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Return Policies for Irregular Migrants and Rejected Asylum Seekers in Croatia

ABSTRACT: *Croatia acceded to the European Union in 2013 and the Schengen Area in 2023; it is located on the EU's external border and the so-called Western Balkans irregular migration route, one of the main corridors for migrants travelling to the EU. Over the years, Croatian authorities have developed national immigration policies, including various measures to prevent irregular migration on Croatian territory and protect state borders. Nonetheless, Croatia is still perceived as a transit country and a point of entry into the EU by many irregular migrants and refugees. This paper provides an overview of measures for the return of irregular migrants and rejected asylum seekers in Croatia. In addition to discussing the most relevant legislation regulating return policies, the paper presents available statistical data on the work of the relevant Croatian authorities (the Ministry of Interior and courts). It analyses current practices of administrative and constitutional courts, as well as some actions taken by the European Court of Human Rights against Croatia. It concludes with some general comments on Croatia's return policy. The analyses of legislation, mainly the Aliens Act and to some extent, the International and Temporary Protection Act, shows that Croatia has regulated in detail different measures within its return policies. This legislation aligns with the EU and Schengen acquis communautaire, and provides different safeguards for vulnerable groups of migrants. Legal remedies and judicial protection are guaranteed by the relevant law. However, in practice there are certain shortcomings that need to be addressed.*

KEYWORDS: return policies, irregular migrants, rejected asylum seekers, judicial practice, Croatia

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1. Introduction

The Republic of Croatia (RoC hereinafter) is located in Central and Southeast Europe; due to its geostrategic position between Central Europe, the Mediterranean, and the Balkans, it has been exposed to migration for centuries.

Croatia acceded to the EU in 2013 and the Schengen Area in 2023, and is situated on the external EU border and the so-called Western Balkans irregular migration route, one of the key corridors for migrants heading for the EU. According to Frontex, between January and April 2023 the Western Balkans route (which passes through Serbia and Bosnia, the main transit countries to Hungary and Croatia), was the second most active, with more than 22,500 detections, down 21 per cent from 2022.[1]

Over the years, Croatian authorities have formulated national immigration policies that encompass diverse measures aimed at preventing irregular migration within Croatian territory and safeguarding state borders.[2] However, for many irregular migrants and refugees, Croatia is still perceived as a transit country and an entry point to the EU and, more recently, the Schengen area. Accordingly, the number of asylum seekers is on the rise: in 2022, 12,872 people expressed their intention to apply for international protection, representing a dramatic increase compared to the 2021 figure of 3,039 people.[3] At the same time, between 2017 and 2022, there were many warnings and reports of international and national non-governmental organisations and other actors on push-backs of refugees and migrants from Croatia coupled with limited access to international protection.

Croatian legislation concerning migration and asylum has been developed following the EU and Schengen *acquis communautaire*; it is also based on the Constitution of the RoC.[4] According to Art. 26 of the Constitution, aliens are equal to Croatian citizens before the courts, governmental agencies, and other bodies vested with public authority. The Aliens Act is the main legislation that regulates penalties against irregular entry or stay of third-country nationals (TCNs hereinafter) in the RoC.[5] The asylum system is regulated by the International and Temporary Protection Act.[6]

1 Frontex: Detections in Central Mediterranean at record level and all the available bibliographical data, 2023.
2 See Lalić Novak and Giljević, 2022; Lalić Novak, 2022.
3 CLC, 2023, p. 16.
4 Constitution of the RoC, Official Gazette, Nos. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010 – consolidated text, 5/2014.
5 Aliens Act, Official Gazette, Nos. 133/2020, 114/2022, 151/2022.
6 International and Temporary Protection Act, Official Gazette, Nos. 70/2015, 127/2017, 33/2023.

The main authority for the overall implementation of migration and asylum policies is the Ministry of the Interior (MoI hereinafter).[7] It consists of the headquarters (the central level administration), the police administration (the regional level), and the police station (the local level). It is, however, a unified hierarchical organisation; lower organisational units are strictly subordinate towards the higher organisational units and the centralised organisation. The territorial organisation of the MoI is based on the so-called divergent organisational structure model, in which organisational units cover a particular territory; together, they cover the entire RoC territory. The MoI is in charge of implementing measures stipulated in the return policies related to irregular migrants and rejected asylum seekers.

Following an appeal to the High Administrative Court, the decisions made in the MoI's administrative procedures can be the subject of judicial review by one of the administrative courts established in 2012 in Zagreb, Split, Rijeka, and Osijek. If an administrative procedure is found to violate the constitutional rights of the individual, a constitutional complaint can be filed with the Constitutional Court.

This paper provides an overview of measures for the return of irregular migrants and rejected asylum seekers in Croatia. In addition to discussing the most relevant legislation that regulates return policies, the paper presents available statistical data about the work of relevant Croatian authorities (i.e. the MoI and courts). It analyses current practices of the administrative courts and Constitutional Court, as well as some actions taken by the European Court for Human Rights against Croatia. In its final part, the paper offers some concluding remarks regarding return policies in Croatia.

