire asylum procedure. […] widespread discrimination exists in asylum detention practices, with some member states routinely detaining certain nationalities or ethnic groups, such as Roma in the UK.

However, the margin of failing to meet the standards set out in *El Dridi* and *Achughbabian* in Cyprus must be higher. Whilst EU law strives to ensure that detention for committing a crime is something that is "conceptually and legally distinct from immigration detention",[25] this is not the case in Cyprus.

The wide discretion afforded to the Cypriot immigration authorities has a long history. Even before the change of immigration policy in 1991, which made Cyprus a destination for many thousands of migrants, Cypriot Courts were extremely reluctant to interfere with the Immigration authorities' discretion. In one early landmark legal precedent, which cited in over 200 subsequent judgments, the judge confirmed the practice on the ground, stressing that "the right of the State to regulate the length of stay of an alien is an attribute of sovereignty."[26] In that case the judge[27] noted:

> "…the right of a country to refuse entry to aliens is, in accordance with International Law an incident of the sovereignty of the country; a sovereign right that cannot be abridged except by a binding treaty or convention. The right of the State to regulate the length of stay of an alien in the country is, likewise, an attribute of the sovereignty and territorial integrity of the country".

Courts reluctance to interfere with immigration authorities' decisions in not unique to Cyprus; however, as the case law reveals, Cypriot courts often fail to duly consider vital aspects of EU law and

[22] Oddly, according to Article 18PST(6) of the Law, such a case would presumably qualify for immediate release from detention as an instance of becoming apparent that there is no reasonable prospect for removal.
[23] Demetriou, 2013; Trimikliniotis, 2013; KISA, 2014
[24] See Beduschi (2014) and Raffaelli (2011).
[25] See Costello, 2012, p. 257.
[26] *Moyo and Another V. The Republic*, Cyprus Supreme Court case (1988) 3 C.L.R., p. 1208.
[27] Judge Pikis cited as an authority the case of *Amanda Marga Ltd. V Republic* (1985) 3 C.L.R. 2583.

case law, fundamental rights and the ECHR. The blanket criminalisation afforded by Cypriot immigration law and practices makes this possible. According to article 6(1)(d) of the *Aliens and Immigration Law*, "any person convicted of murder or criminal offence for which a prison sentence of any duration has been imposed and who, due to the circumstances is considered by the chief immigration officer to be a prohibited immigrant" is subject to return and detention until return. This provision[28] is rigorously applied by the authorities, who declare all third country nationals (TCNs) convicted of an offence, no matter how minor, as unwanted or prohibited immigrants and issue deportation orders against them, a practice increasingly spilling over into the treatment of EU nationals. TCNs convicted of an offence, no matter how minor, such rather traffic offences, are denied the protection offered by the Return Directive, a practice of questionable legality grounded upon an interpretation of Directive Article 2(2)(b) that seeks to exclude all persons convicted of an offence, even an immigration offence, from the ambit of the Directive. Often, the national Courts accept this line of argument: in the case of *Antoan Hazaka* from Syria,[29] the authorities claimed and the judge agreed that the applicant was not entitled to protection under the Directive because the applicant was subject to a return order as a result of a criminal law sanction. Similarly, in the case of *Laal Badh Shah*[30] the Court refused to release the applicant from detention on the ground that there was no reasonable prospect for his removal, as foreseen by the Return Directive, because he was subject to a return decision due to a criminal sanction and thus not entitled to protection under the Directive.

Removal after the implementation of the RD: the case law

A number of recent studies show the routine violation of migrant rights, contravening the relevant EU acquis and international instruments such as the ECHR.[31] The following issues must be highlighted which serves as the basic frame within which the courts address the question of detention and removal of TCNs.

There is a process of criminalisation of TCNs, though the abuse of art. 2.2. of the Return Directive, using the catchall category of article 6 of the Aliens and immigration law via article 6(1)(d) of the Aliens and Immigration Law, as explained above. Authorities use the Return Directive to renew the TCNs detention and at the same time sought to remove the TCN from the ambit of the Directive so as to avoid offering her the protection foreseen in the Directive. The fact that the applicant had been charged with any immigration related offence and served a prison sentence for it, which automatically rendered her an 'unwanted immigrant' and, thus, subject to detention and deportation was not commented upon by the judge. The position that illegal stay may be prosecuted as a crime and that such crime may remove the TCN from the ambit and thus the protection offered by the Directive, essentially amounts both to a violation of the acquis and of the principle derived from *El Dridi* as well as an abuse of Return Directive provision 2(2) in order to deny returnees the protection intended for them under the Directive.

Large numbers of migrants are detained and deported; the vast majority of migrants deported are over-stayers and this has not been altered with the implementation of the Return Directive. There are no statistics as to how many cases like the above have been decided; the Courts do not maintain statistical records based on the type of the case and the immigration authorities do not publicise any statistics based on the reasons for return.[32] However, the number of TCNs apprehended with forged travel documents is on the rise, suggesting the existence of criminal networks operating underground that are supplying them with these documents. When TCNs try to leave Cyprus using those documents, they are apprehended, charged, convicted of a prison sentence (usually two months) and automatically declared unwanted immigrants; these cases, the number of which is rising, are considered as falling

[28] This is a colonial authoritarian relic, happily used, adapted and expanded by Governments since independence. See Trimikliniotis 2013 and 2015.
[29] *Antoan Hazaka V Republic*, Cyprus Supreme Court case, Application No. 110/2013, dated 19July 2013.
[30] *Laal Badh Shah*, Cyprus Supreme Court case, Civil Application No. 49/13, dated 24 April 2013.
[31] European Committee for the Prevention of Torture (2012); Amnesty International (2012); AIDA 2015.
[32] According to the Bureau of Analysis and Statistics of the Immigration department (17/5/2013) in 2010 3,265 Deportations of migrants and 51,652 checks of migrants, in 2011, 3,941 and 60,597, respectively, and for 2012, 3,529 and 58,867.

outside the scope of the Directive and, thus, not entitled to the protection offered by the Directive. Entry bans of indefinite duration are issued in all cases of returns, without exceptions.

The practice of long detention of migrants and asylum-seekers underlies the way removal is understood by authorities. Only after the six months do authorities begin to consider how to deal with each detainee. The 18 months, which is unacceptably long by any standards, as a tariff for any criminal offence, does not act a total maximum in very specific and difficult circumstances, seems to become the routine practice. In the case of Iranians and Syrians detention is far longer. In one case, *Majid Eazadi*,[33] a migrant from Iran, was released after more than four years in detention pending return. His return to Iran was deemed impossible because the Iranian embassy refused to issue travel documents to him. Since the Directive was transposed, usually 18 months, but there have been numerous cases of people detained for longer. Finding a country that will accept them is often delaying matters especially in the case of Iranian and Syrian nationals who will not be deported to their countries of origin, and are often not in possession of travel documents.

There is a lack of an effective remedy as regards deportation and detention. The ECtHR decision against Cyprus on July 23, 2013, for the lack of an effective remedy against deportation and detention may soon change the picture of how the authorities use detention and deportation and how these are challenged through the Courts. The ECtHR issued the decision against Cyprus, *M.A. v. Cyprus*[34] for the lack of an effective remedy against the deportation and detention of a Syrian national of Kurdish origin (the applicant). The case concerned the applicant's detention and his intended deportation to Syria after a police operation on June 11, 2010, removing him and other Syrian Kurds from an encampment outside government buildings in Nicosia in protest against the Cypriot Government's asylum policy. The authorities had decided to remove the protestors, citing unsanitary conditions around the encampment, the illegal use of electricity from a nearby government building and complaints from members of the public. About 250 police officers conducted a removal operation at dawn, leading 149 protestors to mini buses and taking them to police headquarters to check their status. Twenty-two protestors were deported on the same day and 44 others, like the applicant (whose asylum application was still pending at the time) were charged with unlawful stay and transferred to detention centres in Cyprus. Deportation orders were issued against the detainees on the same day (June 11). The applicant and 43 other Syrian Kurds asked the ECHR to apply interim measures under Rule 39 to prevent their imminent deportation to Syria. The applicant was not deported to Syria only because of an interim measure issued by the ECHR under Rule 39 of its Rules of Court to the Cypriot Government indicating that he should not be removed until further notice. The ECtHR found unanimously that there had been: a violation of Article 13 (right to an effective remedy) of the Convention taken together with Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment) due to the lack of an effective remedy with automatic suspensive effect to challenge the applicant's deportation; a violation of Articles 5 (1) and 5 (4) (right to liberty and security) of the Convention due to the unlawfulness of the applicant's entire period of detention with a view to his deportation without an effective remedy at his disposal to challenge the lawfulness of his detention. The ECtHR held that Cyprus was to pay the applicant 10,000 Euros (EUR) in respect of non-pecuniary damage.

Claiming rights against removal based on the RD in the Supreme Court has not proved to be an effective remedy. Claims to substantive rights derived from the Chapter of Fundamental Rights as well as other international instruments (e.g. ECHR, relevant UN Conventions etc.) and the Constitution seem to be rarely taken up, as they are typically subordinated to procedural aspects that take precedence over substance. In a string of landmark decisions the Supreme Court has legitimised the broad discretion of the immigration authorities to regulate immigration stay,[35] and neither the ECHR, nor the Constitution under at. 32 can guarantee the stay of an alien in the Republic.[36] Hence, in the case of *Asanka Ariyarathne* the arguments invoking the right to family life and his ties to Cyprus were explicitly rejected. The Court citing the case of *Kashif v. Republic*[37] decided that the "substantial fact"

[33] *Majid Eazadi v. Republic of Cyprus*, Supreme Court case, Civil Appeal No. 137/2012, 22 November 2012.
[34] *M.A. v. The Republic of Cyprus*, ECtHR case, application no. 41872/10, 23 July 2013.
[35] *Moyo and Another V. The Republic*, Cyprus Supreme Court case (1988) 3 C.L.R., p. 1208.
[36] See *Gnanawathie Kurumage V Republic* 673/2007, 5 December 2008. See also Paraskeva, 2015, p. 566.
[37] No. 1144/2008, 11.7.2008

was that given his alien status, the family situation on its own does not give rights to the applicant. The judge ruled that where the status of the TCN is one of illegal stay, particularly in the area of deportation, it is the sovereign right of the state that predominates, given that no alien has the right to stay in the country without permit.[38] Again the CJEU case law on the Return Directive seem to have little, if any role in the decision-making of the court.

