

Fundamental Rights Applicable in the Management Of Illegal Migration – A European Perspective

Silvia Ioana Lobonțiu¹

Abstract: Fundamental rights are universal and indivisible, applying equally to all; in the context of forced return operations, only specific aspects of them are applicable and not their all encompassing form. At European level, a mechanism has been set up to monitor the respect of fundamental rights during forced return operations, which contributes substantially to the protection of the rights of all persons involved in a return operation, be them returnees, escorts, observers, medical personnel, or others.

Keywords: illegal migration; migrant; return; fundamental rights; monitoring

1. Conceptual Delimitations in the Field of Illegal Migration Management

Between the mechanisms of illegal migration management, there can be spotted out besides the voluntary return and the assisted voluntary return, also the forced return / return under escort.

This article is centred exclusively on only one of the three dimensions of the return concept, namely, the forced return/return under escort.

The operational concept of forced return, could be globally defined as the it could be defined as the returning a person to the country of origin, to a country of transit or a third country, an action based on an act of an administrative or judicial nature (EMN Glossary, 2014, p. 31)

As a legal term, forced return does not enjoy the existence of a clear definition when it comes to European legislation. The Return Directive reffers to the concept of return generally, which, it also defines within article 3, (3) as being the process of

¹ PhD Candidate, Legal Research Institute "Acad. Andrei Rădulescu" of Romanian Academy, Romania, Address: Calea 13 Septembrie no. 13, corp B, et. 4, sector 5, Bucharest 050711, Tel.: +4021/318 81 30, Fax: +4021/318 24 53, Corresponding author: silvia_lobontiu@yahoo.com.

returning a person who has the nationality of a third state, to the country of origin, transit or other third country as a result of complying, voluntarily or not, with the obligation to return.

The notion of forced return operation was defined under the auspices of a European-funded project implemented by the International Center for Migration Policy and Development, the European Agency for Fundamental Rights and FRONTEX, in 2015

According to „Framework for a European Pool of Forced Return Monitors” the above mentioned term refers to the transportation of third country nationals who are subject to a return decision, transportation which can be carried out by land, sea, or air. These operations are organized at EU member states level, by the police and / or government structures with competence in the field of migration.

Although we shall not focus on providing an exhaustive definition of the types of forced return operations, we consider it necessary to specify them, in order to be able to properly contextualize how the theme of the article. Thus, at European level, (under the coordination of the European Border Police and Coast Guard Agency (FRONTEX), return operations can be organized on commercial flights, national return operations (NRO), joint return operations (JRO)) and collection return operations(CRO).

2. Monitoring of Forced Returns

According to the provisions of art. 29 (1) of *EBCG Regulation nr. 1624/2016*, after consulting the fundamental rights officer, a pool of monitors for forced returns shall be set up at the agency level, monitors who shall come from the competent monitoring bodies in each Member State. In order to be part of the agency's pool, the monitors must be nominated by the Member State from which they come and subsequently receive the training necessary to carry out this type of activity.

The monitoring bodies vary from state to state, but we can distinguish three categories - non-governmental organizations (Austria, Romania), national prevention mechanisms (Bulgaria, Croatia), government structures (The Netherlands, Belgium, Portugal, Hungary - in fact the only state in which the monitoring is carried out by specially designated prosecutors within the central structure of the Prosecutor's Office).

The monitoring activity *per se* and the role of the monitor in a return operation organized by FRONTEX, have led to some controversies, especially from the actors directly involved. We use this opportunity precisely to point out the basic aspects of this type of activity in the hope that we shall bring some clarifications that might be welcome in some environments.

The monitor's role, contrary to what one might think is to ensure that any violation of fundamental rights, as well as any potential infringement, is reported. Monitoring contributes substantially to the protection of the rights of all persons involved in a return operation, ensuring transparency both by the presence of the monitor and, subsequently, by the report it draws up after each mission. The monitor's report may support the case of a returned person, who was subjected to improper treatment during the operation, but may also serve as evidence in the case of unfounded allegations against the escort officers. At the same time, the monitors also have the quality of good practice vectors, they aim not only to respect the fundamental rights during the operation, but also to identify those practices that can be disseminated to other organizing states. One final clarification regarding the role and the activity of the monitor – he/she has the role of observer without any power of intervention.

Basically, the monitoring activity is nothing more than a tool that serves the application of fundamental rights.

