Luljeta Ikonomi, LL.M, PhD Candidate*
Law Faculty, Tirana University, Albania

EU Policy on Migration Management and Its Impact for the Western Balkans: The 'Case of Albania'

Abstract

The paper analyses the EU policy on migration management and its impact for countries of origin of migrants, with a specific focus to the case of Albania. It examines the efforts of Albania to align its migration policies and legislation with the obligations stemming from the Stabilisation and Association Agreement (SAA) and the European Partnership document for Albania. In particular, the paper analyses the Readmission Agreement EC-Albania, as an instrument concluded pursuant to the SAA requirements, its impact for Albania and its level of implementation 3 years after entry into force for readmission of own nationals and one year after entry into force of the third country nationals clause.

Keywords: Migration management, illegal migration, readmission agreement.

Introduction

Migration management has been one of the main objectives of the EU policies since the Amsterdam Treaty and the Tampere European Council. While initially the central concern was the fight against illegal immigration through strengthening of the external borders and a harmonized visa policy, EU gradually embarked on an overall immigration policy which combined previous acts with measures for tackling the root causes of migration. This approach was endorsed by the European Council in the Seville meeting when it affirmed that "an integrated, comprehensive and balanced approach to tackle the *root causes* of illegal immigration must remain the EU constant long term objective'.[1] It further emphasized that "any future cooperation, association or equivalent agreement that EU or the EC concludes with any country should include a clause on joint management of migration flows and on a *compulsory readmission* in the event of illegal immigration'.[2] Cooperation with the third countries becomes a

[1] See Conclusions of the European Council, Seville, 21 and 22 June 2002. See also Communication from the Commission integrating migration issues in the European Union's relations with third countries COM (2002) 703, final.
[2] Ibid.

condition sine qua non for the success these objectives. Thus, in its Communication to Council and European Parliament in 2002, the Commission highlighted the importance for integrating migration issues in the ***external policy*** of the Community in order to foster its objectives for addressing root causes of migration and conclusion of *readmission agreements*.

The above approach was followed during the negotiations for the Stabilization and Association Agreements with Western Balkans, and in particular with Albania. As the top country in Europe for the migration rate, with up to 27.5% or 860.485 emigrants abroad[3], Albania has been targeted by EC as a priority country to fight illegal migration and address root causes of migration through a holistic intervention. Within this framework, Albania became the first country in WB which drafted a Strategy on Migration that provides a clear link between emigration and development. The elaboration of this strategy 'required' by EC was supported financially under the EC CARDS Programme. It follows the EU policies on migration management and provides measures that range from fight against illegal migration to enhancing legal channels of emigration, diaspora and development, brain gain and business promotion. While the Strategy aimed at addressing root causes of migration, thus to keep potential migrants home, EC conditioned SAA with the conclusion of another instrument- the multilateral Readmission Agreement. Albania became also the first country in Europe to sign a RA with EC.

The objective of the proposed paper is to analyze the actual impact of the EU migration policies for the countries of origin, focusing on the 'case of Albania". The paper will pay specific attention to Albania, as the first country in the region targeted by EC for conclusion of a RA. It will analyze the impact of the RA regarding changes of the national legislative framework, the modalities and the number of returned migrants. The article will examine RA given the fact that its conclusion started as a clear obligation under SAP for Albania, as opposed to the general reaction of the Albanian public who was against it. For easy reference, the paper has been divided into two main sections: in the first section it states briefly the European policy in immigration and its impact for Albania; while the second section examines the RA, both from the perspective of EU and Albania. The analysis concludes with recommendations for future action both by EC and Albania, which can be taken in consideration (if and where relevant) also by other WB.

[3] See IOM (2008), *Migration in Albani*a, A Country Profile, p.15.

2. European policy on immigration and its impact on Albania

2.1 Developments within EU migration policies

Development of a common policy on migration management has been considered as indispensable in the EU level[4], given the fact that all Member States (MS) have been significantly affected by international migration. Economic and demographic features of the latter are determinant factors in drafting of such policy, due to the reported need for labor force/migrants in Europe which can go up to 56 millions until the year 2050.[5]

The demand for labor force by MS has been associated with uncontrolled increase of the number of immigrants in EU, which, quite often goes beyond the labor market needs. Poverty and high unemployment rates in the countries of origin are among reasons that oblige migrants to pay large amounts of money to organized criminal networks to cross the borders illegally. Smuggling of irregular migrants has since many years turned into a very lucrative and well organized criminal business, which is in the same time very difficult to be tackled by MS individually. Thus, necessarily EU policies have been addressing both dimensions: management of migration flows/legal migration to meet the needs for labor force on one side and fight against irregular migration on the other. The policies and actions against illegal migration initially have been mainly *repressive*, aiming at strengthening border control, establishment of a harmonized visa policy and strengthening of the penalties against smugglers, which have been followed by a gradual consolidation of a common return policy. In 2002, EC adopted the Green Paper on a Community Return Policy on Illegal Residence which states that "*a sustainable and common return policy of the Community is indispensable for a successful management of migration flows (being legal or illegal) and asylum".*[6]This document was followed by the Return Action Plan (November 2002) and the Communication from the Commission on 'Policy priorities in the fight against illegal immigration of third-country nationals'(2006) (COM/2006/0402 final). The latter emphasizes *inter alia* the need for strengthening the cooperation with third countries and conclusion of *readmission agreements* in

[4] Reiterated in the Presidency Conclusions on the Tampere European Council, 15-16 October 2009, European Council Meeting in Laekean (2001), Seville European Council (2002), Thessaloniki European Council(2003), and the Brussels European Council (2004) followed by the Hague Programme.