In most cases, CJEU case law is not referred to at all in the reasoning of the decisions; in other cases judges often seem to accept arguments that distinguish them on the facts. In a formalistic manner the courts would typically invoke procedural obstacles relating to the administrative acts they challenge. In *Asanka Ariyarathne* the judge cited as authority the Supreme Court decision of the full house of *Dejic v. Republic*[39] which approved previous case law:[40] the applicant cannot challenge directly (αυτοτελώς) the orders of detention and removal, which do not suffer from any procedural faults, unless the applicant first annul previous administrative decisions of the immigration authorities which constitute the necessary basis for the issuing of such orders. For instance, the applicant must first challenge the decision to reject extension for stay or the application for citizenship, before challenging the CIO's decision for detention and removal.[41]

The overall picture emerging is that little has changed in the policy and practices following transposition of the Return Directive in 2011; many aspects of which are not implemented or deficiently implemented; in some cases, such as in the case of UM, it has actually worsened. In practice, persons placed under arrest for the purpose of their return are handed a standard letter in English, which is exactly the same in all cases, and which refers only to the relevant article in the Law (Article 6). Often, no real reason of fact is mentioned, which makes it difficult for the detainee's lawyer to prepare the grounds for appealing against the detention decision.[42] In addition to the order for return, the letter informs its recipient that a detention order and an entry ban have been issued against him/her. Amnesty International reports that in some cases, deportation and detention orders were handed to the individuals concerned several months into their detention and that even where the detainees were made aware of the reasons for their detention, they were not aware of how long they would be detained.[43]

The legal requirements for recourse under article 146 of the Constitution are as follows:

> - The recourse must be made on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

[38] The Judge noted: "Τονίστηκε το γεγονός ότι «το ουσιαστικό δεδομένο», ήταν η παράνομη παραμονή στο έδαφος της Δημοκρατίας από το 2007 και ότι η υιοθεσία δεν διαφοροποιεί το δεδομένο ότι ο αιτητής έχει ακόμη την ιδιότητα του αλλοδαπού, η δε οικογενειακή κατάσταση από μόνη της δεν αποτελεί στοιχείο υπέρ ενός αιτητή, ο οποίος κατά τα άλλα βρίσκεται σε καθεστώς έκδηλης παράνομης κατάστασης, ιδιαίτερα στον τομέα της απέλασης όπου το κυρίαρχο δικαίωμα του κράτους προέχει, εφόσον ουδείς δικαιούται να παραμένει στο έδαφος της Δημοκρατίας χωρίς άδεια, (*Kashif v. Δημοκρατίας*, 1144/2008,. 11.7.2008)."

[39] (2008) 3 Α.Α.Δ. 358.

[40] *Khatateav v. Republic* (2008) 3 Α.Α.Δ. 19 and Kedoum v. *Republic* (2005) 3 Α.Α.Δ. 505,

[41] The court rules: "Στην απόφαση της Ολομέλειας Dejic v. Δημοκρατίας (2008) 3 Α.Α.Δ. 358, έγινε με επιδοκιμασία αναφορά στις υποθέσεις Khatateav v. Δημοκρατίας (2008) 3 Α.Α.Δ. 19 και Kedoum v. Δημοκρατίας (2005) 3 Α.Α.Δ. 505, ότι δεν δύναται αιτητής προσβάλλοντας αυτοτελώς τα διατάγματα κράτησης και απέλασης τα οποία αφ΄ εαυτών δεν πάσχουν, να επιδιώξει την ακύρωση προηγούμενων αποφάσεων της διοίκησης που αποτέλεσαν το υπόβαθρο για την έκδοση τους και οι οποίες δεν προσεβλήθηκαν. Ο αιτητής εκεί είχε κηρυχθεί σε απαγορευμένο μετανάστη στη βάση ότι διέμενε χωρίς νόμιμη άδεια, οπότε η Διευθύντρια τον είχε κρίνει «αντικειμενικά» απαγορευμένο μετανάστη και εξέδωσε τα διατάγματα κράτησης και απέλασης ως έκφραση της κυριαρχίας του κράτους. Ο εφεσίβλητος εκεί δεν είχε προσβάλει την προηγούμενη απόρριψη της αίτησης του για παράταση του χρόνου παραμονής ή την αίτηση του για πολιτογράφηση, ενώ είχε δικαίωμα να αμφισβητεί κάθε στάδιο της διαδικασίας. Έτσι και εδώ."

[42] Demetriou, 2013

[43] Amnesty International, 2012, p. 18.

- The person making the recourse must have an existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, and must be adversely and directly affected by such decision or act or omission.

The recourse must be filed within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person filing the recourse. In practice, however, the aforesaid procedure may last for 1-2 years during which the applicant will remain in detention. The applicant will be released only upon a successful determination of his/her recourse and even in that case it is very likely that s/he will be re-arrested and placed in detention again before s/he exits the Court building, on the basis of a fresh administrative act based on the same or new facts.[44]

Article 155(4) of the Constitution provides for the issue of an order of habeas corpus, which may also be used in order to claim the release of a person from detention. This procedure which on average takes 1-2 months can and has been used successfully in order to claim release for detention of persons where there is no reasonable prospect of removal.[45] However, an application for habeas corpus may be rejected where there is an administrative order of detention for the purpose of return, for which an application for judicial review is pending.[46] The Court may also reject a habeas corpus application because it relates to a detention/return order that *needs* to be challenged first through Article 146.[47] Finally, the Court may also reject a habeas corpus application where the applicant is detained for the purpose of return as a result of having been convicted of a criminal offence, in which case s/he loses the protection offered by the Return Directive.[48] Having said that, in the case of *Shanmukan Uthajenthiran,*[49] the applicant detainee applied for habeas corpus without first challenging the legality of the detention/ the deportation order and the judge found in his favour and released him: The applicant in this case had been apprehended when he tried to travel abroad using false travel documents. He was charged and sentenced to three months' imprisonment, following which he was declared an unwanted immigrant and a detention/deportation order was issued against him. As soon as he served his sentence he was arrested for the purposes of his deportation and detained for a year. He filed for asylum, which had the effect of postponing the execution of the deportation order pending examination of his application but continued to be kept in detention. He was released from detention following the aforesaid court decision.

Illegal stay is more often a ground for detention than illegal entry; according to UNHCR officers, migrants are not criminalised for having entered Cyprus from illegal port, such as a port in the Turkish-controlled part of Cyprus.[50] Various issues arise in relation to practices and policies applied in respect of the detention of asylum seekers.

In 2010 the Supreme Court condemned the practice of the immigration authorities to detain and deport rejected asylum seekers immediately upon issue of the negative decision of the Reviewing Authority.[51] This particular case concerned a female applicant from Cameroon who sought to annul the detention and deportation order issued against her pending her appeal against the negative decision of the Asylum service. The orders of detention and deportation were issued on the ground that she was in illegal immigrant because she was an HIV/AIDS carrier. The judge found that the Refugee Directive allowed the member states to decide whether a rejected asylum seeker at first instance will remain or not in the member state pending the appeal (article 39(3)(a) of the Refugee Directive) but at the same time required of the member states to provide for the possibility to request safeguards or protection measures while the appeal is pending (article 39(3)(b) of the Refugee Directive). Therefore, the Cypriot government was not entitled to invoke its own failure to correctly transpose the Refugee Directive into its Refugee Law. The Court found that the instant issue of a return order immediately

[44] Demetriou, 2013.
[45] See the case of *Majid Eazadi*.
[46] See *Laal Badh Shah*.
[47] See *Majid Eazadi*
[48] See *Antoan Hazaka*.
[49] Civil application No. 152/2010, dated 18 January 2011.
[50] All ports and airports in the northern Turkish controlled part of Cyprus are seen by the Cypriot government as unlawful. Demetriou, 2013.
[51] *Leonie Marlyse Yombia Ngassam v. Republic of Cyprus* (Case No. 493/2010, dated 20 August 2010)

after the decision of the Reviewing Authority is illegal; as a result of this illegality, the detention order which was based on the return order was also illegal. However, this decision did not bring about a change in policy: the immigration authorities continue to detain and deport rejected asylum seekers instantly and automatically upon a negative determination of their appeal before the Reviewing Authority.

In *Laal Badh Shah*[52], the applicant was an Afghan national married to a Cypriot since 2005, the applicant was apprehended by the police from his workplace without a warrant and was charged and convicted to two months' imprisonment for illegal stay. In spite of having served his sentence, he continued to be detained in the central prison for more than a year later, without explanation for his continued detention. His first application for habeas corpus was rejected in July 2012 because there was an administrative act for his detention for the purpose of his return, for which an application for judicial review was pending. He claimed that he is being detained for over six months whilst no effort was being made to prepare his return and in spite of the fact that his return was impossible since he had no travel documents. He argued that detention is justified only where the return procedure is processed with due care and there is a realistic prospect for removal. The judge found that the case came under article 18OE(2)(b) of the Law, i.e. the applicant was subject to a return decision due to a criminal sanction; as a result, the principle of *El Dridi* was inapplicable since the applicant was given a sentence based on his illegal stay and illegal work and not as a result of failing to comply with a return decision, as was the case in *El Dridi*.