3. Fundamental Rights Applicable in the Field of Return

Fundamental rights have a universal and indivisible character, applying to each individual. A number of rights, applicable to third-party nationals to be returned, are mainly considered during monitoring. Most often, only specific aspects of fundamental rights and not their all encompassing depth is applicable in the case of a return operation.

In the field of return, one of the most important principles that must be followed is the one referring to *non-refoulement*, a principle which, moreover, the states have the obligation to guarantee, without any derogation or exception being allowed. This is reflected not only in the Convention on the Status of Refugees, but also in the primary European legislation (Articles 18 and 19 of the European Charter of Fundamental Rights and Article 78 of the Treaty on the Functioning of the EU), as well as in the secondary legislation on borders, asylum, migration and return.

The presentation below includes rights that, in one way or another, are interconnected with forced return operations; taking into account the principle of the indivisibility of fundamental rights, we reiterate that all rights apply equally to all.

The right to life, the right to liberty and security and the prohibition of torture and inhuman and degrading treatment are also closely linked to the implementation of a forced return operation, in relation to the observance of the principles regarding the application of force and means of coercion. During a return operation, escort officers may be required to use force and / or apply coercion; that is why, from the perspective of monitoring the observance of fundamental rights, it is imperative that both those who apply force and those who observe such a situation should take into account the limitations of the triad legality-necessity-proportionality. Another crucial factor to keep in mind is that the use of force must be a measure of last resort, after all other means, mechanisms that could help stop the escalation of a potential conflict have been used.

In this context, we can only reiterate that the right to life must be effectively guaranteed and protected even if it would involve stopping an operation, or stopping the removal of a particular person from the territory.

Regarding the right to liberty, a specific aspect of it is taken into account when restrictive means are used - in certain cases, they must be used, but for the monitor it is important to observe how they are applied.

The right to dignity must be guaranteed during all phases of return; returnees must have appropriate clothing and footwear, be assisted if the situation requires it, be able to carry their personal belongings in bags or other appropriate luggage; for women and children it is important to have access to specific hygiene products. Respecting dignity is also associated with the possible use of force and especially means of restraint - in the case of families, if handcuffs are applied to one of the parents it is desirable this action not to be carried out in front of children, especially if they are minors. The European Committee for the Prevention of Torture retains in its reports situations in which a diaper was applied to an adult returnee over his clothing, a fact considered to be a potential violation of the person's dignity.

The principle of non-discrimination is enshrined in the provisions of art. 21 of the European Charter of Fundamental Rights and of art. 14 of the European Convention on Human Rights. It is applicable throughout a forced return operation, none of the returnees can be subjected to discrimination on the grounds of gender, race or ethnic origin, language, religion, nationality, age, sexual orientation or other status.

Freedom of thought, conscience and religion - within a return operation it is unlikely to find an interval that coincides with the need of a returned person to practice his or her religion; in this regard, it is important for the monitor to turn his/her attention to the communication skills of the escorts, how they interact with the returnee, since a proper communication facilitates in essence the respect of these principles and the identification, when possible, of a solution that allows the migrant to exercise the above-mentioned rights.

In the context of forced return, access to information (in a language that the returned person understands) regarding the entire operation, the possibility of filing a complaint about possible improper treatment by virtue of the right to good administration and the right to an effective remedy is monitored.

In order to protect the right to property, it is necessary to take into account that the returnees have the possibility to recover, or to take their essential goods, to carry their luggage properly (they must be labeled and / or numbered so that at the destination to ensure that each returned person receives their luggage). Goods such as jewelry, phones, laptops as well as the cash money the migrant holds must be placed in sealed packaging; during the operation they will be kept by the escort officers who will return them to the migrant before the handover procedure.

Equally, access to food and water both before boarding and during travel is carefully monitored, as it responds to basic needs of all persons involved in the return operation. A desirable practice in this regard is to offer the same type of food to all participants, with the exception of those who have certain restrictions of a medical, or religious nature.

Access to health care implies, first of all, that each returnee will receive, after a thorough medical consultation carried out prior to the actual return, a certificate stating that he/she is fit to travel. During the operation, the presence of qualified medical personnel who can provide support when the situation requires it is mandatory. Greater attention should be paid in cases where returnees have mental health issues and/ or distress and the medication needed for each such patient should not be lacking; it is desirable to ensure that the person concerned will have access to appropriate medical treatment / will be able to continue his / her treatment after the arrival in the country of origin.