2. Legislation with regard to return policies and available statistical data

According to the Aliens Act, offences committed by a TCN with respect to irregular entry or stay in the RoC can be categorised into two groups depending on their severity. Offences are considered as either relatively minor, for which the fine is monetary, or more serious, for which the penalty is either a monetary fine or detention. A specific regime is in place for European Economic Area (EEA hereinafter) citizens and TCNs who are EU Blue Card holders and their family members.

In 2020, 2021, and 2022, there were 29,094, 17,404, and 50,624 cases, respectively, in which actions were taken against people who illegally crossed the state

7 For the development of civilian oversight of law enforcement from 2011 onwards, see Giljević, 2022.

border.[8] The top three countries of origin in 2021 were Afghanistan, whose nationals accounted for 28 per cent of all illegal border crossings, followed by Pakistan and Turkey.[9]

The Criminal Code[10] does not recognise criminal offences that explicitly address unlawful entry or stay of TCNs in Croatia. The Code, however, contains the offence of unlawful entry into, movement, or residence in the RoC, another EU Member State, or signatory of the Schengen Agreement, which refers to assisting in illegally entering, moving, or residing. There is no criminal offence if an individual (without any assistance) illegally enters, leaves, moves, or stays in the RoC, but it is a misdemeanour for which the person will be held accountable, as described previously.[11]

In 2021, a total of 957 criminal offences (relating to 885 offenders) were recorded under Art. 326 of the Criminal Code. The number of criminal offences in 2021 increased by 37.1 per cent compared to 2020, as a consequence of ending measures introduced to combat COVID-19. Most of the perpetrators were citizens of the RoC, followed by Bosnia and Herzegovina, Italy, Serbia, Ukraine, and Romania.[12]

TCNs who have no legal basis to stay in Croatia are considered to be staying illegally and must leave the country without delay.[13] The measures for compelling someone to leave the RoC include voluntary departure, a ban on entering and staying, the restriction of freedom of movement (detention) and less coercive measures, forced removal, and other measures prescribed by the Aliens Act. However, these measures do not apply to TCNs detected near the external state border during or immediately after unlawful entry, TCNs who are denied entry at a border crossing, or TCNs who are to be extradited on the basis of an international treaty.[14]

When measures are taken to compel an individual to leave Croatia, several safeguards must be respected. These include protection of the best interest of minors and the needs of other vulnerable persons (persons with disability; older adults; pregnant women; single parents with minor children; victims of trafficking; victims of torture, rape or other serious forms of psychological, physical, or sexual violence, including, for instance, victims of female genital mutilation; and

8 MoI statistical data, [Online] Available: https://mup.gov.hr/otvoreni-podaci/287522 (Accessed: 1 June 2023).
9 EMN, 2022.
10 Criminal Code, Official Gazette, Nos. 125/2011; 144/2012; 56/2015; 61/2015; 101/2017; 118/2018; 126/2019; 84/2021; 114/2022.
11 Art. 326.
12 EMN, 2021.
13 Art. 183, para. 2, Aliens Act.
14 Art. 181, paras. 1, 3, Aliens Act.

people with mental disabilities). TCNs' family circumstances and health are also considered.[15]

In the case of a TCN illegally residing in Croatia or whose legal stay is to be terminated by a decision of the national body, the MoI issues a decision on return with the following elements: a statement that the TCN is illegally residing or will cease to legally reside in Croatia, a time limit for leaving the EEA (voluntary departure), announcement of forced removal if the TCN does not voluntarily leave the EEA, and an obligation to report at the border crossing when he or she leaves Croatia or at the diplomatic mission or consular post of the RoC after leaving the EEA.[16] The MoI is not obliged to issue a return decision in the following cases: if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, if the TCN may be forcibly deported to another EEA Member State on the basis of a readmission agreement entered into force before 13 January 2009, or if the TCN poses a risk to public order or national security.[17] In these cases, the TCN will be expelled from Croatia. However, TCNs can also be expelled for illegally staying and crossing or attempting to cross the state border for other reasons.[18] The MoI may also issue a decision on the return or expulsion of TCNs illegally residing in the RoC or who have illegally crossed or attempted to cross the state border without conducting a misdemeanour procedure.[19]

There are two situations in which a TCN can be subjected to an expulsion order: illegal stay or increased social danger.[20] In the expulsion decision,[21] the MoI determines that a TCN is illegally residing or will cease to legally reside in Croatia, that he or she is required to leave the EEA, and the length of the ban on entry and stay in the EEA (such a ban on the grounds of illegal stay cannot be shorter than three months or longer than five years).[22] When deciding on expulsion, the MoI has to take into account vulnerability, length of residence in Croatia, age, health, family and economic connections, the level of social and cultural integration in Croatia, and ties to the country of origin.[23]

The structure and content of the form of the decisions on expulsion and return is stipulated by the Ordinance on the treatment of TCNs.[24] The forms are printed in Croatian, English, and at least five other languages most frequently

15 Art. 182, paras. 1, 2, Aliens Act.
16 Art. 184, Aliens Act.
17 Art. 185, para. 1, Aliens Act.
18 Art. 190, para. 1, Aliens Act.
19 Art. 186, para. 3, Aliens Act.
20 Art. 188 and 189, Aliens Act.
21 Art. 192, para. 1, Aliens Act.
22 In the case of expulsion on grounds of a threat to public policy, national security, and public health, the ban can be longer than 20 years (Art. 192, para. 5, Aliens Act).
23 Art. 191, para. 1, Aliens Act.
24 Ordinance on the treatment of TCNs, Official Gazette, No. 136/2021.

understood by TCNs staying illegally (to date, this has included Albanian, Arabic, Bengali, English, Farsi, French, Hindi, Pashto, Russian, Somalian, Spanish, Turkish, and Urdu). TCNs can be informed about the return procedure in the form of a written notice explaining the relevant information in a language he or she understands.