Similarly, in the case of *Antoan Hazaka* from Syria,[53] a Syrian asylum seeker who was convicted of being in possession of forged travel documents, continued to be detained long after he served his prison sentence of two months for the offence committed. The judge rejected his habeas corpus application on the ground that his case fell under article 18OE(2)(b) of the Law because the applicant was subject to a return order as a result of a criminal sanction and was thus not entitled to protection under the Return Directive. In another case however, the court did quash the decision for removal: *Hamid Reza Razzaman*[54] from Iran applied for a habeas corpus order from the Menoyia Detention Centre challenging the legality of his detention and requesting his release. In 2009 he was convicted of attempting to travel with forged travelling documents and was sentenced to imprisonment for seven months. In 2010 a detention and deportation order was issued against him but his deportation was not possible because of his refusal to cooperate in securing travelling documents. A few months later he filed an asylum application which was rejected. His administrative appeal at the Review Authority was also rejected. He was subsequently released, having served a sentence of 15 months, and was asked to depart from Cyprus. In 2014 he was arrested again for driving without a driving license but once the police established that he was undocumented they charged him with unlawful stay and not with the traffic offence. Detention and deportation orders were once again issued against him, pending examination of his appeal against the rejecting decision of his asylum application by the Review Authority. Invoking the ruling of the CJEU case of *Kadzoev*,[55] the applicant claimed he ought to be released from detention as he has already been detained in excess of the 18 months set as ceiling by the Return Directive 115/2008 and because it is clear that there is no reasonable prospect for his removal, as he does not have a passport and the Iranian Government will not issue travelling documents to its nationals who do not want to return to Iran. The court found that his previous detention in 2010-2011 cannot be taken into account for calculating the total period he was detained, because two years and nine months had elapsed between his release from detention and his next arrest in 2014; based on these calculations, his detention at this phase did not exceed six months. The court stressed the fact that he did not cooperate for the issue of travelling documents as a reason to reject his habeas corpus application. The applicant's application before the Supreme Court for the judicial review of the rejection of his asylum application by the Review Authority is still pending. The applicant remained in detention without any reasonable prospect for his deportation, given the lack of travelling documents. In addition, it is clear that he is offered no protection from deportation whilst his

[52] Civil Application No. 49/13, dated 24.04.2013.
[53] Application No. 110/2013, dated 19th July 2013.
[54] *Hamid Reza Razzaman v Republic*, Civil Application No. 107/2014, 18 July 2014http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2014/1-201407-107-2014.htm
[55] C357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)*

appeal against the rejection of his asylum application is pending. The failure to provide such protection to the applicant is contrary to the ruling of the ECtHR against Cyprus in the case of *M.A. v Cyprus*[56] where the ECtHR condemned Cyprus for its failure to provide an effective remedy to an asylum seeker detained for the purpose of deportation, since the judicial process did not have an automatic suspensive effect to suspend his detention and deportation pending trial, as required under Article 13 of the ECHR.

In *Asanka Ariyarathne*,[57] a judicial review case under art. 146, the Court approved of the deportation of the an adult Sri Lankan national adopted by the Cypriot husband of his mother, despite the fact that Cypriot father, who suffered from a medical condition, required the support of his adopted son. The applicant had been deported in the past, due to a criminal conviction for working illegally - they were paid to distribute leaflets and fined 250 Cypriot pounds in 2002. The court ruled that what matters for the Court was that under art 6(1)(κ) of the Immigration law (Cap. 115) renders "any person who remains in the territory of the Republic in violation of any prohibition, term or restriction as prescribed by the law or the regulations is an illegal immigrant".[58]

A rare decision in favour of the applicant is the case of *Shahin Haisan Fawzy Mohamed v Republic of Cyprus.*[59] The case concerned an Egyptian national, who was convicted and imprisoned of grievous bodily harm and deported but whose conviction was subsequently quashed. The applicant complained that the decision to deport him violated Directives 2004/83/EC,[60] 2005/85/EC,[61] 2003/9/EC[62] and 2008/115/EC,[63] Geneva Convention 1951 and relevant Laws 2000-2009 i.e. Law N 6(I)/2000 as amended, as well as the Regulations under the aforementioned laws. Noteworthy is the Judge's criticism about the standard practice of immigration authorities to issue a fresh detention and removal order under art. 6(1) of Cap. 105 on exactly the same basis as the ones annulled by the court, which amounts to a lack of respect for the court and a violation of the principles of good administration, good faith and the justified trust of the applicants to the to the authorities.

In Leonie *Marlyse Yombia Ngassam,*[64] the court allowed an appeal in a case which examined the prospect of issuing a deportation order and then a detention order, whilst an application before the Supreme Court is pending.[65] In the case of Mohammad *Khosh Soruor v. the Republic*[66] it was ruled that detention is allowed even if deportation is impossible or there is appending application challenging removal: postponement of removal does not constitute on its own reason for suspending

[56] *M.A. v Cyprus*, European Court of Human Rights (ECtHR), No. 41872/10, 23 July 2013.
[56] *Asanka Ariyarathne Kariyawasam Lokugamage V. Republic*, Case number 1264/2013, 26 February 2014.
[57] *Asanka Ariyarathne Kariyawasam*.
[58] As per Judge Nathanael: "…ο αιτητής ήταν ήδη απαγορευμένος μετανάστης δυνάμει του άρθρου 6(1)(κ) του Κεφ. 105. Εξ ου και συνελήφθη νομίμως στις 8.3.2013, όταν εντοπίστηκε να διαμένει ακόμα παράνομα στη Δημοκρατία. Το πιο πάνω άρθρο είναι σαφές εφόσον ορίζει ότι οποιοδήποτε πρόσωπο, μεταξύ άλλων, διαμένει στη Δημοκρατία κατά παράβαση οποιασδήποτε απαγόρευσης, όρου, περιορισμού δυνάμει του Νόμου ή των Κανονισμών, καθίσταται απαγορευμένος μετανάστης. Εκ του γεγονότος ότι πρόσωπο είναι απαγορευμένος μετανάστης δύναται να εκδοθεί δυνάμει του άρθρου 14(1) διάταγμα απέλασης από τη Δημοκρατία."
[59] As per Nicolatos J., Case No. 1718/2010, 25 April, 2013, at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-1718-10.htm&qstring=%E1%F0%E5%EB%E1%F3%2A
[60] 29 April 2004, On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which lays down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[61] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.
[62] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
[63] 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
[64] Case no. 493/2010, 20 August, 2010, before Judge Constantinides.
[65] The court considered art. 39 of Directive 2005/85/EC and the case of *Dörr και Ünal C-136/03*, pp. I-04779
[66] Case number 1723/2011, 8 February 2012, as per Kranvis judge, at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2012/4-201202-1723-11.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

detention. In the ex parte application of *Hasnas Natalia v. the Republic*,[67] the court rejected the claim for annulling the deportation order of a mother of an underage child. The court ruled that, as in the case of *Kedoum v. the Republic*, the case must be distinguished from ECtHR decisions of *Berrehab v. Netherlands*, A 138 (1988), *Moustaquim v. Belgium* A 193 (1991) and *Beldjoudi v. France* A 234-A (1992), which were cited by the applicant's counsel. Unlike the ECtHR cases above, the underage child and depended persons have no separate right to remain. As a prohibited immigrant she is subject to deportation.

The Supreme Court considered *El Dridi* also in the case of *Magdalin Mensah v Republic*.[68] The applicant was a female TCN from Ghana who was declared a prohibited immigrant under 6(1)(κ) of Cap. 105, after the rejection of the application to remain in the country, once her employment was terminated. The court considered that the cases of *Dörr* and *Ünal* C-136/03 (2.6.2005) and *El Dridi*, have no application, given the facts of the case. The judge, who cited the Cypriot cases of *Adnan Asghar v. Republic* [69] and *Laal Badh Shah*,[70] construed *El Dridi* principles as follows:

> "what is prohibited is the deprivation of liberty as a criminal measure for the noncompliance by the alien of the order of removal. Here there is no such element, neither has there been any sentence of imprisonment from the competent court for the furthering of the removal of the applicant".[71]

In *Bassam Asslloum v Republic*[72] the applicant was a Syrian national who had arrived originally in 2003 and worked as an agricultural worker; he left his employer and was subsequently declared a "prohibited immigrant". He departed from Cyprus in 2005 and was placed of the stop list. In 2007 after having entered illegally he departed against for Syria; he re-entered the country illegally and was arrested on 17.2.2014 and was sentenced for three months imprisonment for entering and staying in the country illegally. On 29.4.2014 the immigration authorities declared him a prohibited immigrant, under art.6(1)(d) of Cap. 105, "due to the serious nature of the offences committed". The immigration authorities issued orders for detention and deportation and on instruction of the director of Immigration authorities, the examined the possibility of being departed in a country other than Syria. On application for asylum, the immigration authorities suspended the detention order pending the asylum decision. The applicant applied for Habeas Corpus on the grounds that his arrest was illegal, his deportation to Syria is impossible and the Minister ordered a re-examination.[73] The Court considered the art.2(b) as transposed verbatim as art. 18OE(2)(β) of Cap. 105,[74] examining in particular the ECJ decisions: The judge first distinguished *Kadzoer*,[75] which examined the concept of 'reasonable prospect of removal' under the Directive. He then proceeded to distinguish *EL Dridi* in a way that is highly problematic. The judge said that in *EL Dridi* "the sentence was imposed due to the failure of the applicant to comply with the decision to deport him", whilst in the current case the orders for detention and deportation were issued when the applicant became a prohibited immigrant after a conviction by a court. The judge fails to consider that the imprisonment was a for an

[67] Case no. 921/2015, 23 July 2015.
[68] Case no. 5735/2013, 9 August 2013.
[69] 762/2011, 30.6.2011.
[70] 80/2012, 17.7.2012.
[71] Per Judge Nathanel: "Εκείνο το οποίο απαγορεύεται συνεπώς είναι η στέρηση ελευθερίας ως **ποινικό μέτρο** λόγω της μη συμμόρφωσης του αλλοδαπού με διαταγή εγκατάλειψης. Εδώ, δεν υπάρχει τέτοιο στοιχείο, ούτε έχει επιβληθεί ποινή φυλάκισης από αρμόδιο Δικαστήριο λόγω της προώθησης απομάκρυνσης της αιτήτριας".
[72] 17July 2014, case number 91/14, before Judge Michailidou.
[73] "Στην εν λόγω περίπτωση είχε επιβληθεί ποινή φυλάκισης ακριβώς λόγω μη συμμόρφωσης του αιτητή με την απόφαση απέλασης. Εδώ τα διατάγματα κράτησης και απέλασης εξεδόθηκαν λόγω του ότι ο αιτητής κηρύχθηκε απαγορευμένος μετανάστευσης δυνάμει του άρθρου 6(1)(δ) μετά την καταδίκη του από Δικαστήριο της Κυπριακής Δημοκρατίας οπότε και του επεβλήθη ποινή φυλάκισης."
[74] "Member States may decide not to apply this Directive to third-country nationals who: (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures."
[75] C-357/09 PPU

immigration offence. The judge also construed the case of *Arslan*[76] as allowing detention pending removal.

