



REDIAL PROJECT
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I. Introduction

Spanish Immigration Act 4/2000¹ and Royal Decree 557/2011, with regard to its Implementation Rules², do not use the same terminology as the Return Directive³.

Immigration Act 4/2000 has therefore not incorporated the Return Directive's definition of *return decision* as an “administrative or judicial decision or act stating or declaring the stay of a TCN to be illegal and imposing or stating an obligation to return”⁴. Neither does it contain a definition of *removal order* as an “administrative or judicial decision or act ordering the enforcement of the obligation to return, namely the physical transportation out of the Member State”⁵. In fact, the Immigration Act 4/2000 uses only the term “*expulsion from Spanish territory*”. Of course, this could be interpreted to mean that Spanish transposition of the Return Directive, although lacking the Directive's terminology, is, however, taking the return decision to be equivalent to a one-step-procedure. Indeed, following Article 8 (3) of the Return Directive⁶, a removal order can be issued together with the return decision. But in those cases in which a return decision and a removal order are issued together in a one-step-procedure, it should be clear that removal will take place only if the obligation to return within the period of voluntary departure has not been complied with (except in cases in which the voluntary departure is not granted according to the Return Directive). Unfortunately, this does not seem to be so clear in the case of the Spanish transposition of the Return Directive.

Expulsion of Third Country Nationals (hereinafter TCNs) from Spanish territory may follow two differing processes that are anticipated in Immigration Act 4/2000: the ordinary procedure (*procedimiento ordinario*), and the urgent procedure (*procedimiento preferente*). Only the ordinary

¹ Organic Act 4/2000 of 11 January, on rights and freedoms of aliens in Spain and on their social integration (modified by Organic Acts 8/2000, 11/2003, 14/2003, 2/2009, 10/2011, 4/2013 y 4/2015 and Royal Decree Act 16/2012). Hereinafter Immigration Act 4/2000.

² Royal Decree 557/2011, of 20 April, on the approval of the Regulation to Organic Act 4/2000 of 11 January on rights and freedoms of aliens in Spain and on their social integration, as modified by organic Act 2/2009.

³ 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. L 348/98. Official Journal of the European Union 24.12.2008 Hereinafter, Return Directive.

⁴ Article 3(4) of the Return Directive.

⁵ Article 3(5) of the Return Directive.

⁶ Article 8 (3) of the Return Directive affirms: “*Member States may adopt a separate administrative or judicial decision or act ordering the removal*”. Therefore, Member States may also not adopt a separate decision to order the removal.

procedure establishes voluntary departure as a possibility for a TCN so as to prepare his/her exit within a reasonable period of time and in particular, to avoid forcible removal.

Moreover, current Spanish immigration legislation continues to use the same terms regarding the regime of infringements and sanctions (*régimen de infracciones y sanciones*) as those used before the coming into force of the Return Directive⁷. Although the Organic Act 2/2009 of 11 December - modifying the Immigration Act 4/2000 - expressly mentions the transposition of the Return Directive as one of its aims, only minimal changes have been carried out in this regard.

Hence, Article 53 (1), a) of Immigration Act 4/2000 determines it to be a serious infringement *“to stay irregularly in the Spanish territory for not having obtained an extension to a short-term right of stay, or for not having a resident permit, or if that permit has been expired for more than three months, always provided that the TCN has not asked for its renewal in the period of time established by law”*⁸. With regard to Article 57 (1) of the Immigration Act 4/2000, dealing with “Expulsion from Spanish territory”, it establishes the corresponding sanction to the infringement of Article 53 (1) a) - the illegal stay of a TCN - as follows: *“in the light of the principle of proportionality, instead of a financial sanction, the expulsion from the Spanish territory may apply, following the corresponding administrative procedure and through a resolution which has assessed the factors determining the infraction”*⁹.

As explained below (see Paragraph II on Article 8 of the Return Directive), the most obvious problem arising from insufficient transposition of the Directive is that the general sanction applied to a TCN staying irregularly in Spanish territory is a fine *or*, when other *negative factors* are concurrent, expulsion from Spanish territory¹⁰.

Other controversial issues have resulted from this lack of harmony between the terms as defined by the Return Directive and those used in Immigration Act 4/2000. As the current Spanish Immigration Act 4/2000 does not establish the difference between a *return decision* and its further execution (*removal order*), some removal cases following the *urgent procedure (procedimiento preferente)* - which does not include a period for voluntary departure - could constitute an infringement of Article 7 of the

⁷ The Spanish Supreme Court, by decision of 28 November 2008, recalled that under the former system created by Immigration Act 7/1985, the expulsion of TCNs was not considered to be a sanction. However, with the coming into force of Immigration Act 4/2000, the legislator changed the criteria and started to consider the expulsion of TCNs as a sanction. Therefore, with the coming into force of Immigration Act 4/2000, all the principles and guarantees related to the sanctioning procedure according to Spanish Administrative Law started to be applied to the expulsion sanction, among them the principle of proportionality. Due largely to the application of this principle, the Spanish Supreme Court interpreted the Immigration Act 4/2000 by stating that *“When the Administration decided on the expulsion (instead of a financial sanction) the latter needs to be motivate in an specific manner on grounds of proportionality , harm or risk outcoming from the said infraction”* and in general *“the legal or fact circumstances concurrent to impose a sanction of an expulsion and a ban entry into the Spanish territory, which is a much more serious sanction than a fine.”* Supreme Court, 28 November 2008 (Rec. 9581/2003).

⁸ In the original, Article 53 (1) a) affirms: *“Encontrarse irregularmente en territorio español, por no haber obtenido la prórroga de estancia, carecer de autorización de residencia o tener caducada más de tres meses la mencionada autorización, y siempre que el interesado no hubiere solicitado la renovación de la misma en el plazo previsto reglamentariamente”*.