Voluntary departure, as a return measure, means compliance with the obligation to return within the time limit fixed for that purpose in the return decision. The length of the period for voluntary departure may not be shorter than seven days or longer than 30 days; it is determined with due regard to the specific circumstances of the individual case, taking into account, in particular, the prospect of return. The length of the period for voluntary departure might be shorter than seven days if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the TCN poses a risk to public order or national security.[25] In justified cases, the length of the period for voluntary return could be longer than 30 days but not longer than a year.[26]

Under certain conditions, the entry and stay ban may be revoked, or the period may be shortened if the grounds for expulsion ceased to exist, for humanitarian or national security reasons, or if it is in the interest of the RoC. If a TCN has expressed the intention to seek asylum, the decision on expulsion remains valid but will not be enforced until his or her status has been determined.[27]

Forced removal means the enforcement of the obligation to return, the deportation from Croatia under police supervision, regardless of the TCN's willingness to leave. The TCN will be deported in two situations: if he or she failed to leave the EEA or RoC within the deadline set out by a decision, or if the MoI is not obliged to issue a return decision. Deportation will be carried out to the TCN's country of origin, to the country of transit from which he or she arrived in Croatia, to another third country with his or her consent, or to another EEA Member State on the basis of a readmission agreement that entered into force before 13 January, 2009 or under the Dublin procedure. If a decision on return contains a voluntary return period, the TCN will not be deported before the expiry of that period, unless it is established that at the time of the enforcement of the decision, there was a risk of absconding or that such a risk emerged after the decision was issued. TCNs who are caught at the external border during or immediately after illegal entry will be returned to the country from which he or she came to Croatia.[28] The deportation procedure is also envisaged for TCNs against whom an EEA Member State has issued a legally effective decision on expulsion and/or

25 Art. 184 and 185, para. 1, Aliens Act.
26 Art. 188, Aliens Act.
27 Art. 194, Aliens Act.
28 Art. 203, Aliens Act.

return.[29] In Art. 207, the Aliens Act also proscribes safeguards regarding forced removal (prohibition against refoulement and specific procedures in the case of an unaccompanied minor, who can be deported only if it has been established that he or she shall be returned to a member of his or her family, a nominated guardian, or adequate reception facilities in the state of return). In both cases, deportation will be postponed; this also occurs if the court has postponed the enforcement of a decision on return or expulsion. Forced removal can be temporarily postponed if a TCN's identity has not been established, if transportation is impossible, if during execution serious difficulties would arise due to the TCN's health condition, or for any other reasons making it impossible to forcibly remove the TCN. Forced removal can be postponed for a maximum of one year.[30]

The RoC has more than 30 readmission agreements in place, including with the countries at its external borders on the so-called Western Balkans route. Official MoI data about the number of returns based on readmission agreements is not publicly available. However, according to available reports, 290 and 380 people were readmitted to Bosnia and Herzegovina in 2020 and 2021, respectively. The reason for the low number of returns is that Bosnia does not recognise records and notes containing statements of migrants and officials as evidence of irregular border crossing; it only accepts as evidence documents issued by the Bosnian authorities (e.g. certificates of expressed intention to seek asylum, entry stamp), which are difficult to collect. Accordingly, Bosnian authorities reject a number of requests for summary readmission (in which the deadline for acceptance is within 24 hours of receiving the request). This practice can be observed even in cases with 'indisputable evidence that migrants had stayed in Bosnia and Herzegovina before illegally crossing the border and arriving in the RoC, were found immediately after illegally crossing the border by mixed Croatian and Bosnian police patrols'. In such cases, migrants must be detained, 'which represents a risk for the possibility of return'. Similarly, Serbia does not accept migrants in relation to the summary readmission procedure.[31]

Detention is generally justified based on the fact that aliens have broken the law, either by entering the state's territory without authorisation or staying after they have been ordered to leave. A TCN may be arrested and detained for up to 48 hours if it is necessary to establish his or her identity, to establish the circumstances of his or her illegal crossing of the state border or illegal stay, to

29 Art. 205, Aliens Act.

30 Art. 224, Aliens Act.

31 *Annual Report of the Independent Mechanism of Monitoring the Actions of Police Officers of the Ministry of the Interior in the Area of Illegal Migration and International Protection, June 2021 – June 2022.* (July 2022) p. 34. [Online] Available at: https://www.hck.hr/UserDocsImages/dokumenti/Azil,%20migracije,%20trgovanje%20ljudima/Godisnje%20izvjesce%20Nezavisnog%20mehanizma%20nadzora_1%20srpnja%202022.pdf?vel=2086968 (Accessed: 7 June 2023).

carry out forced removal, or if there is a risk that the TCN may abscond. Under certain circumstances, detention can be extended for a maximum of 24 hours.[32]

TCNs can only be held in a reception centre for aliens (closed centre) for as short a period as possible and only as long as removal arrangements are in progress and have been executed with due diligence.[33] TCNs can be detained for up to six months if there is a risk they may not comply with the obligation to leave the EEA or the RoC and only if the same purpose cannot be achieved by applying less coercive measures. Detention may be extended by not more than 12 months if the TCN has refused to provide personal or other information and documents required for forced removal, has provided false information, has prevented or in some other way delayed forced removal, or if it is justifiably expected to receive travel and other documents required for forced removal which were requested from another state.[34] The legislation allows for the detention of children, including unaccompanied children, as a measure of last resort and for the shortest possible time.

