REDIAL PROJECT

National Synthesis Report – Italy

Expulsion from the territory

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1. The reception of the Return Directive in Italy

The reception of the Return Directive in Italy has proved to be rather problematic and stimulated extensive reflections[1]. Implemented with delay, the new provisions introduced some correctives, without however substantially altering the previous regulatory framework.

The mechanism designed by the EU legislator is based on a procedural sequence, conceived in line with the main aims of the directive 2008/115/EC. Under Italian law, the return process – set in Legislative Decree no. 1998/286 ("Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" hereinafter referred to as "the Consolidated Text on Immigration") – was structured in a different way, providing for the execution of the return decision through the forced removal instead of the preference for voluntary departure, or the massive recourse to detention rather than its application as last resort measure. It must be underlined that since 2002 increasingly restrictive policies had been adopted with the aim of repressing irregular migration. It was the Law no. 89/2002, which amended the Consolidated Text on Immigration, to introduce the compulsory escorting to the border as the ordinary measure for the execution of the administrative measure of expulsion of irregular migrants, replacing the previous provision under which the alien was notified the order to leave the country within 15 days. Especially in the years 2008 and 2009, with the adoption of the so-called security packages, the criminal law framework against irregular migrants was strengthened[2].

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[1] On the implementation of the Return Directive in Italy, see among many: C. Favilli, *L'attuazione della direttiva rimpatri: dall'inerzia all'urgenza con scarsa cooperazione*, Rivista di Diritto Internazionale, 2011, 3; B. Nascimbene, *La "direttiva rimpatri" e le conseguenze della sentenza della Corte di Giustizia (El Dridi) nel nostro ordinamento*, "Gli stranieri", 2011, 1, Viganò F., Masera L., *Illegittimità comunitaria della vigente disciplina delle espulsioni e possibili rimedi giurisdizionali*, Rivista italiana di diritto e procedura penale, 2010, 2, P. Bonetti, *L'Eloignement de l'Etranger en situation irregulière en Italie après la transposition de la diretice "retour"*, in C. Severino (sous la direction de), *La transposition de la directive "retour", France, Espagne et Italie*, Bruxelles, 2015.

[2] It must in particular be mentioned the introduction of an aggravating circumstance applicable in the case of criminal violation committed by a foreigner illegally staying and the introduction of an offense that punishes by a fine the foreigner who enters or stays in the territory irregularly. By its judgment no. 249/2010, the Constitutional Court, however, considered the rule on the aggravating circumstance contrary to the principle of equality that does not allow to apply a distinct penal treatment based on the legal status of the infringer. The so-called crime of irregular migration was instead considered legitimate by the Constitutional Court, with judgment no. 250/2001. It has however also been examined by the Court of Justice in the Case C-430/11, *Md Sagor*, judgment of 6 December 2012, where it was affirmed that the return Directive does not preclude Member State legislation, such as that in force in Italy, which penalizes illegal stays by third-country nationals by means of a fine which may be replaced by an expulsion order, but the Court found in the criminal proceedings related to the punishment of the crime some measures that affect the application of the rules of the Directive, depriving the

It is in a context of progressive tightening of the legal framework to combat illegal immigration that must be placed the implementation of the Return Directive. Although the Ministry of the Interior had argued that the implementation of the directive was not necessary in Italy, because national rules were already in compliance, the system of expulsion presented nonetheless several points of incompatibility with the Directive. As mentioned above forced removal represented the central mechanism of the system, whereas an order to leave the territory voluntary could only be issued in the case of non-renewal of the residence permit, but the period established for departure was below the minimum required by Directive (i.e. a maximum of 15 days) and it was not contemplated the possibility of adjustments according to the specificities of each case. Furthermore, the expulsion order was usually complemented by a re-entry ban extremely long (10 years - the expulsion order could provide for a shorter period, in any case not less than five years, taking into account the overall conduct of the concerned person in the period of stay in Italy).

As the deadline set by the directive for transposition was approaching and in order to avoid or, at least, mitigate, the impact on the ongoing expulsion proceedings, the Italian Ministry of Interior adopted a Circular on 17 December 2010, addressing it to the competent authorities and instructing them on how to proceed in order to make the internal expulsion mechanism comply with the provisions of the return directive[3]. The operative instructions provided to Questores and Prefects, however, were insufficient and inadequate to adjust the Italian system of expulsions, because of the structural differences with the new system introduced by the directive.

Given such inconsistencies, the insufficiency of the attempt made by the Italian Government to simply adjust the administrative expulsion procedure inevitably emerged and the inadequateness of the national legislation was highlighted by the Court of Justice in its judgment *El Dridi*[4].

This decision, therefore, forced the Italian legislator to urgently intervene and modify the concerned legislation in accordance with the directive 2008/115/EC and the judgment of the Court. The reform was put in place with the Law decree 23 June 2011, No. 89, later converted and further modified by Law 2 August 2011, No. 129, which amended the Consolidated Text on Immigration in order to achieve such adjustment.