⁹ In the original, Article 57 (1) states: *“Podrá aplicarse, en atención al principio de proporcionalidad, en lugar de la sanción de multa, la expulsión del territorio español, previa la tramitación del correspondiente expediente administrativo y mediante la resolución motivada que valore los hechos que configuran la infracción”*.

¹⁰ The Supreme Court has broadly repeated that: *“(...) illegal stay of TCN is to be sanctioned with a fine, and only when other negative factors are concurrent, will the appropriate sanction be the expulsion from national territory.”* (See, *inter alia*, Supreme Court decisions from 28 November 2008, Rec. 9581/2003; 9 January 2008, Rec. 5245/2004 and 19 July 2007, Rec.1815/2004). I will clarify this issue in Paragraph II, which deals with Article 8 of the Return Directive.

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Return Directive when depriving the TCN's right to a voluntary departure and thus depriving the TCN from preparing his/her exit and avoiding an entry ban in the Schengen Area¹¹.

These two problematic issues will be discussed in the following paragraphs. Firstly, a TCN staying irregularly in Spanish territory and being sanctioned with a fine instead of the removal will be the subject of our commentary on Article 8 of the Return Directive. Secondly, depriving the TCN's right to voluntary departure will be debated in the context of Article 7 of said Return Directive.

II. Article 8 of the Return Directive: TCNs staying irregularly in the Spanish territory sanctioned with a fine instead of the removal from the national territory and the *Zaizoune* Case (23 April 2015)

In accordance with the CJEU's settled case law¹², once it has been determined that a stay is illegal, the competent national authorities must, pursuant to Article 6(1) and Article 8 of the Return Directive, and without prejudice to the exceptions laid down in Article 6(2) to (5) thereof, adopt a return decision. It must be borne in mind in this regard that Recital 2 in the Preamble to the Return Directive states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and their dignity.

Between 2005 and 2008, the Spanish Supreme Court established an interpretation of Article 57(1) of the Spanish Immigration Act 4/2000 (on sanctions for illegally staying TCNs¹³) stating that a fine is to be the main sanction in these cases, and that only when there are other *negative factors* added to the illegal stay - and taking into account the principle of proportionality - should removal (*expulsión*) be the appropriate sanction. *Negative factors* would include: a lack of documentation; having been detained on grounds of participation in a crime¹⁴; not having a house or family roots in Spain; non-compliance with a decision of mandatory exit without seeking to become regularized in administrative terms or having an entry ban in the Schengen Area. In the absence of any *such circumstances*, a fine remains the appropriate sanction. Immigration Act 4/2000 has been modified several times, but the provision on the general character of the fine has not been changed. The position of the Supreme Court on the so-called *doctrine of the fine* has not changed until 2013.

This jurisprudential doctrine was developed before the adoption of the Return Directive. Following the expiry of the transposition period of the Directive, the Supreme Court did not have the opportunity to balance the *doctrine of the fine*, since the contentious administrative jurisdiction was reformed in 2008. With that reform, the competences on judicial appeals against administration decisions on the removal (*expulsión*) of TCNs were transferred to the Contentious Administrative Courts and, on judicial appeal (second instance), to the regional High Courts. However, these Courts have as a general rule followed the Supreme Court doctrine on the financial sanction (rather than removal)¹⁵.

¹¹ See comment below on Article 7 and the new scenario created by the TJUE on *Z ZH and I O* (judgment of 11 June 2015).

¹² Case C 249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, 11 December 2014, paragraph 46. Also in *El Dridi*, C 61/11 PPU, EU:C:2011:268, paragraph 35; *Achughbabian*, EU:C:2011:807, paragraph 31; and *Mukarubega*, EU:C:2014:2336, paragraph 57.

¹³ See above, footnote No. 9.

¹⁴ For instance: on grounds of being undocumented (see; Supreme Court 30 June 2006; 31 October 2006, 29 March 2007); on grounds of having being detained for participation in a crime (see, Supreme Court, 19 December 2006); when not proving accommodation and family roots in Spain (Supreme Court, 28 February 2007) and having an entry ban in the Schengen Area (Supreme Court, 4 October 2007).

¹⁵ Very recent High Court decisions in which the Supreme Court *doctrine of the fine* has been applied are: Castilla-La Mancha, n° 10016/2015 of 28 January 2015; Andalucía, n° 2225 /2014 of 30 December 2014; Galicia, n° 751/2014 of 17 December 2014; Castilla-La Mancha, n° 318 /2014 of 15 December 2014; Com. Valenciana, n° 1174 /2014 of 12 December 2014; Castilla-La Mancha, Decision n° 10278 /2014 of 26 November 2014; Castilla-La Mancha, Decision n° 10229/2014 of 17 June 2014; Andalucía, Decision n° 1910 /2014 of 7 October 2014 (In this particular decision, the High Court specifies (Paragraph 4, F.J. 4) that following the fine sanction, it is necessary for the third-country national to regularize his/her administrative situation, otherwise a

Moreover, on 22 October 2009, the CJEU answered the High Court of Murcia's preliminary reference *Zurita García and Choque Cabrera* on a similar question, ruling that “*where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfill, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person*”¹⁶. However, this Court's answer was referred to Articles 5, 11 and 13 of the Schengen Borders Code¹⁷. It should be noted that the period for the transposition of the Return Directive (up to 24 December 2010) had not yet elapsed at that time.

Three years later, with the Return Directive already applicable, in the Case *Md Sagor*, the CJEU states at paragraph 36 that: “*It should be noted, second, that the possibility that criminal prosecution may lead to a fine is also not liable to impede the return procedure established by Directive 2008/115. Indeed, the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6 to 8 of Directive 2008/115(...)*”¹⁸. We should mention that in Spain, the *Sagor* judgment was wrongly interpreted, as it stated that a national law was not opposed to the Return Directive when sanctioning the illegal stay: several lawyers believed that this case was confirmation for the Spanish doctrine of the fine. However, in *Sagor*, the CJEU did not mean removal could be *substituted* with a fine sanction.