In 2022, a total of 905 aliens were detained in the Reception Centre for Aliens in Ježevo.[35] The most frequent countries of origin included Turkey (490), Afghanistan (71), India (64), Burundi (45), and China (41).[36] According to the 2019 report of the Special Representative on Migration and Refugees, TCNs detained in Ježevo lacked access to legal assistance or interpreters and had not been apprised of the reason for their detention. Detainees were not aware of their rights to have a lawyer or to appeal to a court against the detention decision.[37]

In order to enforce return, the MoI can impose less coercive measures than detention, including deposit of travel documents, travel papers, and travel tickets; deposit of certain financial funds; imposing an obligation to stay at particular address of accommodation; and requiring regular reporting to a police station at a particular time.[38] Although there are no absolute maximum time limits foreseen for the application of less coercive measures in the Aliens Act, it can be concluded that such measures may be imposed as long as and to the extent that they can still be considered a 'necessary measure' to enforce return.

In regard to asylum seekers, the MoI may grant a person asylum or subsidiary protection. It may also reject an application if the asylum seeker does not meet the conditions for asylum or subsidiary protection, if the conditions are met for exclusion, or as manifestly unfounded if the asylum seeker clearly does not meet

32 Art. 211, Aliens Act.
33 Art. 212, Aliens Act.
34 Art. 215, Aliens Act.
35 The Reception Centre for Aliens in Ježevo is used essentially as a pre-removal detention facility. In addition, two transit centres for irregular migrants were opened in Trilj and Tovarnik in 2017, close to the Serbian and Bosnian borders.
36 MoI statistical data, https://mup.gov.hr/otvoreni-podaci/287522 (Accessed: 1 June 2023).
37 Council of Europe, 2019, p. 33.
38 Art. 213, Aliens Act.

the conditions for asylum or subsidiary protection; there are also circumstances in which the MoI can make an accelerated decision.[39] Following a decision to reject an application or on the cessation or revocation of international protection, a subsequent decision will be rendered regarding a measure to ensure return pursuant to the provisions of the Aliens Act. When prescribing measures to ensure return of rejected asylum seekers, priority should be given to voluntary departure, unless the application was dismissed as clearly unfounded or if a subsequent application is dismissed as inadmissible.[40] If a rejected asylum seeker does not comply with the return decision, he or she will be considered an alien residing illegally in the RoC.

The freedom of movement of asylum seekers and aliens in transit is guaranteed by the International and Temporary Protection Act. According to Art. 54, freedom of movement can be restricted if, on the basis of all the facts and circumstances of the specific case, such restriction is deemed to be necessary for the purpose of: (1) establishing the facts and circumstances on which the application for international protection is based, and which cannot be established without restriction of movement, in particular if there is deemed a risk of flight; (2) establishing and verifying identity or citizenship; (3) protecting national security or public order; or (4) preventing abuse of the asylum procedure.[41]

3. Legal remedies in the case of expulsion and detention

Decisions of competent authorities concerning the refusal of the right of aliens to enter, stay, or reside are, by their legal nature, administrative acts and therefore fall under the scope of the General Administrative Procedure Act[42] (a general law applicable to all administrative proceedings). Specialised laws may regulate some procedural issues differently from the Act, but only under strictly regulated conditions. Only particular issues of administrative procedure can be regulated differently, and specific regulation is necessary for proceedings in a particular administrative area; such regulation cannot be contrary to the basic provisions and purpose of the General Administrative Procedure Act.[43] Therefore, the General Administrative Procedure Act must be respected and used as a subsidiary source

39 Art. 38, International and Temporary Protection Act.
40 Art. 37, International and Temporary Protection Act.
41 The following measures can be applied: (1) prohibition of movement outside the Reception Centre for asylum seekers, (2) prohibition of movement outside a specific area, (3) appearance in person at the Reception Centre at a specific time, (4) handing over travel documents or tickets for deposit at the Reception Centre, and (5) accommodation in the reception centre for aliens (Art. 54, para. 5, International and Temporary Protection Act).
42 General Administrative Procedure Act, Official Gazette, Nos. 47/2009; 110/2021.
43 Art. 3, para. 1.

of law in all issues which are not regulated by specialised legislation in the field of migration and asylum.