As a general overview, this legislative intervention, although modifying some specific provisions (notably articles 13 and 14 of the Consolidated Text on Immigration) and implementing the *El Dridi* judgment, did not change the whole structure of the Italian expulsion system. Doubts and criticism about the compatibility of the provisions in force with the Directive 2008/115/EC still continue to be raised.

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latter of its effectiveness. Also in light of this judgment, Law no. 67/2014 delegated the government to repeal this offense (before 17 November 2015), turning it into an administrative offense, and preserving criminal relief to the conduct of violation of administrative measures adopted on the matter. In practice, only the first entry will be de-penalized.

[3] *Ministero dell'Interno, Dipartimento della pubblica sicurezza*, Prot. 400/B/2010. Despite the absence of any legal provisions on voluntary departure, the circular dictated guidelines under which the position of each foreigner would have to be carefully evaluated to see if there were valid reasons for a release residence permit or if it was not possible to grant a period for voluntary departure. In practice, the circular invited the relevant authorities to draw adequate motivations in order to demonstrate that the measures were adopted on the basis of careful consideration, in accordance with the Directive, so as to resist in case of recourse. It was expressly stated "these reasons, to be such as to counteract the effects of the appeal, shall be articulated in such a way that it can clearly emerge the compliance of the return decision with EU law".

[4] ECJ, Judgment of 28 April 2011, case C-61/11 PPU, *El Dridi*. The Court, asked to state on the compatibility with the return directive of some Italian provisions (Articles 14, paragraphs 5-*ter* and 5-*quater* of Legislative Decree 1998/286) which provided for the imprisonment of the irregular foreigner who did not fulfill the order of the Questore to leave the territory within five days (in case it was not possible to carry out pre-detention removal or the relevant period had expired), having stressed the attention particularly on the objectives of the return directive, asserted the incompatibility of the national provisions with the EU rules.

2. Removal

The Italian legal system provides for four forms of expulsion. Three are ordered by the courts: a) the *expulsion ordered by the court* as a security measure against a foreign citizen convicted of certain crimes provided for in the criminal procedure Code or in the criminal Code, if he/she is found to be socially dangerous; b) and c) the *expulsion as an alternative sanction* to detention, ordered by the judge (compulsory or optionally depending on the situation) in case the foreign citizen has been sentenced either to imprisonment for less than two years, or to a penalty, including for the crime of irregular entry and stay. It can be affirmed that the three types of judicial expulsion do not fall within the scope of the return directive[5].

The expulsion as an administrative measure, falling within the scope of the Directive, can be pronounced by two different authorities of public security: a) by the Minister of the Interior for reasons of public order and national security or for reasons of prevention of terrorism; b) by the prefect, on a case-by-case basis, in relation to the expulsion of an alien who is found in two types of situations:

- a foreigner who poses a danger because of their membership to certain specific categories;
- a foreigner who has entered or resides in Italy in violation of immigration rules.

The administrative expulsion is ordered with a reasoned decree, immediately enforceable (except in some limited cases) and challengeable before the Justice of the peace having jurisdiction in the place in which the authority that ordered the expulsion is located. A specific procedure is provided in case the foreigner is subject to a criminal proceedings. Against the decree ordered by the Minister of the Interior, the appeal must be filed before the Rome Administrative Court.

Since removal with accompaniment to the border implies a restriction on personal freedom, the measure is subject to validation by a judicial authority. Consequently, following the adoption by the Prefect of the expulsion order, the Questore ("police commissioner") in charge of the execution shall adopt a removal order to be checked and validated by the Justice of the peace. The decision must be submitted to this latter within 48 hours and must be validated within the following 48 hours, after listening to the alien and their lawyer. The judge performs a check on the merits, verifying the existence of all the elements of form and substance required for the adoption and enforcement of the administrative decision of expulsion. In principle, during the period required for the validation of the expulsion the foreigner is detained in a CIE or subjected to alternative measures to detention.

The Italian legislator made use of the faculty under article 8, para. 3, of the return directive, providing that Member States may adopt a separate administrative or judicial decision or act ordering the removal. In fact, the removal order is an administrative act separate and distinct from the decision of expulsion[6]. This distinction has gained relevance in the Courts' assessment, which distinguished the conditions of legality of the decision of expulsion from those of the order of accompaniment to the border (see below with specific reference to voluntary departure).

[5] The implementing legislation does not contain an express statement of the use of the option provided for in Article 2, para. 2 of the Directive. However it expressly provides that the execution of the expulsion takes place with immediate accompaniment and not with voluntary departure when expulsion is ordered by the court as a criminal law sanction or as a consequence of a criminal penalty. This shall be understood as implicit use of the above option.