On 13 March 2013, on the occasion of a direct appeal (no cassation) by a number of NGOs to the Supreme Court against several provisions of Royal Decree 557/2011 (Implementation Rules to the Immigration Act), the Supreme Court nevertheless for the first time initiated a significant change when it ruled that according to the Return Directive, EU Member States must adopt all necessary measures in order to remove illegally staying TCNs so as to guarantee the effectiveness of the return procedures¹⁹.

In this ruling, the Supreme Court stated that according to the Return Directive, the first step to take would be to offer the TCN the possibility of voluntary departure (article 7 Return Directive), and that only if this is not accomplished would enforced removal take place. Thus, according to paragraph 7 (FJ. 7) of this Supreme Court decision, the adoption of the Return Directive marked a significant shift

return decision will apply. In other High Court decisions applying the *doctrine of the fine*, there is no such reasoning); High Court of Madrid, 565 /2014 of 18 July 2014 and n° 565 /2014 of 17 July 2014.

¹⁶ C-261/08 *María Julia Zurita García and C-348/08 Aurelio Choque Cabrera v Delegado del Gobierno en la Región de Murcia.*, judgment of 22 October 2009. ECLI:EU:C:2009:648 Paragraph 67: “*Articles 6b and 23 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this end, and Article 11 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person*”.

¹⁷ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders OJ 2006 L 105, p. 1.

¹⁸ Case C 430/11, *Md Sagor*, and judgment of 6 December 2012. ECLI:EU:C:2012:777.

¹⁹ Supreme Court, 13 March 2013; Roj: STS 988/2013 - ECLI: ES: TS: 2013:988 On 30 June 2011 several NGOs (*Derechos Humanos de Andalucía* and *Federación SOS Racismo*) presented appeal number 343/2011 to the Spanish Supreme Court (*Sala tercera, Sec. 3ª*) against various provisions of Royal Decree 557/2011, 20 April upon the approval of the Implementation Rules to the Spanish Organic Immigration Act. The appellants requested that the Supreme Court declare illegal and invalid several provisions contained in the above-mentioned Royal Decree. The Supreme Court decision indeed declared invalid some of the provisions of the Royal Decree. However, the most interesting part of the decision for our current purposes is that of Paragraph 7 (*Fundamento jurídico 7º*) of the Supreme Court's decision.

as regards the removal of irregular third-country nationals. It has considerably reinforced Member States' obligation to guarantee the effectiveness of return procedures, as illustrated in CJEU jurisprudence. Such a major change at EU level is likely to challenge the current interpretation and application of the Spanish legislation *'that permits, as of today, the sanctioning of the illegal stay of a third-country national with a fine instead of directly applying a return decision'*²⁰.

Notwithstanding this assessment, Spanish High Courts have continued to apply the financial sanction rather than removal (*expulsión*) sanction following the Supreme Court decision of 13 March 2013. Only a limited number of High Court decisions refer to the *new position* of the Supreme Court deciding on removal rather than a fine. However, they continued to rely on *negative factors* when opting for removals²¹.

This was the Spanish scenario regarding the sanction to be applied in cases of TCNs illegally staying on Spanish territory when, on 17 December 2013, the High Court of the Basque Country decided to

²⁰ Paragraph 7 (FJ. 7) of this Supreme Court decision states: *"The analysis of this question cannot be unaware of the significant change that the adoption of an EU harmonised policy on the return of third nationals has provoked. By the Organic Act 2/2009 Spain has transposed several EU Directives (...) including Directive 2008/115/CE (...) This Return Directive has been interpreted by the CJEU in such terms that it reinforces in a considerable manner the duty of MS to guarantee the effectiveness of the return procedures of third-country national illegally staying in the territory of the MS. This effectiveness implies for MS "the obligation to apply all necessary measures for the return of those illegally staying third-country nationals to take place" (ECJ.28 April 2011, C-61/11 PPU, El Dridi, ECLI:EU: C: 2011:268; ECJ.6 December 2011, C-329/11, Achughbabian, ECLI:UE:C:2011:807; ECJ. 6 December 2012, C-430/11, Sagor, ECLI:E:C: 2012:777). This CJEU jurisprudence will possibly compel Spain to adjust its current interpretation and application of Spanish legislation which permits, as of today, any sanctioning of the illegal stay of a third-country national with a fine instead of directly applying a return decision"*.

²¹ See for instance, High Court of Castilla and León (Valladolid): 996/2014 of 16 May 2014. The case is the following: on 22 November 2013, the Contentious –Administrative Court No. 1 of Salamanca rejected the appeal of Mr. Mario XXX, a national of Morocco, against the Resolution of the Governmental Sub-Delegate in Salamanca, ordering expulsion and a five-year entry ban for Mr. Mario XXX for illegally remaining in Spanish territory. Mr. Mario XXX appealed the decision of the Contentious–Administrative Court to the High Court of Castilla and León. Apart from remaining illegally, Mr. Mario XXX has also been condemned by the Criminal Court num.6 of Tenerife to two years' imprisonment after being found guilty of the crime of bodily harm, and to another two years and four months of prison for robbery.

The decision of the Court of first instance was based on article 53 (1) a) (illegal stay) and article 57 (1) (fine or removal) of Spanish Organic Immigration Act 4/2000. It was finally decided that remaining illegally *may* be (when there are other negative factors) grounds for removal with an entry ban. However, the High Court of Castilla León (second instance) finally decided on article 57(2) of the Organic Immigration Act 4/2000 (different from Article 57 (1)), which states the following: *«It constitutes a ground for expulsion (...) when the third country national has been convicted inside or outside Spain with a crime punished with more than a year of prison, apart from cases in which the criminal records have been cancelled'*. Basing its decision mainly on these grounds, the High Court of Castilla León decided to confirm the decision of the court of first instance and thus also the expulsion, along with the five-year entry ban, of Mr. Mario XXX.