The right to legal remedy is one of the basic legal principles of the General Administrative Procedure Act, which stipulates the appeal and the complaint as the main legal remedies in relation to administrative procedure.[44] An appeal may be filed against a decision on the complaint made by the first instance body, whilst an administrative dispute may be instituted against a decision on the complaint made by the body of the second instance. If there is no second instance body, an administrative dispute may be instituted against the decision on the complaint.[45]

In cases in which there is no appeal against the administrative decision, it is possible to initiate an administrative dispute before the administrative court. Such a claim will postpone the enforcement of the administrative decision (though only if prescribed by the relevant legislation). In addition, the court may decide that the claim will postpone the enforcement of the decision if its enforcement would cause damage to a claimant that could be difficult to repair and if the postponement is not contrary to the public interest.[46]

Any breaches of human rights guaranteed by the Croatian Constitution fall under the jurisdiction of the Constitutional Court. With regards to constitutional complaints against individual decisions of state bodies, the Court decides whether these decisions violate human rights and fundamental freedoms. Citizens and legal entities may initiate a proceeding before the Constitutional Court only after exhausting ordinary legal remedies in the allotted period of 30 days.

No appeal is allowed against decisions on return or expulsion, but TCNs can initiate an administrative dispute;[47] this also applies to decisions on

44 Art. 12.

45 For more about extraordinary legal remedies (*ex officio* interventions), see Koprić et al. 2016. Art. 122, para. 4.

46 Art. 26, Administrative Disputes Act; Official Gazette, Nos. 20/2010; 143/2012; 152/2014; 94/2016; 29/2017; 110/2021.

47 The Aliens Act also stipulates that an administrative dispute can be initiated in the following cases: against a ban on entry and stay or the revocation of a ban on entry and stay if the TCN has a residence permit in another EEA Member State and a decision on expulsion has been issued (Art. 192, para. 4); in response to a negative decision on an application for revocation or shortening of the period of a ban on entry and stay (Art. 194, para. 4); on the forced removal of a TCN who has been granted international protection in another EEA Member State, or forced removal before the expiration of the period for voluntary departure (Art. 203, para. 8); if an EEA Member State has issued a legally effective decision on expulsion against the TCN (Art. 205); and in relation to extending the time limit for voluntary return (Art. 188). Under certain conditions, a TCN is granted the right to free legal assistance (legal advice and assistance in drafting a legal action and representation before the administrative court), but this assistance is limited to TCNs born in the RoC, TCNs staying in the RoC for an uninterrupted period of at least one year, TCNs who have a close family member with long-term residence or permanent stay in the RoC (or who is a Croatian citizen), and TCNs who are vulnerable people (Art. 198). Art. 187 and 193, Aliens Act.

accommodation in the centre (detention) and on extending such detention. The MoI must send a case file on detention to the administrative court immediately after the decision has been issued. The court must decide whether an alien is to be released from the centre within ten days from the delivery of the case file. The administrative court may annul or confirm the decision on extension of detention within five days of delivery of the case file. The obligation of the court to hold an oral hearing with the TCN has been narrowed and now only applies to minors.[48] An appeal against the decision to the High Administrative Court of the RoC is allowed. The appeal postpones the execution of the contested verdict. An administrative dispute can be initiated against the decision to apply less coercive measures.[49] An additional safeguard is provided in the form of regular *ex officio* judicial review of the lawfulness of extension of detention decisions. The MoI has to deliver to the administrative court the case file on detention at the latest ten days before the expiration of the first detention and every three months from the day of extension of detention. The administrative court has to decide, within ten days of delivery of the case file, whether an alien is to be released from the centre.[50]

In these cases, as the dispute was initiated by the delivery of the case files by the MoI to the administrative court, rather than by the filing of a lawsuit, it is considered a quasi-administrative dispute.[51] This form of judicial control over the work of the administration differs from a standard administrative dispute as follows:

(1) it is initiated *ex officio*, without a lawsuit, i.e. the addressee of the act cannot challenge the act independently, but the body that adopted the act only initiates the procedure for assessing its legality; (2) there are no parties (plaintiff, defendant and interested persons); (3) as a rule, there is no oral hearing (except in the case of minors); (4) a number of rules of the General Administrative Procedure Act[52] do not apply (on the submission of a claim to an answer, the principle of a party's statement, the principle of helping an ignorant party, the party's right to representation, etc.) and (5) it is not possible to challenge the court's decision.[53]

In 2022, the judicial review of decisions on restrictions of the freedom of movement of applicants for international protection and aliens in transfer was carried out by the Administrative Court in Zagreb, which assessed 40 decisions; 27 cases were rejected (subject remained detained), ten were adopted (subject was released from detention), one was adopted and referred back to the MoI procedure,

48 Art. 216, Aliens Act.
49 Art. 213, para. 4, Aliens Act.
50 Art. 216, paras. 5 and 8, Aliens Act.
51 This opinion is agreed upon by prominent authors in the field of administrative law; see: Šikić, 2019; Staničić, Britvić Vetma, and Horvat, 2017; Staničić and Horvat, 2020; Čeko Đanić and Held, 2019.
52 General Administrative Procedure Act, Official Gazette, Nos. 47/2009; 110/2021.
53 Staničić and Horvat, 2020, p. 17.

while two cases were transferred to another court. The average duration of these procedures was 38 days. In four cases, the High Administrative Court decided on appeals against administrative court decisions in the procedure of restriction of movement by accommodation in detention centres. In all cases, the appeals were rejected.[54]

A similar situation was observed in previous years. According to available analysis, between 2012 and 2020 there were a total of 1,959 decisions on detention by all (first instance) administrative courts, of which 1,743 (88.97%) confirmed the MoI decision.[55]

4. Practice of courts with respect to return policies in Croatia

■ *4.1. Practice of administrative courts*

In this paper, the practice of Croatian administrative courts with respect to return policies are analysed based on the available decisions in the official database of the Supreme Court.[56] Due to the fact that not all decisions are publicly available, quantitative analysis cannot be performed. Instead, typical decisions are presented to see how courts decide in cases of expulsion and the detention of migrants.