[5] Website of European Parliament citing the study (2007) on "Europe's Demographic Future" at http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IMPRESS&reference=20080107STO17493.

[6] Shih "Green Paper on a Community Return Policy on illegal residents COM (2002) 175, final.

particular with WB. In line with these political objectives, the Directive "On common standards and procedures in MS for returning illegally staying third-country nationals (2008/115/EC)"[7] was adopted in 2008 after several years of discussions.

In addition to the repressive actions, EU gradually embarked into a *preventive* approach, which focuses at fighting root causes of illegal immigration through establishing a real partnership with countries of origin. It can be traced back at the Tampere European Council and in Seville Conclusions[8] followed by the Commission's Communication "Integrating migration issues in the EU external relations with third countries" (COM/2002/0703 final) which constituted the first attempt at clarifying the link between migration and development. The latter served as the basis for the Commission's Communication ' Migration and development: some concrete orientations" (COM (2005) 390) which points out concrete orientations on fostering the development of the countries of origin through increasing remittances flows, facilitating the involvement of Diaspora in the development of countries of origin; facilitating brain circulation and limiting brain drain. These political objectives were reinforced by the *Hague Programe and its implementing Action Plan,* which *inter alia* require strengthening of the borders, fight against illegal migration, conclusion of RA with countries of origin on one side, and strengthening of partnership and provision of technical and financial assistance to enhance their capacities for migration management on the other.

2.2 EU migration policies and Albania

In line with its overall political developments on immigration issues, EU framed its relations with Western Balkans, which share one common feature: EU perspective. The main tool to draw the region closer to such a perspective was the Stabilisation and Association Process (SAP), which was launched as a regional approach in May 1999. The negotiations for the Albanian SAA started in 2003. The draft-SAA (as of 2003 version) included the obligation for management of migration, border control and obligation for conclusion of a Readmission Agreement (art.80 of the draft.SAA). However, being the top country in Europe for migration rate and considered a tranzit route for illegal migration, Albania has been targeted by EU as a priority country to fight irregular migration prior to the launch of SAP. The Action Plan for Albania (1999), envisaged *inter alia* that EU should: finance initiatives for prevention of immigration

[7] This directive is an amended version of the 2005 Proposal for a Return Directive.

[8] See Conclusions of the European Council, Seville, 21 and 22 June 2002 which reiterate that "*an integrated, comprehensive and balanced approach to tackle the root causes of illegal immigration must remain the EU constant long term objective".*

flows (from Albania), pressure Albania to combat illegal trafficking of migrants, *force readmission agreements in the context of SAA.* Albania was targeted for the second time within a list of 9 countries of priority such as China, Russia, Turkey, Libya, Morocco, Tunisia for intensifying the dialogue and cooperation for joint migration management.[9]

Within the framework of the European Partnership approach for WB, EU adopoted the first Partnership with Albania in 2004. The document, *inter alia* requires Albania to manage migration flows, strengthen border control, conclude RA with EC[10]. The revised partnership document of 2008 highlights, *inter alia*, the obligation for implementation of the EC-Albania Readmission Agreement and of the National Strategy on Migration.[11]

Aiming the EU perspective, Albania has committed itself in complying with the above obligations, while EC has provided financial and technical support.[12] Thus, Albania approved the National Strategy on Migration (2004) and its Action Plan (2005) which were made possible only through the financial support of EC under the CARDS programe. The strategy has been conceived as a holistic document in addressing all migration dimensions. Its consists of 3 main pillars: fight against illegal migration, linking emigration of Albanians with the development of Albania and elaboration of an approapriate legal and institutional framework. However, as per the 2008 EC Progress Report the implementation of the Strategy has been slow.[13]

EC apprached Albania for negotiating the Readmission Agreement in 2003, after obtaining its mandate in November 2002. The negotiations started immediately in May 2003 and concluded with the signature of the RA in April 2005. While SAA was signed one year later in 2006 and entered into force in January 2009.

The progress made by Albania is monitored by EC on yearly basis; the success or failure has a direct impact on the liberalization of the visa regime and the

[9] See Albanian National Strategy on Migration (2005), pg. 17.

[10] The 2004 Document has been revised in 2006 and 2008 in accordance with progress made. See European Partnership Document, http://www.mie.gov.al/?fq=brenda&d=3&gj=gj1&kid=111.

[11] See respectively pg.17 and 25 of the 2008 Partnership Document, ibid.