Our interest in this decision – representing others quoted below - is that the High Court of Castilla and León, on the one hand, recalls the *Supreme Court doctrine of the fine* (Supreme Court 2005-2008) but also *emphasizes the new position of the Supreme Court*, as established by its decision of 12 March, 2013. *Recent* High Court decisions – all of them decisions adopted by High Court of Castilla and León, and cognizant of the new stance of the Supreme Court (13 March 2013) are: Decisions of the High Court of Castilla and León (Valladolid) 6/2015, 8 January (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\37136); 8/2015, de 8 January (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\34346); 2390/2014, 25 November (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\29080); 2391/2014, 25 November (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\29798); 2360/2014, 21 November (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\29079); 2338/2014, 19 November (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\27364); 2301/2014, 14 November (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2015\28109); 1786/2014, 15 September (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2014\265407); 996/2014, 16 May (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2014\174659); 367/2014, 21 February (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2014\90399); 189/2014, 31 January (Sala de lo Contencioso-Administrativo, Sección 3ª) (JUR 2014\70965); 142/2014, 27 January (Sala de lo Contencioso-Administrativo) (JUR 2014\46672).

address the CJEU with a preliminary reference. It did so by asking the Luxembourg Court the following question: “*In the light of the principles of sincere cooperation and the effectiveness of directives, must Articles 4(2), 4(3) and 6(1) of Directive 2008/115/EC be interpreted as meaning that they preclude legislation, such as the national legislation at issue in the main proceedings and the case-law which interprets it, pursuant to which the illegal stay of a foreign national may be punishable just by a financial penalty, which, moreover, may not be imposed concurrently with the penalty of removal?*”

On 23 April 2015, the CJEU resolved the Case *Zaizoune*. It did so by seemingly rejecting Spanish Supreme Court *doctrine of the fine*. The CJEU states that the main objective of the Return Directive is to ensure an effective removal and repatriation policy. Moreover, it recalls that in *El Dridi* and *Achughbabian* it had been stated that Article 6(1) of Directive 2008/115/EC provides for an obligation to issue a return decision against any third-country national illegally staying in a Member State, unless there arise exceptions as laid down by Article 6(2) to (5). Additionally, it recalled in *Sagor* that the obligations imposed by Article 8, in order to undertake the removal of TCNs, must be fulfilled as rapidly as possible²².

Furthermore, the CJEU holds that no provision of the Return Directive, not even Article 4(2), allows for a choice, depending on the circumstances of the case, between a fine and removal. In relation to Article 4(3), the Court states that the possibility of Member States adopting more favorable national provisions must be compatible with the Return Directive; and that there is no compatibility²³.

On these grounds, the CJEU ruled that the Return Directive should be interpreted as precluding a Member State legislating for TCNs illegally staying in its territory to be either fined or removed, as the two measures are mutually exclusive.

The judgment of the CJEU in the *Zaizoune* case has raised concerns among many Spanish lawyers and specialists. Whereas, for the time being, the High Court of the Basque Country has not adopted a final decision on the main case, there has been a similar one, in which a decision was made immediately after the CJEU’s ruling on *Zaizoune*. The High Court of Galicia (20 May 2015) has applied the *doctrine of the fine* again, on grounds of the non-retroactivity of the CJEU’s interpretation.

Moreover, on 25 May 2015, the General Council of the Spanish Bar Association/Sub-Commission for Aliens Law published a *Memo* on how to react to the new scenario after the CJEU decision on

²² Since the adoption of the Return Directive, the CJEU has ruled on many occasions on the incompatibility between EU law and national law in these issues. Both the *El Dridi* and *Achughbabian* cases determine that Member States should undertake a “calibration of measures” in order to accomplish the objective of the Return Directive, consisting in enforcing a return decision in an effective and proportionate manner with “all necessary measures”. These measures should be the least intrusive ones available. The CJEU clearly stated in *El Dridi* that “the Directive does not allow those States to apply stricter standards in the area that it governs” (par. 33). Moreover, in Paragraph 35, the CJEU stated that the Return Directive provides principally for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory. On the other hand, according to *Achughbabian* (par. 31), once it has been established that the stay is illegal, national authorities should adopt a return decision. As the CJUE stated when responding to the *Zaizoune* preliminary question (par. 33): “*It must also be noted that, where a return decision has been issued against a third-country national, but that third-country national has not complied with the obligation to return, whether within the period for voluntary departure, or if no period is granted to that effect, Article 8(1) of Directive 2008/115 requires Member States, in order to ensure the effectiveness of return procedures, to take all measures necessary to carry out the removal of the person concerned, namely, pursuant to Article 3, point 5, of that directive, the physical transportation of the person concerned out of that Member State (see, to that effect, judgment in Achughbabian, C329/11, EU:C:2011:807, paragraph 35)*”.

²³ In Case C 61/11 PPU, *Hassen El Dridi*, alias Karim Soufi, judgment of 28 April 2011, the CJEU states at paragraph 33: “*Although Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive does not however allow those States to apply stricter standards in the area that it governs.*” As regards the compatibility of more favourable national conditions with the Return Directive, see the blog contribution of Dr. Diego Acosta, and Dr. Andrea Romano, *The Returns Directive and the removal of Migrants in an Irregular Situation in Spain* <http://eulawanalysis.blogspot.com.es/2015/05/the-returns-directive-and-expulsion-of.html> (visited 6 July 2015).

Zaizoune. This *Memo*²⁴ is addressed to Spanish Courts, and holds that the decision of the CJEU in *Zaizoune* does not affect the current doctrine of the Supreme Court and the High Courts of Justice regarding the removal of TCNs irregularly staying in Spanish territory.