[6] Pursuant to article 13, para. 5-bis, Consolidated Text, In the case of accompaniment to the border, the questore communicates immediately and, however, within forty-eight hours from its adoption, to the justice of the peace territorially competent, the measure with which such accompaniment is provided for.

3. Voluntary departure

Following to the transposition of Directive 2008/115, Italy was forced to amend the system in force and implement the fundamental principle, on the subject of expulsion of foreigners, of gradualism and voluntariness of removal, set forth by the same Directive: as mentioned above this entails a distinctly different approach from that provided in the Consolidated Text on immigration, which was based on the immediate and automatic expulsion with accompaniment to the border. The Directive 2008/115/EC, while still considering the possibility of immediate accompaniment, in case of security and public order needs, establishes that the expulsion should normally be enforced through the voluntary departure of the foreigner, within a period of time between 7 and 30 days (extendable under certain conditions), limiting the use of coercive measures.

In order to order to meet the requirements of the Directive, the foreigner was therefore expressly entitled to request a deadline for voluntary departure. Under the revised article 13, para. 5, Consolidated Text on Immigration, the foreign recipient of an expulsion order, unless the conditions for immediate accompaniment to the border apply, may ask the prefect the granting of a period for voluntary departure, including through voluntary and assisted return programs. The prefect, evaluating the individual case, with the same expulsion measure urges the alien to voluntarily leave the country within a period of 7 to 30 days. This period may be extended, if necessary, by an appropriate period, commensurate to the specific circumstances of the individual case, such as the length of stay in the national territory, the existence of children attending the school or other family and social ties, as well as the admission to assisted voluntary and return programs.

In order for voluntary departure be granted, the foreign citizen must prove to have enough economic resources deriving from legal sources proportionate to the term granted (from one to three times the amount of the monthly welfare check, i.e. the monthly welfare check amounts to Euro 448,50 in 2015) and, in any case, will be subject to measures imposed by the Police Commissioner (Questore). One or more of these measures can be applied a) submission of the passport or other equivalent document in course of validity, which will be given back at the moment of departure; b) the obligation to stay in a place previously identified, where the foreigner can be easily traced; c) daily attendance at the police office until the day of departure. The measures are defined by the Questore in a written, translated and reasoned deed to be communicated to the foreigner and the judge within 48 hours, which will validate them within the following 48 hours.

Non-compliance implies immediate expulsion and the application of a fine from 3,000 to 18,000 Euros, having a criminal (and not administrative) nature. This provision raises questions of compatibility with the Directive, being conceived in terms of obligation: such measures are in fact applicable to all foreigners who benefit from a period for voluntary departure and not only to those who present a real risk of absconding. Possession of sufficient economic resources is furthermore a necessary requirement in all cases. Moreover, the rule is silent as to the criteria that the Questore must follow in adopting one or more of those measures nor on how the survey income should influence the selection of one of them.

In order to allow the alien to ask the granting of a period for voluntary departure, the police shall ensure adequate information to foreigners on such right to request a period for voluntary departure, by means of multilingual information sheets.

It is important to note that the Italian legislator made use of the faculty provided under art. 7, para. 1, of the directive (Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned). In case such term is not requested by the concerned foreigner, the expulsion is executed with accompaniment to the border by the police.

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Despite the changes subsequent to the implementation of the Directive, the Italian legislation is still characterized by a high prevalence of the mechanism of forced removal, not only for the legislative provision, but also because the conditions required for voluntary departure appear quite difficult to

achieve in practice and forced removal is provided in so many cases which make it an ordinary choice, rather than the exception.

In the transposition of Article 8 of the Return Directive, removal with forced accompaniment to the border has been provided in several situations. They in fact, include:

a) all expulsions ordered by the court. As mentioned above, these are cases of expulsion as a security measure or as an alternative measure to detention or by way of alternative sanction of punishment;

b) the administrative expulsions adopted for reasons of public order, national security or issued on suspicion of belonging to terrorist organizations;

c) the administrative expulsions issued against aliens in an irregular situation, in case:

I. of risk of absconding;

II. the application for the residence permit was rejected because clearly unfounded or fraudulent;

III. without justified reason, the alien did not comply with the term granted for voluntary leave;

IV. the alien has also infringed one of the measures ordered by the questore in connection with the term granted for voluntary leave (i.e. passport suspension, daily attendance etc.; however foreigners are not given the opportunity to provide adequate justification in case of infringement) or the measures alternatives to detention;

V. the recipient of the expulsion order did not request a deadline for voluntary departure

Article 3, par. 1, n. 7, of the return directive, leaves it to national legislation the definition of the objective criteria for the identification of the risk of absconding. In implementing this rule, the notion of risk of absconding was significantly expanded. (Such definition of the risk of absconding is also recalled as a criterion for the detention of foreigners).