This paper's database research was conducted using the key legislation (the Aliens Act) and the relevant articles that regulate the possibility of initiating administrative disputes against the MoI's administrative decisions on expulsion or detention (described in the previous section). According to the research, there were no available decisions relating to return,[57] application for revocation or shortening of the period of the ban on entry and stay,[58] or on extending the time limit for voluntary return.[59]

A decision was available regarding a dispute against a decision on expulsion[60] and a ban on entry and stay.[61] The Administrative Court in Rijeka confirmed the MoI's administrative decision stating that:

> Since the decisive facts are not in dispute, the court did not consider further evidence in the dispute, including the evidence proposed by the plaintiff in the lawsuit about the circumstances of his life in RoC

54 CLC, 2023.
55 Staničić and Horvat, 2020, p. 18.
56 For the judicial practice, see the database available at https://sudskapraksa.csp.vsrh.hr/overview (Accessed 20 May 2023).
57 Art. 187.
58 Art. 194.
59 Art. 188.
60 Art. 193.
61 Art. 192.

> because the facts that could be determined by this evidence are not decisive for making a decision in this dispute…
> Therefore, contrary to the plaintiff's claims, the requirements set forth in the Aliens Act for expelling the plaintiff were met because he did not leave the EEA or RoC within the deadline set by the decision, and in addition, the plaintiff in the meantime did not obtain a decision granting him a possible legal stay in the RoC.[62]

In the same case, the plaintiff submitted a proposal for determining the delayed effect of the lawsuit until the finalization of the administrative dispute, based on the following claims: he has no family in the country of origin, his entire family was living in EEA territory, he had established a trading company in the RoC where he had lived for the last two years, and he had a justified fear for his life in case of deportation to the country of origin.

Most of the available court practices refer to judicial reviews of the legality of decisions on the detention of migrants. In most cases, the courts confirmed the MoI's administrative decisions, typically stating that 'the decision maker correctly established the existence of circumstances that indicate the existence of a risk of avoiding the obligation to leave the EEA, that is, the RoC'.[63]

The following explanation was given in one of the analysed decisions of the Administrative Court in Osijek.

> Based on the analysis of the file, there is a risk of avoiding forced removal, which is indicated by the established circumstances … and which the alien himself expressly confirms in his statement. In addition, it cannot be convincingly concluded from the alien's behaviour that he would comply with less coercive measures, because he undoubtedly has no registered residence in Croatia, he crossed the state border illegally, and he himself declares that his intention is to go to France. From this follows a justified fear that he would try to illegally cross the state border again, since his goal is not to stay in Croatia but to achieve his ultimate goal of arriving in France by any means, without complying with legal procedures. The specific period of detention in which activities for the purpose of forced removal must be carried out with due care is considered by the court to be appropriate to the circumstances of the specific case and in accordance with the provisions of Article …[64]

62 Administrative Court in Rijeka, Decision No. Us I-259/2021-5 of 22 September 2021.
63 Administrative Court in Osijek, Decision No. Us I-106/2023-2 of 26 January 2023.
64 Administrative Court in Osijek, Decision No. Us I-188/2023-2 of 8 February 2023.

In another case, the same court confirmed a decision about detention, but disputed its length (up to six months):

> However, with regard to accommodation in the Centre, the Court considers that the duration of detention is too strict and vaguely determined, and that the principle of proportionality was not respected. The decision must determine the length of detention for the shortest possible time ... and the length of detention is set for a duration that must be determined and which, in light of all the circumstances, does not necessarily exceed the necessary time of detention. The shortest term of detention encourages the police service to act promptly and thus reduces the restriction of fundamental freedoms to the shortest possible time.[65]

In this and several similar cases, the Court determined the length of detention to be a maximum of two months, reserving that if subsequently, due to some new circumstances, it turned out that this period was insufficient, the MoI could extend the period of detention.

■ *4.2. Practice of the Constitutional Court*

This paper analyses the practice of the Constitutional Court with respect to return policies based on publicly available decisions in the official database of the Court.[66] According to a database search based on the key legislation (Aliens Act), the Court made four decisions in which it decided on the conformity of certain articles of the Act with the Constitution.

In one case,[67] the People's Ombudsman and two other applicants challenged Art. 5, para. 2 of the (valid at the time) Aliens Act[68] with respect to the Constitution. According to the Act, any explanation of a decision rejecting or terminating the residence of or expelling an alien on national security grounds will only specify legal provisions, and will not elaborate on the national security grounds that informed the decision (which in practice means that the Security and Intelligence Agency does not provide the MoI with a report on the security check

65 Administrative Court in Osijek, Decision No. Us I-157/2023-2 of 6 February 2023. See a similar explanation in, e.g. decisions of the Administrative Court in Osijek: Us I-67/2023-2; Us I-70/2023-2; Us I-65/2023-2 of 13 January 2023 and Us I-51/2023-2 of 10 January 2023.