The rights of vulnerable people take mostly the form of a proactive approach both in the case of the monitor and the organizers of the return operation; in the specific conditions of such an operation, it is important that the persons identified as having

a vulnerability, be it caused by disabilities, age, medical situation, or sexual orientation, or social origin, receive the most appropriate support.

Regarding family unity - when possible, given the specificity of a forced return operation, it is desirable for families to be placed together, in a space separate from the other persons returned; only in exceptional cases, when a family member has an aggressive behavior that can progress to become violent and needs handcuffing, will he be removed from his family. The best interest of the child must also be given priority in the case of forced return operations; we mention in this regard that unaccompanied minors cannot be returned under the auspices of an operation coordinated by FRONTEX.

4. Short systematization of legal sources and instruments with regard to the respect of fundamental rights in the field of return

We mention that the list proposed below is not an exhaustive one, as it takes into consideration mainly European primary and secondary sources.

Treatment with dignity/prohibition of torture/illtreatment:

- a) Return Directive (RD) Art. 8(4);
- b) New Schengen Borders Code (SBC) Art. 6;
- c) Charter of Fundamental Rights (CFR) Arts. 1, 4

Non-refoulement principle:

- a) Return Directive (RD) Arts. 4(2), 4(4) (b), 5, 9(1) (a) and recitals 8 and 9;
- b) New Schengen Borders Code SBC Arts. 3 (b) and 4;
- c) European Border and Coast Guard (EBCG) Regulation Arts. 14(2), 28(3), 34 and 54;
- d) Charter of Fundamental Rights CFR Arts. 4, 18 and 19

Legality and proportionality of law enforcement measures including use of force:

- a) Return Directive (RD) recital 13 and Art. 8 (4);
- b) New Schengen Borders Code recital 7 and Art. 7;
- c) Decision 2004/573 Annex paras. 2.1 (f) and 3.2;

- d) Charter of Fundamental Rights CFR Arts. 1, 2, 4, and 6

Conditions in detention facilities:

- a) Return Directive (RD) Arts. 16 and 17 (for children and families);
- b) Charter of Fundamental Rights Arts. 1 and 4

Right to property:

- a) Return Directive (RD) – recitals 22, 24, Art.1;
- b) New Schengen Borders Code – Arts. 3(b), 4, 5(3);
- c) European Convention of Human Rights – Protocol No. 1 Art.1

Children's rights:

- a) Return Directive (RD) – Arts.5, 7 (2), 10, 14, 17 and recital 22
- b) New Schengen Borders Code – Art. 20 and Annex VII
- c) Charter of Fundamental Rights – Art.24
- d) Treaty on the Functioning of the European Union – Art.3

Procedural safeguards:

- a) Return Directive (RD) – Arts. 12, 13, 14, 15(2)-(3) and recital 11;
- b) New Schengen Borders Code – Art. 14, Annex V – A
- c) Charter of Fundamental Rights Arts. 41 and art. 47

Victims of trafficking in human beings:

- a) Return Directive (RD) art. 11 (3)
- b) Anti-Trafficking Directive (2011/36/EU) recital 25 and Art. 18 (3)

Protection of personal data:

- a) SIS Regulation II 1987/2006
- b) Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data 95/46/EC
- c) Asylum Procedures Directive 2013/32/EU – art. 48 (confidentiality)
- d) Treaty on the Functioning of the European Union – art. 8

Bibliography

Primary sources:

Treaty on the Functioning of the European Union

EU Charter of Fundamental Rights

European Convention of Human Rights

Return Directive 115/2008/EC/RD

Asylum Procedures Directive

Noul Cod Schengen privind frontierele Reg.(EU) 2016/399 (SBC)

European Border and Coast Guard (EBCG) Regulation 1624/2016

Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data 95/46/EC

Anti-Trafficking Directive (2011/36/EU)

Secondary sources – EU:

1. Decision 2004/573/EC
2. Case law of the Court of Justice of the EU (CJEU)
3. Case law of the European Court of Human Rights (ECtHR)

Other documents and international standards which are relevant but not binding:

1. Revised Return Handbook– 2017
2. FRONTEX Code of Conduct– 2013
3. CoE Twenty Guidelines on Forced Return– 2005
4. Committee for the Prevention of Torture (CPT)

Online sources:

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