For the purposes of Article. 13, para. 4-bis, the risk of absconding can subsist, if one of the following conditions occur:

I. the alien is not in possession of a passport or other equivalent document, in course of validity;

II. the alien does not have proper documentation capable of proving the availability of an accommodation where he/she can be easily traced;

III. the alien stated previously or falsely certified his personal data;

IV. the foreigner did not observe any of the obligations set by the questore to ensure voluntary departure, or has violated the prohibition of entry on the Italian territory or did not comply with detention;

V. the foreigner did not ask for the deadline for voluntary departure.

In the presence of at least one of the above circumstances, the prefect should assess on a case by case basis that there is a danger that the alien may evade voluntary execution of the expulsion order. In accordance with the Directive, in fact, the risk of absconding should be evaluated by considering the reasons that are listed only as symptomatic of a potential risk, to be verified on the basis of a consideration of each individual case.

These provisions are very broad in scope and can actually be applied against the foreigner even if there is no concrete risk of absconding. The lack of a passport may be due to a difficulty in issue by the diplomatic missions, similarly it is not common that foreigners in an irregular situation can have accommodation and offer them a guarantee.

The Directive also leaves to Member States the choice of introducing a re-entry ban for all persons who have voluntarily left the country, providing that they can assess in such cases the faculty to revoke or suspend such a prohibition. Italy has, however, decided to keep in the law the ban on re-entry related to the order of removal that was enacted through voluntary departure, with the same duration as in case of forced removal.

The modalities for access to voluntary return are therefore burdensome for the alien, the latter having to be able to produce documents proving the availability of housing, as well as sufficient resources "resulting from legal sources". These terms of practicality, combined with limited benefits for the foreigner who spontaneously fulfill the order of removal after having sought and obtained voluntary return, appear to show that in the system the option of voluntary return is far from being favored. The alien recipient of an expulsion order, in fact, should leave the country within a period between seven and thirty days, unless extended, at his own expense without, however, receiving special benefits (if not the possibility to request, once back in his country, the withdrawal of the ban on re-entry). Moreover, the period for voluntary departure can be granted only following an application by the third country national concerned and such application does not prevent from being forcibly removed while waiting for the prefect's reaction.

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This approach towards voluntary departure is also reflected in the jurisprudence. Initially the Corte di Cassazione (Supreme Court of Cassation) considered irrelevant, on appeal against the expulsion decision, the circumstance that a term for voluntary departure had not been granted. It was affirmed that the rules on the granting of a term for voluntary departure (which can be requested, according to the national provisions, exclusively by the concerned person), do not affect the legality of the expulsion order itself, which must be assessed only in the light of the fact that the legal requirements are met, i.e. breach of the norms on entry and stay and the circumstance of representing a social danger. Any differences relating to the execution have a relevance at the time of validation of the accompaniment and/or detention and not in order to evaluate the legality of the decision of expulsion[7].

More recently (starting from decision no. 437/2014) it can be noted an evolution. The new element lays in the fact that the return decision is considered to be composed not only (as previously affirmed) of the assessment of the above mentioned requirements for the legality of the order (i.e. irregular entry, stay or social dangerousness), but also of a part related to the granting or the denial of the period for voluntary departure. According to this more recent orientation, the inobservance of the discipline for the granting of the period for voluntary departure results in the illegitimacy of the whole return decision.

As a consequence of the above approach, according to which the return decision is composed of two elements, objective and subjective, it becomes possible to raise the issue of the illegality of the decision on the deadline for voluntary departure on appeal against the return decision. Previously it was considered that voluntary departure only covered the execution phase of the return decision and that compliance with that specific rules could be assessed only as part of the remedies provided for in the quickest and summary procedure for the validation of the order of accompaniment to the border or of detention in a CIE.

It is also interesting to mention a recent decision issued by the Justice of the Peace of Trento and which highlights an increased focus on whether the conditions for voluntary departure exist in order to exclude the legality of the decision of forced removal. The magistrate did not validate a removal administrative order with immediate accompaniment to the border. The ground which was considered not adequately motivated concerned the refusal to grant a deadline for voluntary departure, for alleged lack of a passport or other equivalent identification document, which according to the Italian law constitutes one typical criteria for considering the risk of absconding and denying that period (art. 13, paragraph 4bis, letter. a) of the Consolidated Text on Immigration). On appeal, the legality of the measure was challenged also in light of the circumstance that it was submitted copy of a Moroccan valid passport (released before the issue of the removal order) and showed that the concerned foreigner had regularly lived for many years in Italy, establishing strong social and family ties[8].

[7] Corte di Cassazione, decisions no. 10243/2012 and no. 15185/2012.