Shahin Haisan Fawzy Mohamed V Republic[77] is a rather exceptional case as it restricts the blanket criminalisation of TCNs practice in Cyprus. The judge considered that the nature of the offence that the Egyptian national was convicted was minor and the time lapse did not justify removal.[78] The application for asylum was rejected by the Asylum Unit on the grounds that he had not tuned up for the interview and was subsequently deported; however, the reason for not attending the interview was because he was detained at the time; moreover, the applicant had been subsequently acquitted from a wrongful criminal conviction in 2010.[79] The Supreme Court judge therefore annulled the orders for detention and removal and approved the Criminal Appeal Court's reasoning[80] that removal for a minor previous conviction, for working without a permit[81] after four years[82] would "contravene the principles of good administration, good faith and justified trust to the authorities". The judgment is in line with the cases C-554/13, *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie* and *Staatssecretaris voor Veiligheid en Justitie v I. O.* A quote from the conclusion of the case:

> "Article 7(4) of Directive 2008/115 must be interpreted to the effect that, in the case of a third-country national who is staying illegally within the territory of a Member State and is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision. Any matter which relates to the reliability of the suspicion that the third-country national concerned committed the alleged criminal offence, as the case may be, is also relevant to that assessment."

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[76] C-534/11, 30.5.213. The judge said: "Στην υπόθεση ***C-534/11, Arslan, ημερ. 30.5.2013***, αποφασίστηκε ότι η Οδηγία 2003/9/ΕΚ του Συμβουλίου της 27ης Ιανουαρίου 2003 σχετικά με τις ελάχιστες απαιτήσεις για την υποδοχή των αιτούντων άσυλο στα κράτη μέλη και η Οδηγία 2005/85/ΕΚ του Συμβουλίου της 1ης Δεκεμβρίου ανωτέρω, σχετικά με τις ελάχιστες προδιαγραφές για τις διαδικασίες με τις οποίες τα κράτη μέλη χορηγούν και ανακαλούν το καθεστώς του πρόσφυγα, δεν απαγορεύουν τη διατήρηση της κράτησης υπηκόου τρίτης χώρας ο οποίος υπέβαλε αίτηση διεθνούς προστασίας στην έννοια της Οδηγίας 2008/115/ΕΚ, εφόσον τέθηκε υπό κράτηση δυνάμει του άρθρου 15 της τελευταίας, βάσει διατάξεως του εθνικού δικαίου, όπως είναι η περίπτωση του αιτητή. Αυτό εάν βεβαίως προκύπτει από το σύνολο των κρίσιμων γεγονότων και περιστάσεων ότι η αίτηση ασύλου υποβλήθηκε με μοναδικό σκοπό να καθυστερήσει να ματαιωθεί η εκτέλεση της απόφασης περί επιστροφής. Περαιτέρω είναι αντικειμενικώς αναγκαία η διατήρηση του μέτρου της κράτησης για να αποτραπεί το ενδεχόμενο να διαφύγει οριστικά ο ενδιαφερόμενος και να εμποδίσει έτσι την επιστροφή του. Τα γεγονότα αντικειμενικώς ιδωμένα υποστηρίζουν καθολικά το σκόπιμο της υποβολής αίτησης ασύλου."

[77] case no. 1718/2010, 25.4.2013, http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-1718-10.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

[78] As Judge Nicolatos stated: "Τα διατάγματα δεν μπορούσαν να εκδοθούν στη βάση της καταδίκης του του 2010, εφόσον με την απόφαση του Εφετείου στην Ποινική Έφεση 152/09, ημερ. 3.6.2010, αυτός αθωώθηκε και απαλλάγηκε. Τα διατάγματα δεν μπορούσαν να είχαν εκδοθεί στη βάση της παράνομης παραμονής του αιτητή στην Κύπρο, εφόσον αυτός ήταν αιτητής ασύλου μέχρι 15.9.2010, ενώ από 3.6.2010 υπήρχαν εναντίον του διατάγματα απέλασης/κράτησης, και ο αιτητής ήταν υπό κράτηση. Η έκδοση των διαταγμάτων δεν μπορούσε επίσης να βασισθεί στην, πριν από πολλά χρόνια, καταδίκη του αιτητή για παράνομη απασχόληση και επιβολή προστίμου £300. Όπως επεξηγήθηκε στην προαναφερόμενη απόφαση, ο αιτητής είχε καταδικαστεί στις 17.11.2006 για παράνομη απασχόληση επειδή, ενώ είχε δικαίωμα να εργαστεί ως αιτητής ασύλου, απασχολήθηκε σε εργασία άλλη από εκείνη στην οποία εδικαιούτο να εργαστεί. Παρήλθαν χρόνια έκτοτε, χωρίς να ληφθεί οποιοδήποτε μέτρο εναντίον του και, επομένως «θα ήταν κατά παράβαση των αρχών της χρηστής διοίκησης, της καλής πίστης και της δικαιολογημένης εμπιστοσύνης του διοικούμενου η ανάσυρση εκείνης της καταδίκης, σχεδόν 4 χρόνια μετά, για να απελαθεί εξαιτίας της, δυνάμει της παραγράφου (κ) του άρθρου 6(1) του Κεφ. 105».

[79] Ποινική Έφεση 152/09, 3.6.2010

[80] Crim. Appeal 152/09, ημερ. 3.6.2010

[81] He was permitted to work in the restricted sectors provided for asylum-seekers but worked in another sector. In 2006 he was fined 300 CyPounds (515.13 euro).

[82] On the basis of 6(1)(k) of Cap. 105

4. Article 9: Postponement of removal

Art.18ΠΑ or 18PA(1) purports to transpose art. 9.1 of the RD. Article 18PA(1) has transposed Article 9(1) of the Directive regarding postponement of removal. The Director has the authority to postpone removal when it would violate the principle of *non-refoulement* or for as long as a suspensory effect is granted in accordance with an order issued by the court. The latter is Order 13 of the Procedural Orders of the Supreme Constitutional Court of 1962.

Article 9(2) of the Directive has been transposed by Article 18PA(2). The provision of Article 18PA(2) of the law applies without prejudice to Article 18PA(1) in which the postponement of removal is mandatory. The appropriate period has not been defined by the national legislation but its' determination falls into the discretion of the Director. Article 18PA(2) has provided the same examples of specific circumstances of each individual case as in the Directive and has not provided further examples. As these circumstances are not exhaustive and the Director has the power to extend the postponement to other circumstances as well.

Art. 9(3) has been purported to be transposed by Article 18PA(3). However, the obligations set out in Article 18OTH(3) which has transposed Article 7(3) of the Directive, may be imposed in case of postponement of removal provided for in Article 18PA(2). It seems that these obligations may not be imposed if the postponement of removal has been ordered for cases provided for in Article 18PA(1), in which postponement is not optional but obligatory. This means that an obligation of regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place can be imposed on the third-country national whose removal in question is postponed under Article 9(2) of the Directive but not if it has been postponed under Article 9(1) of the Directive. Further clarifications might be inquired from the Republic of Cyprus and prove useful in this regard. TYPIC (2013, p.38-39) suggests that "since Article 9(3) is an option and since the national law provides a more favourable regime for third-country national whose removal has been postponed on the basis of Article 9(1) of the Directive, conformity is concluded".

No figures are available, but this is a major course for postponement especially since the outbreak of the war in Syria. As a matter of policy, TCNs who file an asylum application after a certain period of unlawful stay are, upon filing their application, arrested and detained for the purpose of deportation. The execution of the deportation order is suspended until the determination of their asylum application at the first instance and, if the rejected asylum seeker files a recourse at the Reviewing Authority, then the suspension applies until the Reviewing Authority issues its decision. Once this decision is issued, the deportation order can be and usually is executed, even if an application has been filed at the Courts for a judicial review of the administrative decision rejecting the asylum application.

Health issues can be a cause for postponing removal but only in very extreme cases, such as pregnant women nearing the end of their pregnancy. If a returnee is in a condition s/he can travel, then s/he will be deported.[83]

Technical issues: If the returnee has no travelling papers or if the immigration authorities are awaiting documents to be sent to them from another country (e.g. the country of origin of the returnee or the country of destination, if different).

Other: Sometimes airlines refuse to transport persons who demonstrate resistance or do not cooperate, as the pilot does not want to take responsibility of transporting an unwilling person, especially if it is a private airline. There was a case of a Nigerian man whom the authorities tried to deport twice. Initially police officers tried to convince him to cooperate and they failed. Then two policemen in civilian clothing transported him to the airport but he was in such a bad condition, obviously as a result of having been beaten up, that the pilot refused to have him on board. Then they transported him to a non-place where he was obviously tortured and then they took him to the Aradipou police station where they forcibly removed his clothes and asked him to leave, which he refused. After that, they must have drugged him to put him on the plane, because he arrived in Dubai half dragged. The case

[83] Demetriou, 2013 refers as a source an interview with the Ombudsman's office.

was investigated by the Ombudsman's office and issued a report as Commission for the Prevention of Torture.[84]

In practice Courts rarely intervene in matters of administrative or executive discretion; therefore the provision of 9(2) of the RD that refers to "may postpone" as well as time-frames have not been addressed by the Courts.