It states that “*the Organic Immigration Act 4/2000 foreseeing the imposition of a fine for merely illegally staying TCNs, however read in conjunction with articles 24, 1 and 2 of Royal Decree 557/2011 - establishing the compulsory departure within a period of a maximum of 15 days*²⁵ - is in accordance with Articles 6 (1) and 8 (1) of Directive 2008/115/CE”.

The grounds set forth in the *Memo* are in line with an argument repeatedly put forward by Spanish lawyers. From their point of view, the key issue is that the question presented by the High Court of the Basque Country on *Zaizoune* has been wrongly formulated. Both the *Memo* and the specialists’ opinion hold that it is incorrect to state that Spanish legislation and jurisprudential doctrine are punishing the illegal stay of a third-country national with “*a financial penalty, which, moreover, may not be imposed concurrently with the penalty of removal*”.

According to the *Memo* and to the experts, since the financial penalty is accompanied with a compulsory departure within a period of a maximum of 15 days, financial sanction and removal orders are not *mutually exclusive*. Rather, they are *successive*. In that sense, the *Memo* considers that the imposition of a *fine plus the compulsory departure* correspond, according to the Return Directive, to a return decision²⁶.

Moreover, the *Memo* encourages Spanish Courts to request from the CJEU a preliminary ruling with the following question in order to clarify the current scenario: “*Must Articles 4(2), 4(3) and 6(1) of Directive 2008/115/EC be interpreted as meaning that they preclude legislation, such as the Spanish legislation and the case-law which interprets it, pursuant to which the illegal stay of a third country national may be punishable by a financial penalty and the obligation to leave the Spanish territory within 15 days, leading to the removal in case of non-compliance with the voluntary departure order?*”

²⁴ Circular 1/2015 de la Subcomisión de extranjería del Consejo General de la Abogacía Española: “*Argumentario a la Sentencia de 23 de abril de 2015 del TJUE*” http://web.icam.es/bucket/RS_06278_15-SIN%20PAG1.pdf.

²⁵ The *compulsory departure obligation* is regulated by Spanish immigration legislation, and is added to every denial of a residence permit and also to the fine sanction for an illegally-staying TCN. Spanish case law in which *voluntary departure* (Article 7 of the Return Directive) is mentioned is scarce. By contrast, the *compulsory departure obligation* appears in several decisions, but never in relation with Article 7 (1) of the Return Directive. See, for instance: High Court of Balearic Islands 222/2015 of 31 March (JUR 2015\107397). This is a case in which an irregularly staying TCN was detained whilst driving under the effects of alcohol and other drugs. He was sanctioned with a fine and with a *compulsory departure obligation*. The TCN appealed against this decision on the grounds of settlement (*arraigo*) as he has a *de facto* partner in Spain. The Court decided to suspend the *departure obligation* and to sanction only via the fine.

See also, High Court of Galicia, núm. 312/2015 de 20 mayo. JUR 2015\143772, which affirms: “*In any case, as stated in decision of 21 May 2014 (appeal 4/2014) it is to be noted that all administrative resolutions denying a resident permit, the obligation to leave the Spanish territory is added to be comply in a period time of up to fifteen days. Although it is only a warning regarding the legal consequence of denying a residence permit and does not mean the removal of the TCN, a removal order may be issued if the TCN disobeys the obligation to leave the national territory*”.

See also, High Court of Madrid, núm. 326/2015 of 30 April. JUR 2015\149396 stating: “*The denial of a resident permit always includes an obligation to leave the national territory.(...) In these cases, the TCN whose residence permit has been denied has a fifteen-day period to organize his/her departure, and may even remain in the territory until, prior to the processing of the corresponding file, s/he is sanctioned with an expulsion, which is materially performed*”.

²⁶ It is worth pointing out that the fine sanction, as it is conjoined with an obligation to leave in up to 15 days (Article 24, 1 and 2 of Royal Decree 557/2011), could be equivalent to a return decision in the terminology of the Return Directive. However, it contradicts a plethora of decisions taken by various Spanish High Courts which, until *Zaizoune*, have always insisted that their judicial decision consists of exchanging the expulsion sanction for a fine sanction.

Finally the *Memo* holds the non-retroactivity of the CJEU's decision on *Zaizoune*, which follows from the ECtHR's case-law *Del Río Prada vs Spain*. However, the CJEU has ruled that national courts cannot limit the temporal application of the CJEU judgments²⁷ which could only be limited by the CJEU itself²⁸. Moreover, this is quite contradictory, as the *Memo* states that the financial sanction and the removal order are not *mutually exclusive* but *successive*. And if, therefore, there is no incorrect transposition of the Return Directive, why this reference to the non-retroactivity principle?

In my opinion, the interpretation of the General Council could save the Spanish Immigration Act and its Implementation Rules. Namely, that article 57(1) of the Immigration Act 4/2000 - which determines that a fine is the main sanction in cases of TCNs merely illegally staying - read jointly with articles 24, 1 and 2 of Royal Decree 557/2011 - which establishes compulsory departure within a period of a maximum of 15 days - are not contrary to the Return Directive²⁹.

However, this is not the case regarding the so called Supreme Court *doctrine of the fine* (before it was adjusted by the above-mentioned decision of 13 March 2013), which several Spanish High Courts continue to apply, in the absence of aggravating circumstances, in cases of irregular stay. The Courts use the financial sanction as a *lighter* sanction *vis à vis* the removal. In many cases this judicial interpretation applies because Courts find that the TCN has settled within Spanish society³⁰. However, Spanish Courts seldom envisage the possibility of further regularization.