[12] Through its financial assistance programme- Phare, Cards, AENEAS, EC has provided during 1991-2007, 1.3 billion euros for Albania. While for the 2008-2010 there has been foreseen 245 million euro.

[13] See 2008 EC Progress Report for Albania. See also Report on the implementation of National Strategy on Migration, 2007 elaborated from European Institute of Tirana which provides that out of 63 measures for implementation within 2006, only 27% were implemented or started the implementation process. See pg.19 of the document at *www.soros.al/nosa/en/migration_strategy.pdf*

application for EU membership. The last EC Progress Report of 2008 points out on the *visa, migration and border control* that: *Albania overall continues to partially meet the obligations on border control, some progress has been made on migration management, implementation of the national strategy is ongoing, albeit slowly. Border and migration staff cuts could limit Albanian's capacity to meet its obligation under Readmission Agreement. Overall illegal migration remains a significant problem, especially at Albania-Greek border. Albania continues to partially meet its targets on migration.*

3. Analyses of EC-Albania Readmission Agreement

3.1 Background

Entry into force of the RA EC- Albania in May 2006 was considered a *historical step*, not only in the formulation of an EC common policy on readmission, but also in the development of a new cooperation of the EC with the Western Balkans.[14] Albania was the first European country that concluded such an agreement with EC, paving the way to other agreements with the rest of WB countries.

The RA EC- Albania is considered a new instrument in the fight against illegal migration, because of its two specific features: multilateral character and inclusion of the third country nationals' (TCN) clause. Prior to it, Albania had concluded RA with individual MS[15], however, the EC-Albania RA provided unified return/readmission procedures in the EU level and contained the third country nationals' clause, which was the most problematic point (Achilles' hill) during the negotiations.

Contrary to what was expected, the entry into force of the RA was not followed by any substantial change in the numbers and return procedures. The highest number of returnees continues to be that of Albanians expelled from Greece; however, their return/readmission is not in line with the procedures foreseen in the agreement, despite the fact that Greece is one of the MS for which the agreement is binding. Similarly, the return of TCN has not been affected by the entry into force of the TCN's clause in May 2008. This should not be taken as an indication that the

[14] Statement of the European Commission, Directorate-General Justice, Freedom and Security, published at the IOM Publication 'Return and Readmission- Experience of selected EU member states", 2006.

[15] Prior to the RA with EC, Albania had concluded 11 bilateral RAs, some of them with the traditional and new MS , such as with Italy of 1997, Belgium (2001), Hungary (2001), Bulgaria (2002), Germany (2002), Romania (2002) or with other European countries such as Switzerland (2000), Croatia(2003).

situation will continue to be the same in the future. Prior to analyzing the reasons for the lack of implementation, it is worth to mention the rationale for concluding such an agreement both on EU and Albanian perspective.

3.2. The role of RA on the perspective of EU

Readmission is the last component of the consolidated repressive set of measures used by EU to fight illegal migration. Other traditional components envisaged by EU Acquis are strengthening the border control, a harmonized visa policy, strengthening of the criminal penalties against illegal residence/employment, trafficking and smuggling of migrants. However, these measures would be without effect in practice, if not followed with the return of irregular migrants. An important development within EU on this issue is the approval of the Directive on 'Common standards and procedures of the MS for return of irregular third country nationals" (2008/115/EC) which unified the return procedures by MS, through envisaging common standards and procedures. It should be highlighted that the Directive's standards are considered minimalist, thus, MS should minimally respect those standards, while ensuring higher ones, if relevant. In this framework, Albania, in its efforts to approximate with EU legislation, should duly take in consideration the provisions of the Directive.The Directive stipulates that a TCN shall be removed pursuant to a removal order issued after individual examination of the case, with due consideration of the best interest of the child, family life, health conditions or any other special need of irregular migrant, in full compliance with human rights law.[16]It provides for voluntary return as preferred option.[17] In case the immigrant does not leave voluntary within the specified period or for interests of national security or public policies, he/she is returned immediately in the country of origin.[18]

Despite this framework, MS often face difficulties in carrying out removal, mainly due to the lack of documentation of the irregular migrant. In such situations, MS are in front of two alternatives: 1) to detain the irregular migrant in a closed reception center, until the conditions for return are fulfilled; or, 2) to allow him/her to move freely in the territory, regardless of irregular status. The latter is problematic, as first of all, there is the risk of absconding, in case the authorities manage to obtain the relevant documentation. Secondly, there is the risk of creating the perception that

[16] See arts.3, 5, 7, 10 and 12 of the Return Directive.
[17] Art. 7, Ibid.
[18] Art.7,8, Ibid. The removal order is followed by the 'entry ban' which forbids the migrant to enter any MS within a period (in principle) of 5 years. [18]

illegal residence is not problematic in EU, which, in turn, becomes a '*pull factor*' for further irregular migrants' flows. In this situation, MS have mainly followed the first alternative, detention of the migrant in a closed Reception Center. Detention is very expensive for the MS, thus, it should be considered only as the least worst available option.[19]