5. Article 10: Return and removal of unaccompanied minors (UAMs)

Article 10 of the Return Directive is transposed by Article 18PB of the Law which provides that before deciding to issue a return decision in respect of an unaccompanied minor, the CIO seeks assistance from the Director of the Social Welfare Services (SWS), who provides such assistance taking due consideration of the best interests of the child. Although independent from the immigration authorities, the SWS is still a state agency. The SWS is mainly staffed by social workers; there is no legal staff to provide UAMs with legal assistance or legal representation but they can provide them with general information about their rights. There is no non-governmental or independent agency involved in the process and no monitoring is carried out by any independent agency.

Appointment of a guardian

The appointment of a guardian is made by the Court, upon an application by the SWS, when the Court is satisfied that other measures are not sufficient to prevent the risk of physical, mental or psychological health of a child.[85] A provision in the Children's law entitling the Director of the SWS to assume guardianship for children under his or her care without a court order where the parents or guardians are dead or have abandoned or neglected the child or are unfit to exercise parental duties[86] is through an inter-agency consensus no longer applied even though it has not been formally abolished.[87]

The SWS will not always apply for guardianship though; if the SWS have located the parents and are satisfied that they are suitable, then they will choose to take the child under their care, which is a temporary status for which no court decision is necessary, rather than seek to step into the shoes of the guardian. 'Care' is a rather lesser status that resembles 'supervision', whilst 'guardianship' means essentially stepping into the shoes of the parent. The SWS will take a child under its care if it appears to them to be under the age of sixteen, to be without a parent or guardian, abandoned or the parent/guardian cannot provide the child with proper accommodation, maintenance or upbringing and there is no person available, capable, fit or willing to undertake the care of such child and the intervention of the SWS is necessary in the interests of the welfare of such child.[88]

If the SWS have been appointed by the Court as the child's guardian, which effectively means stepping into the shoes of the parents, the SWS will not return the child to his or her country of origin because in order to apply for guardianship the SWS must have already assessed that return is not in the child's best interests. In cases of children under the care of the SWS, the assessment as to whether a child ought to return to his or her country of origin will be made at the level of a multi-thematic committee involving various state agencies.[89] The Ministry of Interior will issue the executive decision based on the findings of the multi-thematic committee. Unless there are contestations as regards the return decision, the Court will not be involved. The law does not provide a procedure for the monitoring of return.

[84] See Ombudsman, 2013a and 2013b

[85] Cyprus, Law on the relationship between parents and children (Ο περί Σχέσεων Γονέων και Τέκνων Νόμος) N. 216/1990. article 18(3). Available at www.cylaw.org/nomoi/enop/ind/1990_1_216/section-scb8e419d7-088e-4fc0-b333-88c157f688c3.html

[86] Cyprus, Law on Children (*Ο περί Παιδίων Νόμος*) Cap.352, article 4. Available at www.cylaw.org/nomoi/enop/ind/0_352/section-scb9a6fd52-785a-478a-9758-19d214fdd0ef.html

[87] Consultation with officer from the Attorney General's office, 7 April 2015.

[88] Cyprus, Law on Children (*Ο περί Παιδίων Νόμος*) Cap.352, article 3. Available at www.cylaw.org/nomoi/enop/ind/0_352/section-scb9a6fd52-785a-478a-9758-19d214fdd0ef.html

[89] Consultation with SWS officer, 2 April 2015.

Children may be returned to their country of origin or to another country to which they have the right of residence or to a third country for the purpose of family reunification. Return will be ordered only where it is ensured that the returned children will be received with adequate conditions and care depending on the children's needs and taking into account the age and degree of independence allowed by the parents or guardians in the country of destination. For the purpose of return, the Minister of the Interior may cooperate with the children's families in the country of destination, with the national authorities of the receiving country unless the child is an asylum seeker, with international organisations and NGOs in order to check the conditions of reception in the receiving country.[90]

Once a child is returned, the SWS may contact ISS with the request of appointing a local agent in the receiving country to monitor the child's situation, although this is not standard practice in all cases.[91]

Best interests determination

There is no law or policy paper determining the tasks or duties of the SWS in the case of return of UAMs. The Law literally transposed the wording of the Directive regarding due consideration and the best interests of the child without giving any examples or setting any standards for it. As a result, discretion is given to the Director of the SWS to determine the scope of the assistance. No special guidelines apply as to how the best interests determination will be carried out and there is no tick list or manual to be followed. The SWS claims to be using the guidelines provided in the UN Convention on the Rights of the Child and will take the child's views into consideration provided the child is deemed, through a maturity assessment, to be mature enough to express a view.

With regard to whether it is in the child's best interests to return to his or her country of origin, the assessment and the decision of return will be made in the multi-thematic committee which will be participated, inter alia, by the Ministry of the Interior which has a supervisory role on trafficking of persons and on all immigration related matters in general.

If the SWS think that it is not in the child's best interests to return to his or her country of origin, then the SWS will apply for guardianship. There are no guidelines or indicators on the basis of which the SWS will decide whether to apply for guardianship or not; the decision is made ad hoc and following consultation with the multi-thematic committee. If the SWS apply to the Court for guardianship of the unaccompanied child, the Attorney General's office will request that the guardianship application is published in the national press daily, or in a daily newspaper of the child's country of origin or both, so as to give the child's existing guardian the opportunity to appear and contest the SWS's application for guardianship. If the child's parents or guardians have been located and their address is known, the established practice is that a notice be served on them through the Cypriot Foreign Ministry, giving them the opportunity to appear in the Court in Cyprus and contest the SWS's application for guardianship, in which case the Court will decide on who will be appointed guardian. In the event that the Court decides to appoint as guardian a person whom the SWS deems unsuitable, then the SWS will inform the ISS about their concerns as regards the child's welfare and safety, so that they can follow the case up through their local agents or partners in the receiving country.[92]

Separation of children from their sole carer parent in the process of return proceedings of the latter have regularly appeared in the media, criticising the immigration authorities for ignoring the child's best interests. On 31 August 2015, the Commissioner for the rights of the Child issued a statement criticizing a Supreme Court decision which rejected an application to suspend the deportation and re-entry ban of a TCN who was the mother and sole carer of a 12 year child attending school in Cyprus. The Commissioner was particularly critical of the fact that the court's decision did not take into consideration the child's best interests, which was not raised by the mother's lawyer either. The Commissioner found that the said court decision violated article 3 of the Convention on the rights of

[90] Cyprus, Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims *(Νόμος που αναθεωρεί το νομικό πλαίσιο που διέπει την πρόληψη και την καταπολέμηση της εμπορίας προσώπων και την προστασία των θυμάτων*) N.60(I)/2014, 15 April 2014, Article 58-60. Available at www.cylaw.org/nomoi/arith/2014_1_60.pdf#page=1&zoom=auto,-82,842
[91] Consultation with SWS officer, 13 May 2015.
[92] Consultation with SWS officer, 13 May 2015.

the Child and highlighted the need for training of lawyers and judges as well as of the administrative organs issuing decisions affecting children.[93] In the judgement, the court concluded that no irreparable harm would occur to the applicant if she was to be deported, because she could always claim compensation and the child could meanwhile remain in Cyprus under the care of her sister.[94]

Legal representation of UAMs

In 2013 the Refugee Law was amended to provide that the SWS act as the UAM's representative in the asylum proceedings (Law N. 9(I)/2003) after years of a legal vacuum that denied unaccompanied minors access to the asylum system. Prior to that amendment, the asylum applications of minors were not examined, following a disagreement between the various agencies involved as to who would act as the child's legal representatives. Originally, this service used to be provided by lawyers appointed by the Child Commissioner, but the Minister of Interior was opposed to this practice, so following an opinion from the Attorney General that assistance does not have to be legal, this is now provided by the SWS who do not have legal expertise. As of December 2014 the Court may appoint the Commissioner for the Rights of the Child as the legal representative of a child involved in judicial proceedings[95] but a gap remains in the legal representation and advise of children in the asylum procedure at the administrative level.

Adequate reception facilities in the state of return

If the UAM wants to return or to be united or re-united with a member of his/her family, the SWS will ask the equivalent state authority of the country of residence of the guardian or through ISS (the International Social Services, based in Switzerland),[96] which links the various social services in different countries. Through the SWS of the country of proposed destination or if that is not responding then the ISS, the SWS will seek to verify that the person to receive the UAM is indeed his/her a legal guardian and to ascertain that the guardian's circumstances are adequate to receive, support and bring up the child. If the parent or guardian is located, the standard practice followed is for the SWS to send, through the Cypriot Foreign Ministry, an official request to the Social Welfare Services of the country of origin to assess the parent/guardian's suitability to perform parental duties in relation to the child. If the parents or guardians are assessed as suitable, then the SWS will request the receiving country's embassy in Cyprus to issue travelling papers and will endeavour to return the child to his or her parents or guardians; depending on the child's age and degree of vulnerability, a social worker from SWS will escort the child to this journey. The practice is not based on legislation but the SWS's mandate in child protection is wide enough to allow for it.[97] If the SWS is satisfied that all is in order, and provided the child is willing, then the child can be returned to his/her country or sent to the country where the guardian is based. If there is no trusted person to escort the child,[98] then the SWS will physically escort the minor throughout the journey until the child meets with the person authorised to receive him/her. The SWS will ask the SWS of the country of destination for a follow up

[93] Position of the Commissioner for the Rights of the Child regarding the decision of the Supreme Court for the deportation of a mother of a minor, 2015.
[94] *Hasnas Natalia v the Republic of Cyprus*, Supreme Court Case No. 921/2015, 23 July 2015. Available at www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2015/4-201507-921-15.htm
[95] Procedural Regulation on the Commissioner for the rights of the child (appointment of Commissioner by the Court as the child's representative) of 2014, 5 December 2014. Available at www.childcom.org.cy/ccr/ccr.nsf/All/B9B6BCA3576531C2C2257DDB00331B08?OpenDocument
[96] For details please see ISS' website at: www.iss-ssi.org/index.php/en/
[97] Law on the prevention and combating of sexual abuse and sexual exploitation of children and child pornography (*Ο περί της Πρόληψης και της Καταπολέμησης της Σεξουαλικής Κακοποίησης, της Σεξουαλικής Εκμετάλλευσης Παιδιών και της Παιδικής Πορνογραφίας Νόμος του 2014*) N. 91(I)/2014, articles 31-44. Available at http://www.cylaw.org/nomoi/enop/ind/2014_1_91/section-scd64b343e-b01b-7c23-40aa-0176c0990714.html
[98] The SWS officer interviewed mentioned that sometimes Embassies or consular authorities are very cooperative and even offer an escort to an UAM to be transferred to their country, citing in particular the case of the Jordanian Embassy.

report regarding the welfare of the child (interview with SWS officer). Beyond this procedure, there is no way of ascertaining whether the child has been transferred to a safe place.