In my view, in cases where Spanish Courts have decided not to return a third-country national, they should nonetheless *expressly permit* the third-country national's regularization (or some kind of similar status). A failure to do so could see the Spanish system interpreted as a pull factor for illegal immigration.

A very recent decision of the High Court of Murcia³¹ revoked an expulsion order and an entry ban for six years by applying both Article 5 of the RD on the "best interest of the child" and Article 6 of the RD on exceptions to the removal (due to existence of a minor child born in Spain).

²⁷ See, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, C-199/82, ECLI:EU:C:1983:318; *Hauser*, C-13/08, ECLI:EU:C:2008:774.

²⁸ See, *Nisipeanu* judgment, C-263/10, ECLI:EU:C:2011:466.

²⁹ The *Memo* understands that Spanish immigration law provides a two-step procedure regarding the return of illegally-remaining TCNs. Following the first step procedure (the sanction in the form of a fine is imposed in addition to an obligation to departure), then if the TCN does not comply with the departure, a removal order will be issued.

³⁰ For example, the High Court of Madrid, on 20 March 2014 (Rec. 993/2013) considered that the settlement for the appellant was due to the fact that he has a daughter of Spanish nationality and was married to a TCN legal resident in Spain, and that these circumstances counteracted both the existence of a previous financial sanction and his non-compliance with his obligation to departure from national territory, which had been added to that financial sanction. Therefore, the settlement was appreciated, and the removal order (decided because the TCN did not obey the obligation to depart, added to the fine sanction) was annulled. Nothing is mentioned regarding the state of *limbo* regarding legal status in which the irregular TCN found him/herself.

³¹ High Court of Murcia , 25 September 2015 (Rec. 58/2015, Res. 791/2015) - ECLI:ES:TSJMU:2015:2135.

III. Article 7 of the Return Directive: Depriving TCN's illegally staying in Spanish territory from their right to a voluntary departure?

Regarding voluntary departure, Article 7(1) of the Return Directive states that “*a return decision shall provide for an appropriate period for voluntary departure³² of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4*”. Subsequently, Article 7 confers a right to voluntary departure and authorizes the derogation from that right only in particular circumstances.

Spain has transposed Article 7(1) of the Return Directive through Article 63 *bis* of the current Spanish Immigration Act 4/2000 and Article 226-233 of the Implementation Rules to the Immigration Act 4/2000. This Article 63 *bis* has recently been added by virtue of the modification operated by Organic Act 2/2009 of 11 December³³ and introduces voluntary departure as a phase included in the ordinary procedure (*procedimiento ordinario*). It affirms that:

“1. When expulsion is ordered for cases not anticipated in Article 63, the procedure to be followed will be the ordinary procedure” “2. The resolution on the expulsion issued through the ordinary procedure shall provide a period for voluntary departure from the national territory. The duration of this period will be from seven to thirty days starting from the date of notification of the decision”³⁴.

In their turn, Article 63 of the Immigration Act 4/2000 and Article 234-237 of the Implementation Rules to the Immigration Act 4/2000 regulate the urgent procedure (*procedimiento preferente*), which does not include the possibility of voluntary departure³⁵. Article 63 (1) establishes that the urgent procedure will apply in cases of TCNs irregularly staying in Spain³⁶ only when: “*1) there is a risk of non-appearance; 2) if the third-country national hinders his/her removal; or 3) if the third-country national represents a risk for the public order, public security or national security*”³⁷. As we can see, grounds under Immigration Act 4/2000 which justify the urgent procedure are not the same circumstances provided by Article 7(4) of the RD.

³² The CJEU in *El Dridi*, paragraph 36 states: “*As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days*”.

³³ Article 63 *bis* is supplemented by article 69 of the Organic Act 2/2009 of 11 December. Ref. BOE-A-2009-19949. This means that before 2009, all expulsion procedures of TCNs illegally staying in Spain followed the urgent procedure (*procedimiento preferente*). This differs from the ordinary one in its shorter time periods and in the refusal to grant the TCN the possibility of choosing voluntary return, and therefore, not giving him/her the chance to avoid an entry ban in the Schengen Area, when the exceptions of Article 7 (2) and (4) do not apply.

³⁴ In the original language, Article 63 *bis* states: “*1. Cuando se tramite la expulsión para supuestos distintos a los previstos en el artículo 63 el procedimiento a seguir será el ordinario 2. La resolución en que se adopte la expulsión tramitada mediante el procedimiento ordinario incluirá un plazo de cumplimiento voluntario para que el interesado abandone el territorio nacional. La duración de dicho plazo oscilará entre siete y treinta días y comenzará a contar desde el momento de la notificación de la citada resolución*”.

³⁵ As the General Advocate has stated in his opinion on *Zh. and I. O.*, paragraph 92, it is not true (as the referring court maintained) that refraining from granting a period for voluntary departure is the least restrictive measure: “*On the contrary: where a Member State applies a policy of refraining from granting such a period in every case, it does not apply the least restrictive measure. Since all cases are subject to the same general rule, there is no process of individual assessment. That position does not seem to me to be in accordance with the principle of proportionality*” OPINION OF ADVOCATE GENERAL SHARPSTON delivered on 12 February 2015 *Case C-554/13 Z. Zh. And I. O. v Staatssecretaris van Veiligheid en Justitie*.

³⁶ Article 53 (1) a Immigration Act 4/2000 explained above (see footnote n. 8).

³⁷ In the original language, Article 63 (1) states: “*(...) Igualmente, el procedimiento preferente será aplicable cuando, tratándose de las infracciones previstas en la letra a) del apartado 1 del artículo 53, se diera alguna de las siguientes circunstancias: a) riesgo de incomparecencia; b) el extranjero evitara o dificultase la expulsión, sin perjuicio de las actuaciones en ejercicio de sus derechos; c) el extranjero representase un riesgo para el orden público, la seguridad pública o la seguridad nacional. En estos supuestos no cabrá la concesión del período de salida voluntaria*”.