Detention is prevention of liberty, as such is can be only allowed under the conditions and pursuant to the procedures envisaged by law.[20] The Return Directive envisages that: *unless other sufficient but less coercive measures can be applied effectively in a specific case, MS may only keep in detention a third country national (TCN) who is subject of return decision to prepare the return and/or carry out removal in particular when there is the risk of absconding or the TCN hampers the preparation of the removal process.*[21] The detention shall be carried out pursuant to an official administrative or judicial written order and the right to appeal against the order shall be provided.[22] One of the most debatable issues addressed by the Directive- length of detention- has been envisaged for 6 months, with possibility of extension with further 12 months.[23]Given the fact that detention is not considered as a criminal sentence, but rather as a measure to facilitate the return of migrant, the Directive provides that as a rule, it shall take place in special centers established for this purpose.[24]Establishment of such centers, creation of adequate accommodation, running and daily maintenance is a huge financial burden for the MS. Thus, irregular migration is associated with high costs, both for the individual and the state. Expensive for the individual as illegal border crossing or illegal stay is generally facilitated by smugglers, who in return require high fees from immigrants. It is

[19] In many cases, the MS offer amnesty for irregular migrants, but only when there is need for labor force.

[20] See art. Art. 9 of the International Covenant on Civil and Political Rights. European Convention on Human Rights envisages that '*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*… (f) *the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition (art.5)*

[21] Art. 15 of the Return Directive.

[22] Ibid.

[23]Only if and when the TCN does not cooperate for obtaining the necessary documents. Ibid.

[24] Art. 16 of the Return Directive. In case MS can not afford such centers, irregular migrants can be detained in prisons, the TCN in detention shall be separated by ordinary prisoners. Minors shall be detained only as a last resort for the shortest appropriate period of time (art.17 of the Return Directive). During detention, irregular migrants shall have the right to meet their legal representatives or family members; as well as to be informed in a language that she/he understands on the rights and obligations.

expensive for MS as the measures for the return of illegal migrant are all financial and human resources consuming; all the procedures, starting from the bureaucratic elements of individual examination of the case, removal order, actual removal, which mainly takes place through special charters, and in particular detention in specific centers for migrants, is more and more becoming a huge public burden for the MS. In this way, it is in the interest of the MS to return irregular migrants as soon as possible to eliminate the costs. Here comes to play the Readmission Agreement, whose very essence is to facilitate the return process.

RA is important for an effective return of irregular migrants, given the fact that the right of a state to return illegal migrants in their country of origin and transit is without any practical relevance if there is not a corresponding obligation of the country of origin or transit to accept own citizens or TCN who have used the said country as a transit for EU MS. But, *is it legal for a state to refuse entry into the territory of his citizens if it has not concluded any RA with returning country? Can a state actually refuse entry to own citizens?*

International law, in particular international human rights law envisages that states can not refuse entry in the territory to their citizens. Universal Declaration of Human Rights (UDHR), ICCPR, ECHR state that: *"No one shall be arbitrarily deprived of the right to enter the territory of the state of which country he is a national'.*[25] It is believed that the obligation to readmit own citizens has obtained the status of international custom and prevails to all other obligations that states have towards each other.[26]

However, in practice the return of irregular migrants is associated with many difficulties. Countries of origin not necessarily accept returnees due to lack of relevant documentation that can prove the citizenship of the migrant. In such cases, the authorities of the MS are obliged to cooperate with the diplomatic/consular representatives of the country of origin to enable the identification of the person. Due to the long bureaucratic procedures (while the immigrant is held in the detention centers) or in other limited cases, due to lack of cooperation by the countries of origin, MS try to avoid these barriers through negotiating RAs, which envisage obligations, cooperation modalities and return procedures for both the parties in the agreement. Thus, in essence, the RA 'was born' by the lack of spontaneous reaction of the countries of origin towards the requests for identification of irregular migrant, and subsequently, refusal to readmit own citizens. In this context, it can be said that Readmission has become an issue closely linked with the level of cooperation among the countries. It is meant to facilitate the communication between MS (sending

[25] See art. 3,Prot.4 of ECHR. See also art. 13 of UDHR, Art.12 of ICCPR.
[26] IOM, Essentials on Migration Management, IOM, 2004, p. 35.

countries) and countries of origin for an effective implementation of removal, which in turn, reduces costs of illegal migration for countries of destination.

As such, EU has treated conclusion of the Readmission Agreement as one of the priorities of its foreign policy. One important development in this area is the movement from bilateral agreement in multilateral agreements concluded by the European Commission. In so far, EC has concluded multilateral readmission agreements with several countries of origin such as Hong Kong (2001), Sri Lanka (2002), Macao (2003) Albania(2005), Russia (2006), Ukraine (2006), Moldova (2007) Ukraine(2007) Macedonia (2007), Montenegro(2007), Serbia (2007) B&H (2007) and is under negotiations with Algeria, China, Morocco, Pakistan, Turkey.