It is up to SWS of the receiving country to determine whether the returned UAM will be placed in a reception facility upon return. If the child is at a maturity level that can express an opinion and agrees to be sent to a country in order to be placed at a reception facility, and the SWS of the receiving country can indeed offer such option, then the Cypriot SWS will escort the child until this is received by the authorities of the receiving country.

UAMs who are victims of trafficking

The return procedure of a child who is a victim of trafficking differs from the cases of other unaccompanied children, as additional protection measures are foreseen and certain conditions must be fulfilled.[99] The Minister of Interior may order the return of children victims of trafficking taking into consideration the views of the prosecution authorities, the SWS, the Mental Health Services and the medical services as well as the views of the children themselves depending on their age and their degree of maturity. Such decision will be made only following an individual risk assessment, carried out by the SWS, the police's anti-trafficking unit, the prosecution authorities and the health services, and provided this is in the child's best interests.

The police's anti-trafficking unit will make an assessment as to whether the child is a victim of trafficking or not.[100] The procedure for the recognition of a person as a victim of trafficking is set out in legislation and is the same irrespective of the child's nationality.[101] If it emerges from this assessment that the child is a victim of trafficking, then the procedure for the protection of child trafficked victims, as foreseen in the anti-trafficking legislation,[102] will be activated. A slightly different protection procedure is foreseen for children who are victims of sexual exploitation but not recognised victims of trafficking,[103] although many of the protection measures foreseen for both categories are the same. The protection measures and procedures for all categories of unaccompanied children are the same irrespective of a child's nationality.

Gaps and failures

Although there are no court decisions as regards unaccompanied minors, the incidents of UAMs reported by NGOs and lawyers point to serious systemic failures. A lawyer has reported of the case of a group of 16-year-old children from Sierra Leone who were child soldiers and who tried to enter the Republic controlled areas through the buffer zone separating the northern Turkish occupied part and the southern Greek-Cypriot controlled part of the country. In co-operation with a Turkish Cypriot human rights organisation, the children managed to apply for asylum at the Republic (south). The applicants were awaiting for permit to cross the buffer zone and enter the Republic-controlled areas but were denied permit from the Greek Cypriot police. The Turkish police warned the Greek-Cypriot

[99] Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims, N.60(I)/2014, 15 April 2014, Articles 56(1) and 58(1). Available at www.cylaw.org/nomoi/arith/2014_1_60.pdf#page=1&zoom=auto,-82,842

[100] Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims *(Νόμος που αναθεωρεί το νομικό πλαίσιο που διέπει την πρόληψη και την καταπολέμηση της εμπορίας προσώπων και την προστασία των θυμάτων*) N.60 (I)/2014, 15 April 2014, Article 45.

[101] Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims Articles 48-51

[102] Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims,N.60 (I)/2014, Article 45

[103] CLaw on the prevention and combating of sexual abuse and sexual exploitation of children and child pornography (Ο περί της Πρόληψης και της Καταπολέμησης της Σεξουαλικής Κακοποίησης, της Σεξουαλικής Εκμετάλλευσης Παιδιών και της Παιδικής Πορνογραφίας Νόμος του 2014) N. 91(I)/2014, articles 31-44. Available at http://www.cylaw.org/nomoi/enop/ind/2014_1_91/section-scd64b343e-b01b-7c23-40aa-0176c0990714.html

police that if they do not give permit to the applicants to cross the border in two hours, then they would deport them. The Greek Cypriot police failed to respond and the children were deported by the Turkish police. Another reported incident concerned the five children of a recognised refugee whose father was deported following revocation of his refugee status because he travelled secretly to his country when his mum died. [104]

The Commissioner for the rights of the child has also identified legal and institutional gaps as regards UAMs who are neither asylum seekers nor trafficked victims, as there is no legislative or policy framework to regulate the handling of these children. These include gaps as regards the child's access to Cypriot territory, as regards identification, registration and documentation, as regards the appointment of a guardian and a legal advisor, as regards age determination and particularly as regards detention. This issue is further dealt with below. The Commissioner further found lack of coordination between the competent bodies, failure to secure an interpreter for the various stages of the procedure (in court, during the interview, during contact with the SWS officer, the fact that they appear in court without a lawyer to represent them and the failure of the authorities to inform the children about their rights.[105]

Detention of UAMs

Stakeholders have expressed the view that the transposition of the Directive, in combination with the enactment of a new law in 2011 regarding the operation of detention centres for returnees,[106] have in fact lowered the standard. Thus, whilst before 2011 the detention of unaccompanied minors (UAMs) was very rare indeed, from 2011 there have been a number of cases where UAMs were detained. A study carried out by the Commissioner for the rights of the Child located a series of systemic failures in the manner in which the authorities treat UAMs. The study also established that NGOs are more likely to immediately inform the SWS than the police that an UAM is being detained; the police may inform the SWS with several months of delay, whilst the child may in the meantime remain in police custody.[107]

The Commissioner for the rights of the child has located a series of weaknesses in the system, which does not conform with the policy or legislation in place. These include: [108]

- UAMs can be detained for as long as 10 months;

- The SWS is not informed by the police for months, and in some cases never, that an unaccompanied minor has been apprehended;

- The children's own submission that they are below 18 does not constitute either a rebuttable or in irrebuttable presumption whilst age identification procedures carried out by the health services, which involve x-rays, are contested by both the Asylum Service and the Commissioner.

- At least on one instance, the Commissioner's allegations about police brutality against a minor in detention were deemed groundless and rejected against clear evidence of physical abuse.

The Ombudsman has recorded an instance where the competent services involved in the handling of a third country national in detention who claimed to be minor ignored this person's allegations and failed to conduct age determination, relying exclusively on the information in this person's passport

[104] Information derived from consultation with immigration lawyer Michalis Paraskevas.
[105] Commissioner for the Rights of the Child, 2014.
[106] Law on the creation and regulation of operation of detention centres for illegal immigrants N. 83(I)/2011,. Although this law does not expressly authorise the detention of children it states that regulations may be issued to provide inter alia for the handling of cases of families with children in detention (article 9(2)). The law transposing the Return Directive also provides (in article 18PH) that children (unaccompanied or with families) may be detained as a last resort.
[107] Commissioner for the Rights of the Child (2014)
[108] Commissioner for the Rights of the Child (2014)

which showed him to be 18; based on the data of his passport, this person was deported. The Ombudsman criticised this practise stressing that children are often sent to foreign countries by their families with a false passport showing them older than what they are, in order to enable them to work and support their families back home.[109]

6. Article 11: Entry bans

Article 18PG(2) of the law has literally transposed Article 11(2) of the Directive, which sets the length of an entry ban. The law specifies that its maximum length shall be in principle five years. The length of the entry ban is not always determined, as the practice has been for entry bans to remain indefinitely. A third-country national who wishes to enter Cyprus after five years usually has to make an application to request that his name is removed from the stop list. Article 18PG(2) merely copies article 11.2 of RD, which states that the length of the entry ban is determined with due regard to all relevant circumstances of the individual case. There is no reference in the Cypriot law regarding the calculation of the period of an entry ban and it is unknown whether this applies from the actual date of removal or the date the return decision has been issued. The option provided by the second sentence of Article 11(2) of the RD foresees an exception to the maximum length of an entry ban, if the third-country national represents a serious threat to public policy, public security or national security. This option has been literally transposed by Article 18PG(2). This gives the opportunity to the Republic of Cyprus to decide extending the length of the entry ban in the presence of the abovementioned circumstances. Article 11(2) does not foresee a maximum period for 'public order cases' in which Member State may foresee periods exceeding five years. However the principle of proportionality applies by virtue of the Constitution and the Cypriot authorities should take all circumstances into account when determining the maximum period of time.

Any person who has at any stage been deported for whatever reason is automatically considered an illegal immigrant to whom entry is prohibited, under Article 6(1)(th) of the Cap. 105. The standard letter informing a TCN that a deportation/detention order is issued against him/her also states that re-entry is prohibited (without specifying a time line during which this prohibition shall be in force). Entry bans are typically imposed on all cases of deportees without exception. No figures have been made available by the competent authority. However, entry bans are automatically issued in all cases of returns, irrespective of whether they are voluntary or enforced and irrespective of the ground on which the return decision was issued. Entry bans are issued in all cases where a return decision is issued. No figures have been made available by the competent authority. However, the number of entry bans should be identical to the number of return decisions.

Although Directive Article 11(3) has been literally transposed, cases in which it has been applied in order to suspend or withdraw an entry ban are extremely rare. In general entry bans are of indefinite duration. The same policy of imposing indefinite entry bans applies to all and automatically. As identified by the TIPIK study, the entry ban foreseen in the Law applies only in relation to Cyprus and not in relation to any other Member States. All categories of TCNs are treated alike. The suspension or withdrawal of an entry ban is discretionary and scarce. It is possible for a returnee to request the Minister of Interior for a withdrawal or suspension of an entry ban but so far none of the stakeholders were aware of any positive response to such a request. One stakeholder referred, by way of an example, to a case where a Cypriot woman who married a TCN who had before their marriage been deported from Cyprus: she applied to the Minister of Interior to remove the entry ban so that her husband joins her in Cyprus but her application was refused.[110] Also it is also possible to appeal against an entry ban through the judicial review procedure foreseen in article 146 of the Constitution and the Court may hear the lawyer in the place of the person against whom the challenged entry ban applies since that person cannot enter Cyprus. The transposition of the Directive had no impact on this policy.