[8] Justice of the Peace of Trento**,** decision of 15.4.2014. The decision recalls a precedent of the Corte di Cassazione, where the expulsion decision without the granting of period for voluntary departure was quashed precisely because it did not contain any proper reasoning regarding the assumed risk of absconding of the

Being granted only upon the concerned person's application, recently the Corte di Cassazione also emphasized the importance that appropriate information is provided about the possibility to ask a deadline for voluntary departure[9]. The relevant provision, in fact, does not specify what are the languages in which such information must be provided, only stating that multilingual information sheets must be made available to foreigners. In the absence of a regulatory provision governing the content of the information sheets and the languages in which they must be translated, each police office is allowed to define the content of such forms and decide in what language to translate them. Nevertheless, the possibility to lodge an aware request for voluntary return (for whom the language understanding is essential) represents, the Court highlights, an act of compliance imperatively imposed by the law and by the founding principles of the rights of the third-country nationals that have constitutional and EU law origin. With regard to the use of multilingual information sheets, the Corte di Cassazione has recalled principles already affirmed with regard to the removal order[10]: it can be considered "impossible" to translate the removal order in any language; it is therefore possible to use one of the most widely spoken languages (such English, French, etc.) when the administration declares, and the judge considers it plausible, that a text in the foreigner's mother language is not available (because particularly rare) or the inadequacy of this text in order to communicate the decision adopted in that case (because of its diversity from the other decisions normally adopted) and it is acknowledged that a translator is not available in that circumstance.

4. Postponement of removal

The Italian legislation does not provide for cases in which removal may be postponed. However, a similar effect is obtained by referring to other provisions concerning the same hypothesis defined in Article 9, para. 2, of the Directive.

In particular, when the alien to be expelled is in difficult physical and mental conditions (Article 9, para. 2), the Italian legislation does not use the power of postponement under the Directive in that it provides, before all, the right of foreigners in an irregular situation to receive urgent and essential care in a hospital, in case of illness, accident or pregnancy (art. 35 TU). In particular, foreign nationals on the national territory, not in comply with the rules on entry and stay, are insured outpatient treatment and hospital urgent or essential care, even if continuative, for illness and injury. This measure implicitly suspends the execution of the expulsion.

As pointed out by the Corte di Cassazione, the guarantee of the fundamental right to health of the alien in an irregular situation prevents the expulsion against him, if from the immediate enforcement of the measure he/she could suffer irreparable harm. This guarantee includes not only emergency care and emergency medicine but also all other services essential for life (the court quashed the order of expulsion of a foreigner with HIV; leaving it to the trial judge to assess whether the treatment to which the applicant was subjected in Italy was essential in the light of the principle that also the simple administration of medications can be considered as treatments necessary to eliminate risks to the life or the occurrence of major damage to health, in relation to the unavailability of medicines in the country to which the foreigner would be expelled)[11].

In case of technical difficulties, such as lack of transportation or identification (art. 9, 2, b) Italian law does not provide for the postponement of removal, but considers these situations as objective impediments and provides for the detention in a center for identification and expulsion (CIE) or the adoption of an order to leave the national territory within seven days (art. 14 TU). In particular, in light of the changes introduced by Law no. 161/2014, the order to leave the national territory within 7 days should have a broader application, since this is also ordered if the specific circumstances show that there is no longer any reasonable prospect to enforce the removal and that the alien may be accepted by the state of origin or provenance.

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foreigner. The case was thus returned to the Justice of the Peace of Trento (in the person of a different magistrate) for a proper assessment.

[9] Corte di Cassazione, decision no. 1809/2014.

[10] Corte di Cassazione, decision no. 3676/2012

[11] Corte di Cassazione, decision no. 14500/2013.

5. Entry Ban

Under Italian Law, all expulsion decisions imply the prohibition of entry into the Italian territory. The Directive was thus transposed envisaging a ban not only in cases provided under article 11, para. 1, a) and b) of the same directive, but also in other cases.

Further to the transposition of the directive, the rules regarding the ban on re-entry were however amended. Based on previous legislation, the duration of the entry-ban was ten years (except in case of a special authorization granted by the Ministry of the Interior), whereas the rules currently in force set a period ranging from 3 to 5 years (the duration is determined based on all circumstances of the case).

Such duration can be increased only in case of dangerousness of the irregular foreigner. The faculty provided under article 11, para. 2, of the directive was thus used. The duration can therefore be increased in the event of expulsion pronounced by the Minister of the Interior for reasons of public policy or national security, or for expulsion pronounced by the prefect against foreigners suspected of living in dangerous situations, or for expulsion pronounced by the Minister of the Interior or the Prefect against foreigners suspected of supporting terrorist organizations.

On the other side, the Italian legislator made use of the option provided for in art. 8 , paragraphs 1 and 2 of the Directive. Therefore the irregular foreigner who has left the country voluntarily according to the deadline provided in the removal order, has the right to request a revocation of the ban on re-entry by proving that he actually departed from the country. It is, however, a faculty of revocation that is left to the discretion of the Minister of the Interior.

