

Impossibility of sanctioning the refusal of an
illegal immigrant to submit to a Covid-19
screening test in the event of the transfer of an
alien from one member state to another (Ruling
n° 379 - 22-84.426)

13/04/2023



Ruling No. 379

Dismissal

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE CRIMINAL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION)

OF 13 APRIL 2023

The Prosecutor-General at the *Cour d'appel* (Court of Appeal) of Metz brought an appeal against ruling No. 329 of the Criminal Chamber of said court, dated 16 June 2022, which acquitted Ms [X] [M] of an offence under the law on foreigners, as a repeat offence.

A written submission was filed.

On the report of Mr Tureaux, judge, and the submissions of Mr Courtial, advocate-general referee, after discussions in the public hearing of 22 February 2023 attended by Mr Bonnal, president, Mr Tureaux, judge-rapporteur, M^{me} Larosière de Champfeu, Ms Labrousse, Ms Leprieur, Ms Sudre, Mr Maziau, Mr Seys, Mr Dary, Ms Thomas, Mr Laurent, Mr Gouton, Mr Brugère, Ms Chaline-Bellamy, Mr Hill, judges of the Chamber, Mr Violeau, Mr Mallard, Ms Guerrini, Mr Michon, Ms Diop-Simon, judge referees, Mr Courtial, advocate-general referee, and Ms Boudalia, Chamber Registrar,

the criminal chamber of the *Cour de cassation* (Court of Cassation), composed of the above-mentioned President and judges, after having deliberated in accordance with the law, has issued this ruling.

Account of the dispute

Facts and procedure

1. The following results from the ruling under appeal and the documents of the proceedings.
2. Ms [X] [M], an Angolan national, entered the territory of the European Union and made an application for asylum in Germany. She then entered French territory irregularly.
3. She submitted an asylum application to the Prefecture of Loiret on 20 March 2018, then underwent a transfer procedure and was handed over to the German authorities on 21 December 2018, pursuant to Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, known as the Dublin III Regulation.
4. She then returned to the French territory.
5. On 26 October 2021, at the request of the French authorities, the German authorities agreed to take Ms [M] back. On 15 November 2021, she was subject to a prefectural transfer order to Germany.
6. She was placed in administrative detention on 3 January 2022. On 19 February 2022, she refused to undergo a COVID-19 test required by the German authorities. She repeated her refusal on 23 February 2022.
7. She was placed in police custody, then prosecuted before the Criminal Court on the basis of Article L. 824-9 of the Code on the Entry and Residence of Foreigners and the Right of Asylum for refusal by a foreign national to submit to the methods of transport or health obligations necessary for the automatic execution of a removal order.
8. By judgement of 1 March 2022, the Criminal Court pronounced her acquittal after having admitted a plea of nullity.
9. The Public Prosecutor appealed this decision.

Pleas

Review of the plea

Statement of plea

10. The plea criticises the ruling under appeal insofar as it upheld the objections of nullity and acquitted Ms [M], whereas article L. 824-9 of the Code on the Entry and Residence of Foreigners and the Right of Asylum does not require the person concerned to have been the subject of a lawful detention order or house arrest that has ended without it having been possible to remove them, a legal requirement that appears exclusively in article L. 824-3 of the same Code, which makes it an offence to remain in the country illegally, in holding that the impossibility of instituting criminal proceedings against a foreign national who is subject to an administrative detention order before the maximum detention period has expired must be interpreted as a general principle that applies not only to the offence of remaining in France illegally, but also to the offences of obstructing and evading the execution of an administrative deportation order, the Court of Appeal violated articles L. 824-9 of the Code on the Entry and Residence of Foreigners and the Right of Asylum and 591 of the Code of Criminal Procedure.

Statement of reasons

Court's response

11. In order to accept the plea of nullity raised by the defendant and pronounce her acquittal, the ruling under appeal maintains that the proceedings were carried out before the maximum deadline of detention of the person prosecuted had been reached, in breach of the rules laid down by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, as interpreted by the Court of Justice of the European Union.
12. The *Cour d'appel* (Court of Appeal) erred in applying the above-mentioned provisions and case-law.
13. Article 3 of that directive, which lays down the standards and procedures to be applied in the Member States for the return of illegal third-country nationals, defines return as the fact that those nationals, voluntarily or by being forced to do so, return to their country of origin, or to a country of transit in accordance with Community or bilateral agreements or other readmission arrangements, or to another third country which accepts them.
14. The transit countries thus mentioned are third countries to the European Union.
15. Directive 2008/115 is therefore not applicable to procedures for transfer from one European Union State to another Member State, which, as in the present case, are carried out in accordance with Regulation No. 604/2013.
16. However, the ruling will stand for the following reasons.
17. Given the purpose of the procedure applied to the accused, Article L. 824-9 of the Code on the Entry and Residence of Foreigners and the Right of Asylum, which penalises the non-enforcement of an administrative prohibition on French territory, of an obligation to leave the territory or of a deportation decision, a violation of which has been prosecuted, is not applicable to the situation of the accused, who was prosecuted for having opposed a transfer decision.
18. On the one hand, the refusal to use the transport designated to the person in question for the enforcement of the removal order to which they are subject, as provided for in the same article, is intended, according to the relevant

legislative history (*travaux parlementaires*), to punish cases in which the person in question refuses to board when the order is automatically executed.

19. Secondly, pursuant to article L. 824-10 of the aforementioned Code, the fact that a foreign national evades the execution of a transfer decision is punishable by three years' imprisonment, as provided for in article L. 572-1 of the same Code, under which a foreign national whose asylum application is under the responsibility of another State may be transferred to the State responsible for examining the application.
20. It does not follow from the latter texts that the legislator intended to penalise the refusal by the person concerned, when executing the transfer decision taken on the basis of the above-mentioned regulation of 26 June 2013, to submit to the health obligations prior to the execution of the decision *ex officio*.
21. The plea is therefore unfounded.
22. Moreover, the ruling is procedurally correct.

Operative part of the judgment

ON THESE GROUNDS, the Court:

DISMISSES the request;

Thus decided by the criminal chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president at the public hearing of the thirteenth day of the month of April of the year two thousand and twenty-three.

President : Mr Bonnal

Advocate-general referee : Mr Courtial

Reporting Judge : Mr Tureaux

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Institution judiciaire

Translated rulings