[109] Independent Authority for the Prevention of Torture, Report on the visit to the Paphos police station on 3 October 2014.
[110] Interview with officer of the Ombudsman's office.

In a recent case, *Elie Jamil El Khoury v. Republic*,[111] where a Lebanese Businessman challenged the entry ban he was given, the judge, who cited a number of Cypriot authorities,[112] ruled that the placing of a person's name on stop list of prohibited immigrants is not judicially reviewable. Placing someone on the stop list it amounts to "an executed act" and not an "executory act or decision" (*Gogoladze v. Republic*), which are reviewable in court.[113] The judge stated that it is "an internal regulatory measure that cannot be challenged in itself",[114] as it is the consequence of the deportation of the person, typically resulting from the declaration of the person as a prohibited immigrant due to his/her involvement or/and his/her criminal conviction by a court. The Court rejected the applicant's submission that the entry ban could not exceed five years. There is no right to challenge an entry ban and without any reference to art. 11 of the RD, the Court effectively rendered the RD's application redundant.

In the same case, the judge reiterated that the sovereign right to the Republic to accept or reject aliens is diachronically established in jurisprudence as "an exercise of sovereignty", once again citing *Moyo v Republic*, which is a power that cannot be reviewed, so long that this is exercised in good faith will (*Amanda Marga v. Republic*). The judge then made a number of observations regarding the power to remove persons due public danger and internal order. He noted that the power of deportation is broad and is dependent on the danger of trouble in the internal order and public security."[115] Discretion in such matters is extremely wide and there is a rebuttable presumption of an initial good faith on behalf of the authorities.[116]

When it comes to national security or public order, the courts accept that the discretion of CIO is very wide: the full house of the Supreme Court in *Eddine v Republic*[117] ruled the even general indications that there may be a problem on the basis of information that justifiably cause concern will suffice to deport a TCN. The immigration authorities are not obliged to give any reasons for issuing an entry ban.[118]

This brings us to the CJEU case *Zh. and O., C-554/13*,[119] where the ECJ ruled on the interpretation of Art. 7(4) of the Return Directive.[120] Given the RoC does not properly offer voluntary departure, a more general reading of *Zh. and O.* is proposed here. In any case, issues relating to TCNs who "are deemed to be a risk to public order" underlie many aspects connected to the detention, removal and

[111] Per Judge Nathanael, case no. 5710/2013, 25 June 2015.
[112] Such as *Gogoladze v. Δημοκρατίας* (1998) 4 Α.Α.Δ. 216; *Κωνσταντίνου v. Δημοκρατίας* (1996) 3 Α.Α.Δ. 474, *Fayez v. Δημοκρατίας* (1995) 4 Α.Α.Δ. 933 and *Florin Puscasu v. Δημοκρατίας*, case number 771/12, 12.9.2014.
[113] For more on this distinction see Pikis, 2006, p.115-17
[114] "Αποτελεί ένα εσωτερικό ρυθμιστικό μέτρο εκτέλεσης μη προσβλητό αφ΄ ευατού, (*Κωνσταντίνου v. Δημοκρατίας* (1996) 3 Α.Α.Δ. 474, *Fayez v. Δημοκρατίας* (1995) 4 Α.Α.Δ. 933 και *Florin Puscasu v. Δημοκρατίας*, υπόθ. αρ. 771/12, ημερ. 12.9.2014)".
[115] The judge cited *Mushtag v. Δημοκρατίας* (1995) 4 Α.Α.Δ. 1479 and *Anghel Viorel v. Δημοκρατίας*, case no. 1064/2012, 20.5.2014.
[116] The judge cited *Suleiman v. Republic* (1987) 3 C.L.R. 224.
[117] Per judge Eliades, *Eddine v Republic* (2008) 3 Α.Α.Δ. 95.
[118] *Kapsaskis and others v. Republic*, cases no. 290/2012, 291/2012 και 203/2012, dated 20.2.2013,
[119] Z. *Zh. V Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v I. O.*,
at http://curia.europa.eu/juris/document/document.jsf?text=&docid=164962&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=119392
[120] The CJEU considered when a TCN is "deemed to pose a risk to public policy" on suspicion due to criminal conviction of an act punishable as a criminal offence under national law. Also it decided that factors such as "the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the national authorities" that "may be relevant in the assessment of whether he poses a risk to public policy". It concluded that "any matter which relates to the reliability of the suspicion that the third-country national concerned committed the alleged criminal offence, as the case may be, is also relevant to that assessment". Also it ruled that "any legislation or practice of a Member State on this issue must ensure that a case-by-case assessment is conducted of whether the refusal to grant such a period is compatible with that person's fundamental rights".

entry bans of. In the case of *Falak Shad v the Republic*,[121] the Supreme Court rejected the application of a Pakistani national which sought to challenge the detention and deportation orders issued against him. The detention and deportation decisions had been premised upon the assumption that the applicant was a danger to public order, even though he had never been convicted of any crime. His lawyer argued that in the absence of a conviction the presumption of innocence was being violated. The court rejected this argument on the ground that the applicant himself did not deny his involvement in the case for which he had been arrested and concluded that the absence of any justification for the deportation decision does not affect the validity of this decision when there are national security issues at stake rendering the applicant 'undesirable'. The reasoning was premised on a previous decision of the Court where a group of people were deported on the allegation that they were a danger to national security even though they had never been convicted of any crime. In that case, the Court accepted the argument of the administration that the applicants were a threat to national security "based on information in their possession" and that the deportation was not decided upon by way of a punishment of the applicants but rather as "an expression and exercise of the administration's discretion". The judge concluded that the administration's discretion as regards issues of entry, stay and work of third country nationals is wide and there is no duty to justify its actions when issues of security are invoked, which render the administration's discretion even wider. In cases where national security is invoked, the Court concluded, the administration is not obliged to give reasons for the deportation or refusal of entry of any person and the Court will not look into reasons of state security, as this is a matter purely for the executive and not the judiciary.[122] In essence, Court tradition as regards the definition of what constitutes 'national security' for the purposes of the Return Directive tends to cancel the judiciary's right to review the actions of the administration as soon as the latter invokes 'national security' without having to present any justification to prove that such as an issue exists.

As for the treatment of victims of trafficking in human beings, who cooperate with the competent authorities and are theoretically not subject of an entry ban, there was one case that received publicity. This was a case of a TCN recognised as a trafficked victim, who was deported from Cyprus overnight and an entry ban was issued against her. The victim filed the complaint from her country of origin where she was deported to, after she had given testimony in a trial in Cyprus where her former employer was convicted of trafficking. Instead of being repatriated, as is the due practice in the case of trafficked victims, she was deported by the immigration authorities against the express instructions of the Minister of Interior.[123]

There is no reported case where the exception of humanitarian reasons has been applied.

7. Conclusions

A number of issues emerge from the study of Cypriot case law. A TCN convicted of an offence, irrespective of how minor or grave, is automatically declared a prohibited immigrant and is subject to a return order coupled with a detention order, thus essentially being punished again for the same crime for which he has already served a sentence. S/he is also subject to an entry ban of an indefinite duration.

The stringent application of the merits test legal aid applications means that legal aid is hardly available adds further problems relating to access to justice for TCNs challenging detention and removal and claiming rights derived from the RD.

The overall conclusions of this report are the following:

[121] *Falak Shad v the Republic of Cyprus*, Supreme Court case no. 763/2011, 26 July 2013. Available at www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201307-763-11.htm&qstring=%E1%F0%E5%EB%E1%F3%2A

[122] *Gerasimos Kapsaskis et al v. Republic*, Supreme Court Case No. 290/2012, 20 February 2013. Available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201302-290-12etc.htm&qstring=Kapsaskis

[123] Interview with officer of Ombudsman's office.

a. When it comes to orders for removal/deportation of TCN, a number of substantive violations of the principles of *El Dridi* are apparent. There is a process of criminalisation of all immigration offences. This is because all immigration offences, save for "failure to comply with an order of removal", are classified as pure penal offences, activating the option in *El Dridi* to treat the matter as a purely criminal matter and thus exclude the operation of *El Dridi* altogether. The Courts typically construe and apply the 'sovereign right/prerogative' of authorities to criminalise and declare as "prohibited immigrants" anyone violating the conditions of stay under art. 6 of the Cap 105. This undermines the underlying logic of the RD to the extent that is questionable whether the prohibition of *El Dridi* is operative: in many Cypriot cases, judges construe criminal legislation in a manner that can be "capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness". The rights derived from the Return Directive are often not referred to at all; in other instances, the ratio of *El Dridi* is often too narrowly constructed and is thus unjustifiably considered to be irrelevant due to the particular facts of the case.

b. In some cases, minor offences such as minor traffic-related offences committed by TCNs are used for justifying removal. Another practice by the immigration authorities is to charge TCNs with immigration offences such as illegal stay and order detention and removal, if arrested for other minor offences such as traffic-related offences.[124] An exception is the case of *Shahin Haisan Fawzy Mohamed v Republic* where the conviction of a minor offence and the time lapse did not justify removal.

c. Claims to substantive rights derived from the Chapter of Fundamental Rights as well as other international instruments (e.g. ECHR, relevant UN Conventions etc.) and the Constitution seem to be rarely taken up; they typically seem to be subordinated to procedural aspects that appear to take precedence over substance. Landmark decisions by the Supreme Court show that the Court approves the broad discretion of the immigration authorities to regulate immigration stay,[125] and neither the ECHR, nor the Constitution can guarantee the stay of an alien in the Republic. For instance arguments invoking the right to family life and his ties to Cyprus can be explicitly rejected. The "substantial fact" for the court is the TCN's alien status, which in combination with illegal stay means that the sovereign right of the state predominates. The CJEU case law on the Return Directive seem play little role: there is often no reference in the reasoning of the decisions or judges often seem to accept arguments that distinguish them on the facts. Formalism seems to predominate over substance. In *Asanka Ariyarathne* the judge cited ruled that the applicant cannot challenge directly the orders of detention and removal, which do not suffer from any procedural faults unless they first annul previous administrative decisions of the immigration authorities which constitute the necessary basis for the issuing of such orders.

