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2.5.9 Applying the Return Directive

The CJEU held that legislation in Hungary does not comply with EU law as it allows the removal of illegally-staying third-country nationals without complying with the substantive and procedural safeguards stipulated in the Return Directive. In *European Commission* v *Hungary* (C-808/18), the authorities had forcibly removed third-country nationals to a strip of land devoid of any infrastructure, leaving them with no other option but to return to Serbia. The court noted that a forced removal is to take place only as a last resort. The CJEU dismissed Hungary's claim that the TFEU, Article 72, allowed the removal as a derogation from the substantive and procedural safeguards established by the Return Directive.

The CJEU also interpreted the Return Directive in two cases concerning the withdrawal of social assistance and the return of third-country nationals suffering from serious illnesses. In both cases, *LM* (C?402/19) and *B.* (C?233/19), the CJEU ruled that the enforcement of the return decision should not expose the third-country national suffering from a serious illness to a serious risk of grave and irreversible deterioration of their health. In both cases the CJEU noted its previous finding in the *Gnandi* case, that an appeal must have an automatic suspensive effect when the enforcement of a return decision would entail a risk of *refoulement*.

In addition, several cases pronounced by the CJEU concerned the interpretation of the Return Directive in proceedings on the removal of illegally-staying third-country nationals and outlined principles which are relevant to former applicants for international protection who are subject to return procedures. In *WM* (C-18/19), the CJEU held that the Return Directive, Article 16(1) does not preclude national legislation allowing detention in prison, separately from ordinary detainees, of illegally-staying third-country nationals who will be returned and who pose a genuine, present and sufficiently serious threat to the fundamental interests of society or the internal or external security of the Member State.

In *MO* (C?568/19), the CJEU ruled on the conditions for the removal of an illegally-staying third-country national in Spain. The CJEU noted that the competent national authority may not rely directly on the provisions of the Return Directive in order to adopt a return decision and, where national legislation provides for either a fine or removal in the case of an illegal stay, removal may be enforced only if there are aggravating circumstances concerning the national in addition to the illegal stay.

In *JZ* (C-806/18), the CJEU ruled on an entry ban in appeal proceedings brought by a third-country national who was sentenced to 2 months imprisonment for breaching an order to leave the Netherlands. The CJEU held that the Return Directive, Article 11 does not preclude national legislation permitting the imprisonment of a third-country national who was the subject of a return procedure and who is staying illegally with no justified ground for non-return. The CJEU highlighted that the entry ban produces effects only from the moment the individual leaves the territory of the Member State. If the third-country national has not left the territory, a punishment can be imposed only on the basis of an initial illegal stay, not on the basis of breaching an entry ban, and the national criminal legislation must be sufficiently accessible, precise and foreseeable.

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