3.3 Readmission Agreement from the perspective of Albania

While it is clear why the returning countries, in particular EU MS are interested for conclusion of RA, it can not be said the same for the countries of origin. In many cases, countries of origin are reluctant to conclude such agreements, claiming that it is not in the interest of their citizens. However, the more migration is becoming an international phenomena, the more it is becoming difficult to find countries that are only of origin or only of destination; the same country can be both returning and readmitting irregular migrants, as such, it is interested to facilitate the return process in a reciprocal way. In the case of WB, there is one more specific factor: WB aspire the European perspective, which is conditional *inter alia* with the migration management and conclusion of RA as an integral part of the EU external policy.

In the case of Albania, the conclusion of the RA was stipulated in the article 80 of draft- SAA: *The parties agree for conclusion of an agreement… that stipulates concrete obligations... for readmission, including readmission of third country nationals and stateless persons.*[27]

In the final version of SAA, the Readmission is foreseen in article 81, which actually sanctions the article 2 and 5 of the RA.[28]

The negotiations for the RA were carried out in parallel with those for SAA. Despite the objective of the Albanian team to finalize the two agreements in the

[27] Draft –SAA, prior to final version.

[28] Art.81 of the SAA reiterates the very essence of the EC-Albania RA. See for a full text of the SAA at : *ec.europa.eu/enlargement/pdf/**albania**/st08164.06_en.pdf* It envisages that: Parties agree that, upon request and without further formalities, Albania and the Member States: shall readmit any of their nationals illegally present on their territories; shall readmit nationals of third countries and stateless persons illegally present on their territories and having entered the territory of Albania via or from a Member State, or having entered the territory of a Member State via or from Albania.

same time, it became obvious that it was impossible due to the complexity of the SAA. In the end, the RA was concluded one year earlier then the SAA.

Ratification of RA was fiercely opposed by the public opinion.[29] The written media highlighted the massive potential return of Albanian emigrants from EU MS, given the fact that many of them were with irregular status. However, the governmental representatives in most of the cases pointed out that conclusion of the RA was an obligation of the SAA, non reversible and non-negotiable. It was further reiterated that the conclusion of RA would subsequently lead to visa facilitation and liberalization.[30] However, regardless of the interest and the requests of the Albanian part for negotiating in parallel a Visa Facilitation Agreement (VFA), the EC team made it clear that they did not have the authority to negotiate visa facilitation or liberalization. Their mandate could only allow the Commission to conclude RA.[31] It is worth to mention here that during a certain phase of the negotiations of SAA, the Albanian authorities started to articulate a 'visa liberalization agreement', instead of visa facilitation agreement. Even though, as of 2008, visa liberalization is the main objective of the GOA, clearly this was not the situation of the 2006. However this is an indication that there was confusion as to the distinction of the two instruments.[32] The VFA, by its name, aims at facilitating the procedures for some categories of citizens, depending on the success of negotiations by the interested parties, in some cases it includes a clause for speeding up the process of issuing the visas or facilitates the process for issuing multi-entry or long term visas. This was actually what happened with the EC-Albania VFA. Even though an analysis of the implementation of this agreement is not objective of this article, it is important to mention that regardless of the objective, in practice the VFA is not fully functioning.[33] The procedures and difficulties for obtaining visas remain almost the same, with Albania being the top country for visa refusal in the WB.[34]

Several scholars have identified that the link between the process of visa facilitation regime and conclusion of the RA is articulated in some strategic documents such as the Hague Programme (2004) which *'invites the Council and the Commission to*

[29] IOM, Return and Readmission- The case of Albania, 2006, p.25
[30] Ibid, p.23.
[31] Ibid.
[32] Declaration of former Minister of European Integration, Ms. Trashani in 2006 for requesting visa liberalization regime during the 10th round of SAA negotiations.
[33] See Albanian European Movement Study http://www.em al.org/?fq=brenda&m=shfaqart&aid=95
[34] Ibid.

examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues"[35]; or in the action plan implementing Hague Programme (2005) where the Commission recommends that '*Specific recommendations for negotiating directives on visa facilitation on a case by case basis with third countries in the context of the EC readmission policy, where possible and on the basis of reciprocity, with a view to developing a real partnership on migration management issues (2005-2009*)".[36]

In fact, most of the countries, such as Macao, Hong Kong that negotiated RA before Albania had been exempted from visa requirements, while Russia considered it as a prerequisite for continuing negotiations on RA, while Albania was an exceptional case. Philippe DeBruycker mentions that even if Albanian team insisted further, it is more likely that the Commission would not have accepted such approach, because by that time, the political and technical structures of the Commission where discussing on changing the perception on the conditional relation between RA and VFA.[37] However, the hesitation of the Commission for negotiation of the VFA in parallel with RA in the case of Albania was an exception. The VFA concluded two years after the EC-Albania RA was not only for Albania, as the first WB state that ratified RA, but was part of a regional approach, which included all the WB countries. The Commission negotiated in parallel two agreements-RA and VFA- for other WB such as Bosnia Herzegovina, Montenegro, Serbia, Macedonia. The result of the Commission's negotiations finalized in September 18, 2007 was the conclusion of nine agreements, five VFA and only four RA. This is due to the fact that the RA with Albania was signed since two years. The situation was similar with Moldova, Ukraine, Georgia, which, following Russia's example conditioned the EC with conclusion of the two agreements in the same time- RA and VFA[38].Thus, regardless of the (temporary) arguments of the Commission that RA is not a condition for the facilitation of the visa regime, the practice, before and after 'the case of Albania', clearly indicates that RA are followed with VFA.