d. Whilst the purported transposition of the Return Directive codified for the first time a procedure for voluntary returns, voluntary departures within the meaning of the Directive are generally not practised or are very scarcely practiced in Cyprus. The Courts themselves regard the communication for voluntary departure as a mere request that cannot be subjected to judicial review. The Supreme Court decision in *Tatsiana Balashevich*[126] found that the standard letter, which the immigration authorities customarily send to all TCNs in an irregular situation requesting them to depart by themselves, does not constitute an executive administrative act but a mere request of no legal consequence and as such it cannot be subjected to judicial review or be suspended through an interim order. The Court thus does not recognise the practice of the immigration authorities to request the applicant to depart as a voluntary return decision within the meaning of the Return Directive which, in any case, was not mentioned in the judgement.

e. The law grants wide powers to the Social Welfare Services to determine the scope of assistance to unaccompanied minors and to determine the best interests of unaccompanied minors without involvement or monitoring from any independent agency. There is no provision in either law or in policy to provide children with legal advice or representation during the asylum procedure. The absence of any guidelines or benchmarks as regards the best interests determination by the SWS also

[124] For instance in the case of *Hamid Reza Razzaman.*
[125] *Moyo and Another V. The Republic*, Cyprus Supreme Court case (1988) 3 C.L.R., p. 1208.
[126] *Tatsiana Balashevich v. Republic*, Case No. 5635/2013, judgement delivered on 10 July 2013

has an impact on administrative actions and court decisions which take no notice of the best interests rule, as demonstrated by the case of *Hasnas Natalia* who was separated from her under age child because the judge refused to suspend the deportation order and entry ban which the authorities issued against her.[127] The transposition of the Return Directive has in fact lowered the standards for unaccompanied minors who can, in the post-transposition period, detained for long periods without the knowledge of or support from the SWS.[128] The gaps and failures of the 'merits' test used to determine entitlement to legal aid[129] are more acute and crucial in the case of unaccompanied minors, as it means that children must argue before a judge without a lawyer why in their view their case has good chances of success and the judge must make an essential assessment of the case before hearing the evidence.

f. On entry bans, the recent case of *Elie Jamil El Khoury* shows that placing of a person's name on stop list of prohibited immigrants is not judicially reviewable. The court did not even refer to the rights, obligations and restrictions contained in Return Directive: the court ruled the there is no right to challenge an entry ban, rendering redundant the application of art. 11 of the Directive. Instead, it is a matter of simple exercise of the sovereign right to the Republic to accept or reject aliens.

g. As for the power to remove persons due public danger and internal order, the power of deportation is broad, discretion is wide and is dependent on the danger of trouble in the internal order and public security.

8. Bibliography

Amnesty International. *Punishment without a crime: Detention of migrants and asylum-seekers in Cyprus*. London: Amnesty International, 2012.

Beduschi, Ana (2014) "Detention of Undocumented Immigrants and the Judicial Impact of the CJEU's Decisions in France", *International Journal of Refugee Law*, 2014, Vol. 00, No. 00, 1–17, at http://oppenheimer.mcgill.ca/IMG/pdf/Int_J_Refugee_Law-2014-Beduschi.pdf;

Cardet (2015) 'Assisted voluntary return becomes a reality', www.cardet.org/projects/current/519-avr-cyprus

Commissioner for the Rights of the Child (2015) *Position of the Commissioner for the Rights of the Child regarding the decision of the Supreme Court for the deportation of a mother of a minor*, 31 August 2015. Available at http://www.childcom.org.cy/ccr/ccr.nsf/All/F60B30E7CECDC293C2257EB2004017C1?Opendocument

Commissioner for the Rights of the Child (2014) *Position of the Commissioner for the Rights of the Child Leda Koursoumba regarding the first instance handling of unaccompanied minor- Findings from the investigation of complaints, from NGO consultations from and interviews with unaccompanied minors*, File No. G.E.P. 11.11.44.01, November 2014. Available at www.childcom.org.cy/ccr/ccr.nsf/All/5F744453BEEA3543C2257D8F003A7EDD?OpenDocument

Costello, C. (2012) 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19 *Indiana Journal of Global Legal Studies*.

Demetriou, C. (2013a), *Evaluation of the Implementation of the Return Directive: Cyprus Country Report*, Matrix Insight in cooperation with the International Centre for Migration Policy Development (ICMPD), the European Council on Refugees and Exiles (ECRE) and the Centre for European Policy Studies (CEPS), commissioned by DG Home Affairs, Directorate C: Migration and Borders.

[127] *Hasnas Natalia v the Republic of Cyprus*, Supreme Court Case No. 921/2015, 23 July 2015. Available at www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2015/4-201507-921-15.htm

[128] Cyprus, Commissioner for the Rights of the Child, 2014.

[129] Law on legal aid of 2002 (Ο Περί Νομικής Αρωγής Νόμος του 2002) N.165(I)/2002 as amended, articles 6B and 6C. Available at www.cylaw.org/nomoi/enop/non-ind/2002_1_165/full.html

Demetriou, C. (2013b), *The role of children in criminal judicial proceedings: Cyprus Country Report*, project operated by Milieu Ltd in partnership with ICF-GHK, commissioned by DG Justice, Directorate C.

ECRI (2013) *Fourth Report on Cyprus*. Strasbourg: Council of Europe.

ECRI (2001) *Second Report on Cyprus*. CRI, 35. Strasbourg: Council of Europe.

European Committee for the Prevention of Torture (2012) *Report to the Government of Cyprus on the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Report Ref. CPT/Inf (2012) 34. Strasbourg: European Committee for the Prevention of Torture, 6 December 2012

FRA (2015) *Overview of Forced Return Monitoring Systems*, http://fra.europa.eu/en/theme/asylum-migration-borders/forced-return

Independent Authority for the Prevention of Torture (2013) *Report regarding the visits carried out at the Centre for the Detention of Migrants in Menoyia on 14 February, 3 April and 19 April 2013*. Ref EMP 2.13. Nicosia: Ombudsman Office, 16 May 2013.

Independent Authority for the Prevention of Torture (2014) *Report on the visit to the Paphos police station on 3 October 2014* (Εκθεση αναφορικά με την επίσκεψη που διενεργήθηκε στα αστυνομικά κρατητήρια Πάφου στις 3 Οκτωβρίου 2014, File No. EMP2.15, 2 March 2014. Available at www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentationsArchive_gr?OpenDocument

KISA (2014) "AT THE LIMEN – The implementation of the return directive in Italy, Cyprus and Spain", http://kisa.org.cy/04-02-2014-investigation-reveals-serious-shortcomings-concerning-the-implementation-of-the-eu-return-directive-in-spain-italy-and-cyprus-%CE%AD%CF%81%CE%B5%CF%85%CE%BD%CE%B1-%CE%B1%CF%80

Ombudsman (2013a) *Report of the commissioner for administration and human rights regarding the allegations for abuse of migrants by members of the immigration police during their arrest, detention and deportation*, Ref. nos. A/P 738/2013, A/P 960/2013, A/P 1063/2013, A/P 1283/2013, A/P 1378/2013, A/P 1470/2013, A/P 1472/2013, 18 September 2013. Available at www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/2327820D610B6281C2257BFA00318FFE/$file/%CE%95%CE%9A%CE%98%CE%95%CE%A3%CE%97%20%CE%92%CE%99%CE%91%20%CE%A5%CE%91%CE%9C%2017%209final.doc?OpenElement;

Ombudsman (2013b) Report regarding the visits carried out at the Menoyia detention centre on 14 February and 19 April 2013, File No. EMP 2.13, 16 May 2013. Available at http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/0821E27838F3532BC2257B7F00311ACE/$file/%CE%95%CE%9A%CE%98%CE%95%CE%A3%CE%97%20%CE%95%CE%A0%CE%99%CE%A3%CE%9A%CE%95%CE%A8%CE%95%CE%99%CE%A3%2014-2%203-4%20%2019-4.doc?OpenElement

Paraskeva, C. (2015) *Κυπριακό Συνταγματικό Δίκαιο, Θεμελιώδη Δικαιώματα*, Nomiki Vivliothiki, Athens.

Parkin, J. (2013) *The Criminalisation of Migration in Europe, A State-of-the-Art of the Academic Literature and Research*, Centre for European Policy Studies, Paper No. 61, October 2013 http://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf

Pikis, G. M. (2006) *Constitutionalism- Human Rights – Separation of Powers, The Cyprus Precedent*, Martinus Nijhoff, Leiden Boston.

Raffaelli, Rosa (2011) "Case Note: The Achughbabian Case. Impact of the Return Directive on National Criminal Legislation", *Nota a Corte di Giustizia dell'Unione europea*, Grande Sezione, sent. 6 dicembre 2011, Achughbabian, causa C-329|11, https://www.academia.edu/1255901/CASE_NOTE_THE_ACHUGHBABIAN_CASE._IMPACT_OF_THE_RETURN_DIRECTIVE_ON_NATIONAL_CRIMINAL_LEGISLATION

Trimikliniotis, N. (2015) *Country Report on Citizenship Law: Cyprus*, Revised and Updated January 2015, European University Institute, Florence, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory RSCAS/EUDO-CIT-CR 2015/1, Badia Fiesolana, San Domenico di Fiesole (FI), Italy, http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Cyprus_citizenship_update_2015.pdf

Trimikliniotis, N. (2013) 'Migration and Freedom of Movement of Workers: EU Law, Crisis and the Cypriot States of Exception.' *Laws* 2 (4): 440-468.

Trimikliniotis N. (1999) 'Racism and New Migration to Cyprus: The Racialisation of Migrant Workers', A. Anthias and Lazarides (eds), *Into the Margins: Migration and Exclusion in Southern Europe*. Aldershot: Ashgate, 138–179.

TYPIC (2013) *Conformity Assessment of Directive 2008/115/EC*, Cyprus.