



## [Netherlands - Supreme Court,](#) [ECLI:NL:HR:2013:BY3151](#)

The applicant faces imprisonment for presence in the Netherlands, after he has been informed that a "declaration of undesirability" has been issued against him. His statelessness claim fails in Court, as his statelessness cannot be plausibly assumed. However, the Court does find that the decision to detain has to be better motivated in light of the EU Returns Directive, ensuring that the processes prescribed by the Directive have been completed.

**Case name (in original language) :** ECLI:NL:HR:2013:BY3151

**Case status:** Decided

**Case number:** ECLI:NL:HR:2013:BY3151

**Citation:**

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BY3151>

**Date of decision:** 21/05/2013

**State:** Netherlands

**Court / UN Treaty Body:** Supreme Court

**Language(s) the decision is available in:** Dutch

**Applicant's country of residence:** Netherlands

**Legal instruments:** European Union law

**Key aspects:** Burden of proof, Country of return, Deportation and removal, Detention, Standard of proof

**Relevant Legislative Provisions:**

EU Returns Directive

### **Facts**

The applicant was born in 1964, and has been living in the Netherlands since 1994. His nationality has been recorded sometimes as Algerian, and sometimes as French. He has been regularly in trouble with the criminal justice system since 1995, which

eventually lead to declaring him an "undesirable foreigner" in 2004. This declaration entails an obligation to immediately leave the Netherlands, and presence in the Netherlands is criminalised after such declaration has been made known to the affected person.

### **Legal arguments by the applicant**

The defendant argued that the request of the prosecution to impose a prison sentence on him for failing his obligation to leave the Netherlands is inadmissible as he is stateless and is not able to leave the Netherlands. Secondly, the defendant argued that the decision to impose a prison sentence has not provided sufficient reasons of compliance with the EU Returns Directive.

### **Decision & Reasoning**

With regard to the claim of inadmissibility of criminal responsibility for presence in the Netherlands, the Court reasoned as follows:

"4.3. Art. 61 of the Law on Foreigners from 2000 obliges a foreigner who does not enjoy legal residence in the Netherlands to leave the Netherlands on his or her own. This means that a foreigner who has been declared undesirable has a legal obligation to leave the country, with the only exception of those foreigners in whose case it is plausible to assume that they are unable, due to no fault of their own, obtain travel documents."

"4.4. The [lower instance] Court has based its rejection of the defendants arguments on the inadmissibility of the prison sentence on its conclusion that it has not been made plausible that the defendant is stateless, and has made serious effort to leave the Netherlands or obtain identity documents. This conclusion is adequately motivated. Thereby the Supreme Court takes into account that the evidence suggests that the defendant was uncooperative during the interviews, and that he has not made efforts to effectuate his departure from the Netherlands."

With regard to insufficient motivation of compatibility with EU law, the Court reasoned as follows:

"4.7. The Supreme Court deduces from the case law of the Court of Justice referred to above in para 3.3 [in particular, case of 28 April 2011, C-61/11 El Dridi v. Italy, where articles 15 and 16 of the Returns Directive were interpreted, case of 6

December 2011, C-329/11 Achughbabian v. France; and case of 6 December 2012, C-430/11 Md Sagor v. Italy] that the Return Directive does not preclude that on the basis of art. 197 (of the former) Criminal Code a prison sentence is imposed on a third-country national declared an undesirable alien within the meaning of art. 3, first paragraph, of the Directive, in case the return procedure provided for in that Directive has already been applied, and who is illegally staying in the Netherlands without a valid reason not to return. However, imposing an unconditional prison sentence on such a third-country national is contrary to the Directive if the steps of the return procedure laid down in the Directive have not yet been completed, considering that the imposition of the sentence can endanger the achievement of the objective of this Directive, in particular the implementation of an effective goal-focussed removal and return policy of illegally staying third-country nationals. This means that the judge who imposes an unconditional prison sentence for acting contrary to art. 197 (of the former) Criminal Code must ensure that the steps of the return procedure have been completed, and must motivate this in the decision."

"4.8.2 The mere statement of the Court in response to the defence's references to ECJ case law that "a completely unconditional imprisonment ... constitutes an appropriate response" is not sufficient as reasoning. The Supreme Court takes into account that while the [the lower instance] court relied on the attitude of the defendant with regard to the intended termination of his stay in the Netherlands, it has not sufficiently discussed anything concerning the measures taken by the Dutch state to remove the suspect. The Court has thus left open the question of whether the steps of the return procedure required by the Directive have been completed. The defendant is thus justified in arguing that adequate reasons for sentencing have not been provided."

### **Decision documents**

[HogeRaad\\_25May2013.pdf](#)

### **Outcome**

The Court rejects the defendant's arguments that he cannot be criminally liable for his presence in the Netherlands on the basis of his statelessness, but accepts his arguments that the prison sentence cannot be imposed without sufficient justifications of compliance with the EU Return Directive. The authority has been ordered to take a new sufficiently motivated decision.

### **Caselaw cited**

Court of Justice of the European Union: C-61/11 El Dridi v. Italy, 28 April 2011; C-329/11 Achughbabian v. France, 6 December 2011; C-430/11 Md Sagor v. Italy, 6 December 2012