[35] Hague Programme, p. 18. See also Debruycker, Philipe: Obtaining Visa Facilitation for the EU: the Case of Albania, Workshop on National Strategy on Migration, 2005 and Trauner and Kruse, EC Visa Facilitation and Readmission Agreements, 2008.

[36] Action plan implementing Hague Programme, p.11. .

[37] Ibid.

[38] Trauner and Kruse, EC Visa Facilitation and Readmission Agreements, 2008

3.4. Analyses of EC- Albania Readmission Agreement

The RA stipulates the obligation of the parties to readmit own citizens and TCN in some specific conditions. The agreement, as a framework instrument provides also the mechanisms and procedures for the readmission of the above categories. For purposes of this article, the obligations of Albania for readmission of nationals and TCN will be analyzed as the ones of MS are identical/ reciprocal.

Readmission of nationals

The key provision of RA is its article 2- *Readmission of nationals which* stipulates: *'Albania shall readmit, upon application by a MS and without further formalities other than those provided for in this Agreement, all persons who do not, or who no longer, fulfill the conditions in force for entry into, presence in, or residence on, the territory of the requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that they are nationals of Albania'.* This paragraph has three main elements which must be analyzed: subjects, proofs and application by the MS.

Subjects:

Article 2 of the RA stipulates the obligation to readmit, through RA procedures only irregular migrants stopped into the territory and not those in the borders. At least, this is the interpretation provided by both parties of the agreement.[39] The rationale for this, is that, irregular migrants caught in the external borders can be immediately sent back, once entry is refused, thus, it is not necessary to follow long buraucratic procedures which can go up to a minimum of 14 days as per RA. This is one of the arguments used by Greece, which points out that returnees are stopped at the borders and not in the territory, thus, no need for prior application, in accordance with the RA.[40] Article 2 further stipulates that for the purpose of the agreement, subject of readmission are also those persons who have been deprived of citizenship

[39] See Arn "*Manual for application on Readmisison Agreement between the EC and RoA',* published by IOM, 2006, p.15. This is the interpretation used by Albanian and Greek authorities during the meetings of the Committee on Readmission, established under the IOM implemented project AENEAS Project "Implementing Readmission Agreement EC-Albania" (2006-2008). See Conclusions of the Albanian Readmission Committee, published by IOM 2008.

[40] Information received by the Director of Immigration Sector, MoI, Albania, during the workshop "Observance of Human rights of returning emigrants' 11.06.2009, Tirana International Hotel.

or have renounced Albanian citizenship, unless, they have been promised citizenship by the MS.[41]It has been discussed whether the Albanian nationals that have been residing in the MS for more than one year are subject of RA procedures, pursuant to article 10 of the RA.[42] One interpretation is that Art.10 which stipulates the time limits for application of return and readmission procedures excludes those who have been residing for more than one year.[43]However, it is not clear whether this interpretation has been accepted by the MS[44]. Art.10 exempts from RA procedures 'third country nationals or stateless persons that have been residing for more than one year in the MS".[45] It is true that within EU migration terminology Albanians are 'third country nationals', however, for the purposes of the RA between EC and Albania, TCN are only persons who are neither Albanian nationals nor of any EU member state. As such, for purpose of this agreement, the time limit of one year can not be argued for own nationals. However, it is yet to be expected how this will be implemented in practice.

Proofs:

RA considers as proofs for citizenship not only the original documents such as passports, seaman documents, ID cards, citizenship certificates or any other official document that mentions the citizenship of the person (the so called, undisputed documents as indicators of the ID of a persons), but also '*prima facie*' evidence. Such documents are photocopies of any of the original document mentioned above, driving license or its photocopies, birth certificate or its photocopy, company identity cards or its photocopy, statements by witnesses or the concerned person and his/her language, any other document which can help in concluding on his/her identity. *The **language,*** considered as a prima facie proof is quite problematic in practice, given the fact that a good part of the irregular migrants from Kosovo, Macedonia who may be Albanian speaker can be returned in Albania on the basis of such proof.

[41] Article 2.1 of the RA.
[42] Art.10 of RA.
[43] From the declaration of N.Ndoci in the Workshop "Observance of the human rights of returning emigrants", 11.6.2009, Tirana International Hotel.
[44] This issue has not also been addressed by the Commentary-Training Manual on EC-Albania RA prepared by Fernand Arn, 2006.
[45] Art.10 of RA.

Application for Readmission:

RA stipulates that "*Albania shall readmit, upon application by a MS and without further formalities other than those provided for in this Agreement… (art.2).* Thus, the procedural *condition* to be followed is the *application* from the MS. Since the entry into force of the RA, the number of applications following RA have been 0.01% according to the Department of Border and Migration, in the Albanian Interior Ministry.[46]While the number of returned Albanian migrants for the year 2008 is approximately 66109 persons or 173 Albanian migrants per day.[47] The highest number of returnees is from border crossing points with Greece, in particular Kapshtica and Kakavija.