66 https://sljeme.usud.hr/usud/praksaw.nsf (Accessed 29 May 2023).

67 Constitutional Court, Decision U-I-1007/2012 of 24 June 2020.

68 Aliens Ac, Official Gazette, Nos. 130/2011; 74/2013; 69/2017; 46/2018; 66/2019; 53/2020. The claim also challenged Art. 41 of the Security Vetting Act according to which the Security and Intelligence Agency, when performing security vetting for aliens who will reside or currently reside in the RoC or for people who are to gain Croatian citizenship, will submit only the opinion on the existence of any security impediments to the authority which submitted the request (Security Vetting Act, Official Gazette, Nos. 85/2008; 86/2012).

conducted with respect to an alien). With dissenting opinions of two judges, the Court rejected a request on its merits and found the proposal not granted, with the following reasoning: [69]

> [...] The very fact that a particular legal or individual measure implies limitations of a fundamental right enshrined in the Constitution does not automatically mean that this measure is also inconsistent with the Constitution. The Constitution explicitly allows for limitations of fundamental rights which meet the general condition of proportionality.
> The measure provided for in Article 5, para. 2 of the Aliens Act does not represent a violation of the fundamental right to effective legal or judicial protection, provided that the competent authorities in their procedures respect the specific requirements of proportionality with regard to the right of parties to effective legal protection. [...]
> The current legal framework, viewed as whole, guarantees courts the necessary powers to assess the legality and justifiability of the adopted opinion on the existence of a security impediment, and thus, within specific administrative disputes, ensures effective judicial protection to persons to whom administrative decisions on the right to stay in the territory of the RoC and the EU apply. [70]

In the second case,[71] the applicant considered that the provision of the Aliens Act was against the Constitution. Namely, that it was unconstitutional for the MoI, that is, the executive body and not the court, to decide to restrict the freedom of movement of a non-Croatian citizen (including detention measures in a closed centre). The Constitutional Court rejected the application.

The third case[72] disputed the conditions for temporary stay for a TCN who was the majority owner of a commercial company in the RoC; the Court rejected the request on its merits. The fourth case[73] was dismissed.

We now analyse the decision of the Constitutional Court relating to a return decision of the MoI and judicial review by administrative courts.[74] The MoI issued a return decision to an applicant from Sierra Leone stating (I) that he was obliged

69 This provision has been slightly changed in the Aliens Act currently in force, which states that decisions issued on the basis of the security check for reasons of national security will contain the legal provision and *any data which can be disclosed without jeopardising national security interests* (Art. 5, para. 2, Aliens Act).

70 In conformity with the recent case law of the Constitutional Court (U-III-2086/2016 from 13 March 2018 and U-I-1007/2012 and others from 24 June 2020)

71 Constitutional Court, Decision U-I-5695/2014 of 24 June 2020.

72 Constitutional Court, Decision No. U-I-6111/2012 of 9 October 2019.

73 Constitutional Court, Decision No. U-I-1067/2017 of 19 December 2017.

74 Constitutional Court, Decision No. U-III-2132/2018 of 19 September 2018.

to leave the EEA within 30 days, (II) that he was obliged to hand over the decision to the police officer at the border crossing when leaving the RoC, and (III) that if he did not comply with the decision, he would be forcibly removed. The Administrative Court in Zagreb and the High Administrative Court confirmed the MoI's decision. The applicant stated that the administrative procedure was conducted in contravention of his right to a fair trial, primarily in relation to the violation of his right to use his own language in the examination procedure, i.e. to use the free assistance of an interpreter in police proceedings. As the applicant had the opportunity to present his case before the Administrative Court in the presence of the attorney-at-law and an English-language interpreter, the Constitutional Court rejected the complaint with the following explanation:

> [...] taking it as undisputed that the MoI's decision, as well as the challenged judgments, expressly refers to relevant legal provisions and contains clear and well-argued reasons to issue a decision ordering the applicant, as an alien residing illegally in the RoC, to leave the EEA, the Constitutional Court determines that there are no reasons, especially not of a constitutional nature, which would call into question the decision and the judgments.

An interesting example of a decision[75] of the Constitutional Court regarding detention is found in the case M.H. and Others that ended with a judgement by the European Court of Human Rights[76] (see more in the next section). The applicants lodged two constitutional complaints in which they complained, inter alia, of the unlawfulness, disproportionality, and inadequate conditions of their placement in the Transit detention centre close to the border with Serbia, and that they had not been able to challenge their detention, while the Administrative Court had decided on their case only after they had already spent two months in detention. The Constitutional Court held that the conditions of their placement in the Tovarnik Centre had not been in breach of Art. 3 of the European Convention on Human Rights, as it had been equipped for accommodating families. Even though the applicants had suffered as a result of certain stressful events, their placement in the Centre could not have caused them additional stress with particularly traumatic consequences. The Constitutional Court further held that there had been no breach of Art. 5 of the Convention. The Court held that although the applicants had been deprived of their liberty during the proceedings to establish their identity and citizenship, the circumstances on which they had based their application for international protection could not have otherwise been established, in particular with regard to the risk of flight. The applicants had been informed about the reasons for the