Moreover, the significant issue is how these exceptions to the ordinary procedure are interpreted, due to the fact that following the urgent procedure, the execution of the removal order will take place immediately³⁸. There is a widely-held opinion which states that the urgent procedure has been applied in several cases where the allegations of “risk of non-appearance, risk for the public order or national security” have been unproven. In some judicial appeals, the appellant (i.e his/her legal representation) has insisted on rejecting the urgent procedure, based on the lack of evidence of the alleged risk of non-appearance of the claimant, estimating that there were no other circumstances to justify a proceeding with fewer guarantees and more disadvantages for the TCN than the ordinary procedure³⁹.

Due to the Spanish legal and judicial systems having replaced the removal with a fine in cases of TCNs illegally staying but showing no other negative factors in their records⁴⁰ - a system which was followed until the *Zaizoune* case (23 April 2015) - the aforementioned incorrect use of the urgent procedure over the ordinary one, and the related denial of voluntary departure, have not been visible to Spanish lawyers and judges.

And this is because to date, Spanish lawyers and judges have taken care to observe the correct application of the principle of proportionality in order to apply the financial sanction instead of the removal sanction; as the expulsion was generally avoided, whether to apply the urgent or the ordinary procedure was not an open question.

However, after *Zaizoune*, a different scenario appears⁴¹. As a consequence of the end of the Spanish judicial doctrine on the prevalence of financial sanction over the removal, many irregular migrants who in the past would have been sanctioned with a fine, will from now on be obliged to leave voluntarily or will be forcibly returned.

Still, given that return decisions must be adopted on a “case-by case basis and based on objective criteria” (Recital 6, Preamble to the Return Directive) it is crucial to find out how the Spanish administrative decisions on applying the urgent procedure are motivated⁴².

³⁸ Article 235 on Implementation Rules to Immigration Act 4/2000 affirms that the decision regarding the urgent procedure will be issued in an immediate manner, although it shall be motivated and needs to resolve all the questions on file. Moreover, it will include the right to appeal the decision, notwithstanding the immediate character of that decision and the impossibility of the administration declaring the suspensive character of the decision. The original text affirms: “*La resolución, en atención a la naturaleza preferente y sumaria del procedimiento, se dictará de forma inmediata. Deberá ser motivada y resolverá todas las cuestiones planteadas en el expediente (...) no excluirá el derecho de recurso por los legitimados para ejercerlo, sin perjuicio de la inmediatez de la expulsión y de la improcedencia de declarar administrativamente efecto suspensivo alguno en contra de ella*”.

³⁹ See for instance the Decision of the High Court of Justice of Andalusia (STSJ 2358/2014.JUR\2015\73548. 28/11/2014) In this case, the TCN brought an action against the expulsion order, which was rejected, before the Contentious-Administrative Court num. 3 of Melilla. The TCN appealed against this decision before the High Court of Andalusia (appeal number 724/2012). His legal representation complained about the following urgent procedure on grounds that the invoked risk of non-appearance was unproven.

⁴⁰ See above my comment on Spanish transposition of Article 8 of the Return Directive.

⁴¹ However, even after *Zaizoune*, the situation continues to be misunderstood. The High Court of Justice of Madrid, núm. 227/2015 of 27May . JUR 2015\158468 affirms “ (...) *the fine is a sanction; however it does not rectify the situation of a TCN that needs to leave the national territory. If the TCN does not voluntarily leave Spanish territory s/he risks receiving a further sanction, which may be expulsion from Spanish territory*”. The bold type is mine.

⁴² In *Zh and O*, the CJEU states at paragraph 48 states: “*In the European Union context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, by analogy, judgment in Gaydarov, C 430/10, EU:C:2011:749, paragraph 32 and the case-law cited)*. At paragraph 50, the CJEU affirms: “ (...) *When it relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national’s personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle*

The key issue when appropriately applying one or the other of the two procedures is how to prove the existence of risk of absconding and/or the threat to public order. It is well known that Member States should make their decisions on the basis of the circumstances of the individual concerned, and as General Advocate states in *Z. Zh. and I. O.*, paragraph 80: “*The directive does not allow Member States to apply stricter standards in the sphere that it governs*”.

There are no official data on the number of TCNs irregularly staying having left Spain through an ordinary procedure and, therefore, having had the opportunity to leave voluntarily. That is why I recently invited a Deputy of the Spanish Congress to seek information on the issue via two written queries⁴³:

1. *How many removals of TCN illegally staying in Spain have followed the ordinary procedure in 2014? What is the percentage - out of the total number of removals of TCN in 2014 - of removals conducted through the ordinary procedure?*

2. *What are the criteria – if any – used in practice to prove the risk of non-appearance (or the threat to public order, public security or public health) so that the urgent instead of the ordinary procedure is followed?*⁴⁴

The answer from Spanish Government (Minister of the Interior) was due in October 2015. However, the Spanish Government did not answer the written question⁴⁵.

On the issue of *leaving immediately*, Article 64 (1) of the Immigration Act 4/2000 affirms that if an ordinary procedure has been followed and the TCN has not left the national territory during the period of voluntary departure, or in *all cases* in which the urgent procedure has been followed, the TCN is forcibly removed in less than 72 hours⁴⁶ unless the removal is not possible. When this is the case, an internment measure is decided upon.

In cases of a financial sanction, and although – as has been already mentioned - an obligation to abandon Spanish territory in 15 days is conjoined to the administrative sanction of a fine, TCNs generally disobey the obligation to leave. Moreover, there is no follow-up of the actual departure or indeed of the TCN him/herself after these 15 days, and in most cases these irregular third country

of proportionality.”. Case C 554/13, *Z. Zh. V Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie I. O.*, judgment of 11 June 2015.