What impact has in practice the prior application for readmission by MS?

Enables Albanian authorities to take adequate measures for readmission process

The high number of returnees has created frequently problems for Albanian border police in charge of readmission. The returned emigrants, in particular from Greece have been subject of long and tiring procedures which go up to 7 days, and once in the borders, have to wait sometimes for more then 10 hours until the finalization of the readmission procedures from Albanian border police. As per Albanian legislation, returned migrants can not be stopped for more than 10 hours by the police, but, in cases of large number of returnees (up to 170 persons) and an interviewing process of a minimum of 10 minutes for a person, the waiting period can go far beyond the allowed time limits. If Albanian police is notified duly in advance through application as stipulated by the agreement, it could take measures by reallocating extra staff, so as proceed quickly. This is not possible, when the MS just 'leaves the returnees in the borders, with an accompanying list" without prior notification/application.

Enables Albanian authorities to take special measures for the minors

A considerable number of returnees are unaccompanied minors[48], which, according to the Albanian legislation are subject to special protection. Thus, they can not be

[46] According to the declaration of the Border and Migration Department in the Joint Readmission Committee, December 2008.
[47] Statistics obtained at the BM department, 2008.
[48] Fatmir Memaj, Study on the Profile of Returning Migrants, 2008 reports a daily average number of 34 returned minors.

interviewed without the presence of their family members of legal custodian. However, in practice, the presence of the family member or the legal custodian is not possible due to two main reasons: a) given the fact that the return of the minor is not carried out following an application by the MS, Albanian border police is not aware of the presence of minors, and thus, can not inform in advance the parents to be present during the interviewing process; b) if the border police officer, during the interview notices that the returnee is minor and obtains information on how to contact his/her parents, in most of the cases, the parents or legal custodian can not come immediately due to the long distance. The police officers may suspend the interview until the arrival of the parents, but this could go for more then the allowed timeframe of 10 hours. This creates further problems with the accommodation of the minor, as there is not a special room/accommodation facility for minors in the border crossing points. Prior application by MS would have a significant impact on this situation, as border police would have adequate time to inform the family members on the returnee.

Eliminates the cases of return in error

Quite often, due to the lack of documentation, the language is the only 'prima facie' proof of the citizenship of a person. As such, there have been cases of citizens of Kosovo, Macedonia or any other country in the region who have been returned in Albania instead of their country of origin, due to the Albanian language. Prior application, as stipulated by the RA, enables elimination of such mistakes, which create extra costs for both the returning and readmitting country.

Eliminates the cases of abuse with the identity of the citizens

One of the problems that accompanies the phenomena of irregular migration is misuse/ abuse with the identity of another person. Irregular migrants, who most of the time lack identity documents, when stopped by police often provide another identity, in several cases the identity of a real person. Pursuant to the EU acquis, irregular migrants that are returned by MS are subject to an entry ban which is up to 5 years. This means that if the returnee applies for a visa in one of the Schengen countries, the visa is refused in any of the MS. However, in practice, many Albanian citizens who have never been in any EU MS have suffered from this penalty, when have applied for a visa, due to misuse of their identity. If the return of irregular migrants is carried out with prior application for return, Albanian authorities, responsible for verifying the identity of the returnee can trace whether it is a case of a misuse of the identity of the person. If that is the case, the MS is informed to double

check the identity of the imigrant and suspend the ban under the false identity, as it would unjustly deprive another citizen from the right to move freely.

Why EU MS do not comply with the obligations of the RA while returning Albanian citizens?

According to RA, the application for readmission can be in two ways: firstly, in the form of a *request/application* submitted to the Albanian authorities, who are obliged to respond within 14 days from the application. In case they do not respond within the said timeframes, they are bound to readmit the returnee once he/she is at the borders. [49]

Secondly, it is in the form of a *written communication*, whereby the sending authorities only inform their Albanian counterparts on the returning process, without need for approval, in the cases when the returnee has a passport or a valid travel document. It goes without saying that when the returnee has valid travel documentation, there is no need for further formalities.[50]This procedure is faster and very convenient for the sending country.

The *request for readmission* should indicate the generalities of the migrant, the proof of nationality, and if relevant, whether the person needs special care, i.e. in case of a minor. Such information facilitates the readmission process for Albanian police as they are able to take all the necessary measures in advance. However, it seems that for the MS the obligations and procedures envisaged by RA are not convenient, despite the fact that MS were actually fostering conclusion of such agreement. One of the argument brought forward by the MS is the lack of implementing protocols, pursuant to article 19 (1) of RA which stipulates that: *Albania and a Member State may draw up implementing Protocols which shall cover rules on (a) designation of the competent authorities, border crossing points and exchange of contact points; (b) conditions for escorted returns, including the transit of third-country nationals and stateless persons under escort; (c) means and documents additional to those listed in the Annexes 1 to 4 to this Agreement.*.