75 Constitutional Court, U-IIIBi-1385/2018 of 18 December 2018.
76 *M.H. and Others v. Croatia*, Application Nos. 15670/18 and 43115/18, 18 November 2021.

deprivation of their liberty and had been represented by a lawyer. The Administrative Court and the High Administrative Court had provided relevant and sufficient reasons for their decisions upholding the applicants' first, second, and fourth deprivation of liberty.[77]

■ *4.3. Practice of the European Court for Human Rights against Croatia*

The European Court for Human Rights made two interesting decisions that went against Croatia; the abovementioned *M.H. and Others v. Croatia* and *Daraibou v. Croatia*.[78]

The first case involved the death of an Afghan six-year-old child who was hit by a train after being ordered by the Croatian authorities to return to Serbia via a railway track after allegedly being refused asylum. It also concerned, in particular, the detention of applicants who had sought international protection. The Court found that the investigation into the death was ineffective, that the detention of the children of the applicants was a form of ill-treatment, and that the decision on the detention of the applicants had not been dealt with diligently. It also argued that some of the applicants had been collectively expelled from Croatia and that the State had hindered the effective exercise of an applicants right to apply as an individual; this included restricting access to his lawyer. As the detention of children had lasted for a protracted period due to the domestic authorities' failure to act with the required expedition, it must have been perceived by the children as a never-ending situation, and could thus be sufficiently severe to engage Art. 3 of the European Convention on Human Rights. The European Court also found that Art. 5 had been violated, in regard to the possibility of using a less coercive alternative measure than detention; it criticised the protracted length of proceedings before the Administrative Courts concerning the applicants' asylum application and review of the lawfulness of their detention. The European Court also questioned the diligence of the authorities in this case and found that they had failed to take all the necessary steps to limit, as far as possible, the detention of the applicant's family.[79]

The second case involved a Moroccan migrant who, together with three other migrants, was detained at a police station in the vicinity of the border with Serbia. Another migrant was believed to have started a fire, killing three migrants and seriously injuring the applicant. Two police officers were responsible for surveillance and one was subjected to disciplinary sanctions, but no criminal proceedings were initiated. However, criminal proceedings against the applicant were initiated, which were stopped when the applicant was expelled to Morocco. The applicant complained of violations of Art. 2 of the European

77 Para. 46, *M.H. and Others v. Croatia.*

78 *Daraibou v. Croatia*, Application No. 84523/17, 17 January 2023.

79 For an analysis of the judgement in relation to the work of the border police, access to territory, and the collective expulsion of aliens see Staničić, 2022.

Convention, stating that Croatia had not prevented the outbreak of the fire that caused serious life-threatening injuries and there had been no effective investigation of the incident. The Court found that the police station and its staff were clearly ill-prepared for fires and that, despite prompt investigation, some questions remained unanswered. In particular, there were shortcomings in the search and monitoring of detainees, who apparently managed to maintain possession of a cigarette lighter and burn their mattresses when they were left unsupervised. Furthermore, the authorities did not investigate the very serious allegations of the applicant regarding the adequateness of the premises and any fire precautions implemented. Moreover, they stated that no attempt had been made to determine whether a broader institutional failure was to blame; addressing such a failure could prevent similar tragedies from happening again in the future.

5. Conclusion

This paper has analysed legislation and available practices of Croatian authorities in regard to return policies targeting migrants and rejected asylum seekers who are determined to be present in the RoC illegally.

The analyses of legislation, mainly the Aliens Act and to some extent the International and Temporary Protection Act, has shown that Croatia has regulated in detail different measures within its return policies. The legislation is aligned with the EU and Schengen *acquis communautaire*. The legislation provides different safeguards for vulnerable groups of migrants. Legal remedies and judicial protection are guaranteed by the relevant law.

In terms of actual practices, the following shortcomings need to be addressed:

First, there is a lack of transparency in regard to the work of the MoI, as the main authority preventing irregular crossing of the state border and illegal stay in the country. The MoI should establish and regularly update a publicly available database with reliable, up-to-date, and comprehensive migration and border-protection statistics that would include the number of detected irregular crossings, the number of individuals that have been returned or expelled in accordance with the Aliens Act or based on readmission agreements with third states, information about the grounds for detention including its length, the number of less coercive measures used, etc.

Second, there is a question about access to legal remedies for TCNs in relation to the return procedure. It is extremely difficult for individuals without legal knowledge or who cannot understand Croatian to bring direct action before the courts. Access to free legal aid is limited to very few categories of TCNs. In addition, the available reports pointed out that detained people were not informed

about their right to a lawyer or to appeal the detention decision before the administrative court.

Third, based on the available data, it can be seen that administrative courts repeatedly confirm the decisions of the MoI regarding return, expulsion, or detention of irregular migrants. Given that they are insulated from democratic pressure and are ostensibly devoted to safeguarding fundamental rights and constitutional guarantees, courts should question the legitimacy and challenge the enforcement of migration policies.[80] Otherwise, public authorities may face little or no substantive pressure to adhere to human rights requirements.[81] Effective judicial protection of migrants and refugees is therefore of huge importance.

80 Passalacqua, 2022.
81 Posner, 2014.

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