In case of breach of the re-entry ban, the alien is punished with imprisonment from one to four years and is expelled again with immediate accompanying to the border.

The recipient of an expulsion measure can re-enter the State's territory before the expiry of the ban only if a special authorization is issued by the Ministry of Interior. A reasoned request must be submitted personally by the alien, through the Italian Consulate of the state of citizenship or residence. The authorization is deemed to be granted if the foreigner has already been authorized to re-enter the territory for reasons of family reunification and if his/her presence is not considered as a real and present danger to public order or the safety of the Italian state or other European states.

The duration of the ban on re-entry begins from the time of effective removal and from the actual start time of the ban the foreigner is required to provide personally the Italian consulate of the country of his nationality or where he lives, evidence of the absence from the Italian territory.

a) The duration of re-entry ban

With the judgment no. 12220/2012 issued on 02.04.2012 the Corte di Cassazione, criminal section, set out the following legal principle. *"The re-entry on the territory of the State by the expelled alien who is not in possession of a special authorization is no longer considered as a criminal offence, if committed beyond five years from the expulsion, because the criminal provision, establishing a re-entry ban for 10 years, shall not be applied due to the contrast with the provisions of the Directive 2008/115/EC, that state that the re-entry ban cannot be issued for a period of more than 5 years".*

In other terms, by annulling the appealed judgment and by stating the acquittal on the ground that the conduct was no longer foreseen as a criminal offence by the law, the Cassazione considered that the modifications determined by the Directive with regard to the duration of the re-entry ban removed the criminal relevance of the conduct committed on the basis of an administrative act whose effects have become illegal from the expiration of the directive transposition term.

Therefore, being the concerned person re-entered about 7 years after the effective expulsion, and so after the term of 5 years, considered as the maximum by the Directive, the foreigner had to be released, on the ground of the supervening abrogation of the criminal offence

b) Criminal sanctions in case of violation of a re-entry ban.

The application of criminal sanctions (and their compatibility with the return directive) for breach of the re-entry ban has been the subject of doctrinal debate and received special attention by the Italian courts.

As mentioned above, the entrance on the Italian territory of foreigners expelled before the expiration of the term established in the expulsion order, without authorization or withdrawal from the Ministry of the Interior, constitutes a criminal violation punishable by imprisonment from 1 to 4 years (or 1 to 5 years if this is a foreign recipient of an expulsion pronounced in a judgment or had already been sentenced for the same reason). A new decision of expulsion is also adopted by the prefect (Article 13, paragraph 3, of the Consolidated Law).

In 2012 the Corte di Cassazione ruled on the compatibility between the provisions of the Directive 2008/115/EC, particularly Article 11, paragraphs 1 and 2, and Article 13, paragraph 13 of the Consolidated Text on Immigration[12].

The issue at stake concerned the extension of the principles set out in the judgment *El Dridi* to the criminal sanctions provided in case of an entry ban. The orientation followed so fa by the Corte di Cassazione was to regard the case (and the reasons behind the choice of criminal policy) as ontologically different from that treated in *El Dridi*. On various occasions the Corte di Cassazione affirmed that the principles set out by the Court of Justice, in the case *El Dridi*, cannot have any relevance with regard to the conduct consisting in re-entering without authorization, in breach of the entry ban.

The Corte di Cassazione didn't refer the issue to the ECJ considering that there is a structural difference between the causes of the irregular staying of a third country national and, therefore, this legitimizes a different legal treatment based on a gradual mechanism, in respect of the principle of proportionality. In the Directive, hence, there is not just a Consolidated category of illegal staying and the re-entry of the person previously expelled does not constitute a case like the others set by the Directive, given that it is based on a re-entry ban, which is "autonomous" in respect to the expulsion order.

The remarks of the Public Prosecutor, on the automatic application of the punishment and on the lack of a gradual character were deemed unfounded also in light of the circumstance that the transposing provision had reduced the ordinary duration of the ban to a maximum of 5 years (instead of 10 years as previously).

Despite the decision of the Corte di Cassazione, the question was later referred to the Court of Justice with a request for preliminary ruling lodged on 22.05.2014 by the Court of Florence, which motivated the referral (instead of merely non applying the national rule which was deemed to contradict the Directive), in light of the above Corte di Cassazione's previous orientation.