⁴³ In its original language, the text states the following: “*A LA MESA DEL CONGRESO DE LOS DIPUTADOS Jon Iñarritu García, diputado de AMAIUR, integrado en el Grupo Mixto, de conformidad con lo previsto en el artículo 185 del Reglamento del Congreso de los Diputados, presenta las siguientes PREGUNTAS AL GOBIERNO CON RUEGO DE RESPUESTA POR ESCRITO. 1 ¿Cuántas expulsiones de nacionales de terceros países en situación irregular se han llevado a cabo en el Estado siguiendo el procedimiento ordinario en 2014 y que porcentaje del total de expulsiones supone? 2 ¿Con qué criterios en la práctica -si los hubiere- se aplica a tal efecto (utilizar el procedimiento preferente en lugar del ordinario) el riesgo de fuga o la amenaza al orden, seguridad o salud públicos? Congreso de los diputados, 1 de julio de 2015*”

⁴⁴ In this regard, it is important to be aware of the statement of CJEU in *Sagor*, paragraph 41: “*However, in that regard, it should be noted that Article 7(4) allows the Member States to refrain from granting a period for voluntary departure, in particular where there is a risk that the person concerned may abscond in order to avoid the return procedure. Any assessment in that regard must be based on an individual examination of that person’s case*”. Case C 430/11, *Md Sagor*, TJUE 6 December 2012.

⁴⁵ On 27th October 2015, Cristina Gortázar received an e-mail from said Deputy of the Spanish Congress with the following information: “*The Government has not answered the written question although some weeks has passed since the legal deadline to deposit an answer has already elapsed. I will register the same question at next legislature. I am sorry for this*”.

⁴⁶ Article 64 (1) Immigration Act 4/2000 states: “*When the period of voluntary departure elapses without the TCN having abandoned the national territory, s/he will be detained and conducted to the exit point in order that effective removal effectively be executed. If the removal cannot take place in a period of up to 72 hours, internment may be required*”. The Spanish text is as follows: “*Expirado el plazo de cumplimiento voluntario sin que el extranjero haya abandonado el territorio nacional, se procederá a su detención y conducción hasta el puesto de salida por el que se deba hacer efectiva la expulsión. Si la expulsión no se pudiera ejecutar en el plazo de setenta y dos horas, podrá solicitarse la medida de internamiento (...)*”. The latest modification of this provision was through Article 70 of Organic Act 2/2009, of 11 December. Ref. BOE-A-2009-19949.

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nationals continue their stay in an irregular manner until they have the chance to obtain a resident permit on grounds of settlement (*arraigo*)⁴⁷. Only if the same TCN is identified in the future as staying illegally does the Administration at this point open a file for the TCN's expulsion, and always via the urgent procedure. From the first time that an irregularly staying TCN is identified and sanctioned with a fine (and advised to leave in up to 15 days), to the moment the same TCN is once again identified and detained, years may pass.

The problematic issue is that in a significant number of cases the personal circumstances of the TCN may in that time have altered radically. However, these new personal circumstances are not taken into account. This application of the Return Directive could be against the CJEU jurisprudence that in Case C 249/13, *Khaled Boudjlida* has clearly established: “*Last, the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced*”⁴⁸

Although there seem to be only very few voluntary departures of irregularly staying TCNs in Spain, by contrast, there are programmes on assisted voluntary return funded by the Spanish Ministry of Employment and Social Security and EU funds. However, it is worth noting that assisted return is different from voluntary departure: migrants ask for assisted return, and NGOs need to select the cases according to the migrant's vulnerability. It has nothing to do with their legal or illegal status.

This said, it is hard to find a single judicial resolution which engages with the terms of voluntary departure. It is to be expected that after *Zaizoune*, judges will begin to monitor the application of Article 7 and will use administrative discretion when choosing between seven and 30 days.

A recent decision in Spain from the High Court of Murcia (22 June 2015) seems to have understood very quickly that after *Zaizoune* (that is, after the end of the possibility of sanction by fine rather than with the removal), the issue of the correct application of Article 7 of the Return Directive has acquired greater importance.

The High Court⁴⁹ states that on grounds of the *Zaizoune* judgment, in this new scenario where it is no longer possible to replace a removal from a national territory with a fine, it is crucial to grant voluntary departure to the irregularly staying TCN. In this case, as the TCN has not had the opportunity to voluntarily leave Spain, because the urgent procedure has been followed in order to decide his/her removal, the High Court rules that a return decision needs to be issued, establishing a period between seven and 30 days for voluntary departure.

It is to be expected that in the near future Spanish judges will develop jurisprudence on Article 7 of the Return Directive⁵⁰ and on the calibration of the period for voluntary departure. Until now the abuse of the urgent procedure (without voluntary departure) has barely received the attention of Spanish judges.

⁴⁷ In some cases, after paying the fine, the TCN manages to regularize his/her status according to *arraigo social* (social settlement, Article 124, 2 of Royal Decree 557/2011) which offers, when certain conditions are fulfilled, the possibility of obtaining a residence permit after three years of illegally remaining(i). The most important condition is to have received a job offer.

⁴⁸ Case C 249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* JUDGMENT OF THE COURT (Fifth Chamber)11 December 2014, paragraph 51.

⁴⁹ High Court of Murcia, num. 422/2015 of 22 June Roj: STSJ MU 1635/2015 - ECLI:ES:TSJMU:2015:1635

⁵⁰ As we were bringing this paper to a close, a Spanish Court decided that the Spanish Administration has failed to apply Article 7,1 of the Return Directive. In this case, Mrs Eloisa XXX, from Dominican Republic, was sanctioned by the Governmental Sub-delegate with an expulsion order and a three-year entry ban after removing her authorization to stay as *de facto* partner of a Spanish national. Contentious-Administrative Court nº 1 Ourense (Galicia) Decision 141/2015 of 13 July.