The case concerns Mr Celaj, an Albanian citizen, who arrived in Italy on an unknown date. In August 2011 he was arrested, prosecuted and finally condemned for attempted robbery. The judgment became final in March 2012. One month later, a removal order, complemented by a three-year re-entry ban, was issued. Nevertheless, Mr Celaj's was not coercively removed, nor he voluntarily left Italy, where he thus continued to live. Later, Mr Celaj was detected by the Italian authorities on several occasions and charged with several offences, including irregular stay and cultivation of narcotic drugs. Soon after the last detection, at the beginning of September 2012, Mr Celaj voluntarily left Italy. Then, in spite of the entry-ban, he re-entered the Italian territory and, in February 2014, he was arrested for breach of Article 13(13) of Legislative Decree No 286 of 1998. On this legal basis, a criminal law proceeding was started against him before the Tribunal of Florence, seeking a sentence of imprisonment of eight months.

[12] Corte di Cassazione, decision no. 35871/2012. The case concerned the appeal of a first instance decision taken by the Court of Terni on 18.04.2011 consisting in the plea bargain of 5 month and 10 days of imprisonment against a third country national who illegally re-entered Italy after having been removed and expelled. The Public Prosecutor of the Court of Appeal of Perugia appealed to the Corte di Cassazione and requested to acquit the defendant or to refer a preliminary ruling to the ECJ.

A preliminary question was therefore raised before the Court of Florence, i.e. concerning the compatibility with the EU law of a national legislation, like that of Italy, which provides for the imprisonment of an illegally staying third-country national who, subject to a return decision and effectively returned to his country of origin, later re-enters the territory of the State in breach of a re-entry ban. In other terms, the Court of Justice has been asked to clarify whether it is still legitimate for a Member State to punish and imprison a third-country national on the sole ground of his/her irregular stay on its territory caused by the unlawful (re-)entry.

By order of 22 May 2014, the Italian judges referred the following question for a preliminary ruling:

"Do the provisions of Directive 2008/115 preclude a Member State's legislation which provides for the imposition of a sentence of imprisonment of up to four years on an illegally staying third-country national who, having been returned to his country of origin neither as a criminal law sanction nor as a consequence of a criminal law sanction, has re-entered the territory of the State in breach of a lawful re-entry ban but has not been the subject of the coercive measures provided for by Article 8 of Directive 2008/115 with a view to his swift and effective removal?".

The ECJ ruling is waited, but on the 28 April, 2015, the Advocate General Szpunar delivered his opinion. Relying on the previous ECJ judgments in cases *El Dridi*, *Achughbabian* and *Sagor* and recalling the principles on the application of criminal sanctions by member states, the AG considers that the Court did not precisely define when a criminal-law imprisonment *after* the application of the return procedure is deemed to be 'applied'. In contrast with the opinions of several MS (including the above mentioned Italian Corte di Cassazione's orientation) and the Commission, the AG dis not attach significance to the distinction between a third-country national entering the territory of a Member State for the first time and his entering again subsequently, once a return procedure has been carried out, and possible dissuasive effect in this latter case, stressing that the aim of the entry-ban is to end and not to prevent an illegal stay. In line with the directive's objectives, prison sentence should therefore be limited also in case of breach of an entry-ban.

c) Withdrawal of re-entry ban

Article 13, para. 14, of the Consolidated Text on Immigration has provided for a re-entry ban having an ordinary duration from three to five years in all cases in which a third country national is subject to an expulsion order, whereas withdrawal can only occur in cases in which the return decision is accompanied by a deadline for voluntary departure.

The issue of lifting the ban on re-entry has not been addressed broadly by the courts and the decision issued by the justice of the peace of Ravenna is one of the few cases in this respect. The magistrate upheld the appeal since he noticed that the circumstance that the foreigner had effectively left the country within the period for voluntary departure, pursuant to article 13, para. 5, of the Consolidated Text on Immigration, was proven, and yet the withdrawal, while not automatic, had been denied for a wrong formal reason and non for the existence of grounds of merit relevant in the individual case[13].

As pointed out by the Court, the only condition laid down by the legislature to the purpose of lifting the ban on re-entry is precisely to have voluntarily left the country. The mere fact of having left the national territory does not automatically entail the withdrawal of the re-entry ban, as it is still reserved for the administration to evaluate each situation. It is then left to the administration to assess in each case whether the application can be accepted in relation to security reasons or other impediments to the re-entry. The administration retains the power to reject the application, also if the alien voluntarily left the country, but based upon such reasons, which did not occur in the present case.

6. Removal of unaccompanied minors

Pursuant to article 19, para. 2, Consolidated Text on Immigration, expulsion is not allowed against minor foreign children, withstanding the right to follow an expelled parent or custodian; in Italy, a minor can only be expelled for reasons related to public order or security of the State. In this case, it is the juvenile court that has jurisdiction to order removal.

[13] Giudice di pace di Ravenna, decision of 11.4.2013.

Unaccompanied minors are subject to a special treatment in relation to their stay on the Italian territory. During the minority, the protective measures provided by law (custody, guardianship, adoption) are adopted in their regard under the responsibility of the Juvenile Court and the tutelary judge.

All unaccompanied minors are entitled, for the mere fact of being underage (and therefore under a general prohibition of expulsion), to obtain a residence permit for minor age. The permit is valid for as long as necessary to carry out the surveys on family members in countries of origin. These children can not be expelled until it has been verified that they will be welcomed by their family or by appropriate institutions in their country. In practice, the impact of such provision is very limited: between 2011 and 2014 only 20 minors were reunited with their family within the framework of an assisted return program.

Although the management of a phenomenon just as relevant[14] involves significant financial costs and organizational difficulties, the rule set in article 10 of the Directive appears generally well implemented under Italian law.

If therefore cautions in favour of foreign children are clearly established in the law, a critical issue arises in relation to the difficulty of establishing the age. This is, however, decisive in order to enact the specific treatment (and expulsion ban) foreseen by the Italian legislation. The decree issued by the Justice of the Peace of Bologna on 27.06.2013 (that annulled an administrative expulsion decision) can be taken as example, despite its very concise reasoning, of a relatively common problem relating to administrative expulsions of people who say they are unaccompanied minors but that are not believed and considered to be older, thus becoming recipients of measures of administrative expulsion

This issue normally arises within the framework, first, of the administrative expulsion procedure and then in the jurisdictional phase started upon appeal of the interested person[15] on the basis of the contrast between the registry documents (if available) and the auxologic exam which consists in a radiography of the bones of the hand and of the wrist of the concerned person and in the medical diagnosis of the age based on osseous development (according to the Greulich and Pyle method).

The fully scientific reliability of such auxologic exam has been contested in recent years, because it would not properly take into consideration: the biological variability among homogeneous groups (in an average time-frame of about two years) in respect to the date of skeletal maturation; systematic distortion related to the diversity in the skeletal maturation of subjects that have had different living and health conditions and are of different ethnicity; the margin of error (estimated in average between 3 and 6 months) in the medical reading of the radiographies although of a good quality.

Some decisions, having regard to the critical issues raised in relation to this method, have affirmed the prevalence of the registry data over the result of this medical exam, subject to the condition that there are no doubts about the genuineness of the documents submitted.

The case decided by the Giudice di Pace of Bologna concerned a person overtly minor (born in Bangladesh) that voluntarily showed himself to the Police in order to receive assistance as unaccompanied minor, and that was expelled, as adult, on the basis of the results of the auxologic exam.

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[14] As of 31 December 2014 it was recorded the highest number of unaccompanied foreign minors in Italy (10,536). This figure represents a significant increase compared to the presence counted as of 31 December 2013 (6319). Although almost 80% are young people aged sixteen and above (for which the assessment of the age is a significant issue), there has been an increase in the range 7-14 years, passed from 593 to 952. For a detailed analysis of the Italian reception system for unaccompanied minors and statistical figure see: Ministero del lavoro e delle politiche sociali, *I minori stranieri non accompagnati (msna) in italia, Report di monitoraggio - 31 dicembre 2014*, Rome, 2015, available at: http://www.lavoro.gov.it/AreaSociale/Immigrazione/minori_stranieri/Documents/Report%20di%20monitoraggio%20dicembre%202014%20(2).pdf.

[15] The case fell within the competence of the Giudice di Pace and not the Juvenile Court, because formally concerning a person considered as adult by the administrative authority that had issued the return decision.

These results have been contested during the proceedings by the applicant by presenting several certificates, that proved his birth date, as well as the original passport.

7. Concluding remarks

The implementation in Italy of the Return Directive presents some critical issues with respect to the rules on expulsion. It certainly is a positive specification that the decision to expel should be taken on a case by case basis, in accordance with the provisions of recital 6 of the Directive. Nevertheless the prevalence accorded by the Italian legislator to the forced removal of the third country national still persists: pursuant to the national rules in fact, the option of the voluntary return is significantly reduced in practice by fixing very strict and demanding criteria for the determination of the "risk of absconding", which, if considered present, implies the denial of the term for the voluntary departure and the recourse to the forced removal. As mentioned above, additional guarantees intended to avoid such risk are moreover defined in terms of obligation applicable to all beneficiaries of voluntary departure. Within this framework, it should however be stressed the recent guidance of the Corte di Cassazione, emerged from 2014, which seems to pay more attention to the fact that all adequate assessments in respect of granting a period for voluntary departure were actually carried out.

Another issue that remains open is the application of prison sentence for breaches of the re-entry ban. The Corte di Cassazione has so far taken a clear orientation which excludes the incompatibility with the return directive, considering the different nature of a violation of a ban, compared to the case of those who are found on the territory for the first time in violation of immigration rules . This approach also seems to characterize the choice of the legislature in view of the next amendment of the so-called crime of irregular migration. Apparently not being shared by the Advocate General, the Court of Justice will be able to clarify the compatibility of this approach with the directive in the (much awaited) *Celaj* case.