This article uses the term "*may"* draw up implementing protocols, thus, if the parties consider it as necessary to conclude, however, lack of implementing protocol does not render the RA inapplicable. RA is a self executing document, as it stipulates clearly the modalities and procedures of return and readmission. The rationale behind article 19 was to provide the parties with further tools to facilitate the process through detailing the procedures in accordance with their specific needs for a

[49] Art.2 of RA.
[50] Art. 14 of RA.

successful cooperation; i.e. while Albania and Germany can not use return by land, the implementing protocol can further specify different conditions for escorting of returnees as compared with Greece, where the preferred return mode would be via land. The parties could also design specific hours or specific border crossing points for return, relevant to their needs or appoint specific contact points. However, the lack of the implementing protocol does not impair the implementation of the RA, as the RA itself does not envisage the protocol as a *conditio sine qua non* for its implementation.

Another argument articulated lately is that full compliance with the obligations of RA does not facilitate but slows down the return process, which in turn, penalizes the Albanian irregular migrants whose period of detention would be extended.[51] It is true that if we refer to the number of the returnees, i.e. from Greece, the main returning MS, with a daily average of 160 irregular migrants for the year 2008, the *application for readmission* would create difficulties for sending authorities. However, it can be argued that if the Greek authorities were to comply with the provisions of RA, it is quite likely that the daily average would be far less for several reasons:

1. Irregular migrants stopped at the borders do not fall under the RA, as opposed to those stopped in the territory. Thus, the former would be immediately returned in the border, without any prior application. In this way, the fluxes of migrants stopped at the borders and those in the territory, which are subject to RA would be clearly divided. In so far, Greek authorities do not make any differentiation as to the return procedures or treatment.

2. The subject of readmission would enjoy the guarantees envisaged by the EU return Directive, which *inter alia* provides the issuance of the removal order, information of the returnee on the reasons for removal, appeal possibilities etc. In practice, the majority of returnees from Greece do not enjoy the minimal guarantees envisaged by the Directive, as immediately after the *prima facie proof*- mainly *Albanian language,* when the migrant does not have any documentation, he/she is immediately send in the police commissariat and removed from the territory without any possibility for appeal or legal assistance[52]. Thus, any Albanian irregular migrant, regardless of his/her residence is treated as 'stopped at the borders' by the Greek authorities. Speculations have also been on the nature of the 'sweeping operations'[53] for the Albanian irregular migrants, which could be argued as 'collective expulsion' given the fact that in those operations the irregular migrants are stopped at the spot-

[51] As per the IOM's representative comment in the workshop on "Observance of human rights of returned migrants" organized in 11 June 2009, Tirana, Albania.
[52] As per the interviews conducted by F.Memaj "Profile of returned migrants", 2008.
[53] Ibid.

in the street, work or any public place frequented by irregular migrants, and are immediately sent with buses in the borders, without following the procedures specified by the return Directive, in particular the obligation for an individual examination of the case for each returnee.

3. Even if the number of the irregular migrant's subject of readmission would still be very high, Greek authorities could at least follow the *written communication* as a procedure, and not the prior application, so as to avoid delays and buraucracy. This option would be beneficial for both parties, given the fact as neighboring countries sharing land borders, the travel document is not necessary for the return, as it is the case for return from many EU MS due to transiting in different airports. An advanced notification could only provide the generalities of the returnees, specific needs, if relevant, the border crossing point and the time of return (without having to wait 14 days envisaged in RA).

It can be argued that EU MS do not comply with RA due to a continued commodity provided by the Albanian readmission authorities. Albania has never refused readmission of own citizens even without prior notification or application; in several cases it has readmitted TCN with the argument of the returning party that the migrant is Albanian, regardless of inadequate proofs. Hence, it can be further argued that the reason why Albania was the first European country targeted by EU for conclusion of a RA, was not to facilitate the return of nationals but rather the facilitation of the return of TCN.

Can Albania refuse readmission of citizens if the MS do not follow the procedures stipulated by RA?

Albanian legislation does not include a provision similar to the one found in article 3 Protocol 4 of the ECHR regarding the 'arbitrary deprival of entry of nationals in the country". Article 38 of the Constitution envisages only right of free movement within the territory and the right to go abroad. However, as Albania has ratified the ECHR, it is bound by its provisions. Thus, Albania can not refuse the entry of Albanian citizens in the territory. However, possession of a document indicating the citizenship is a necessity, as the ECHR refers specifically to the 'nationals'. Thus, the application from MS providing adequate proof of the citizenship of returnees is crucial. Furthermore, RA is a legal document, a 'solemn commitment' by the parties for complying with its obligations, as such, there is not any reason to refrain from complying with it, given that EU itself required and conditioned conclusion of such agreement within SAP.

Readmission of third country nationals

The most debatable point of the RA was the 'third country nationals' clause". As mentioned in the previous section of this article, this is one of the new features of this agreement as compared to previous bilateral ones that Albania had concluded with Member States. As it stands currently, RA envisages that: *Albania shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfill the conditions in force for entry into, presence in, or residence on, the territory of the requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons (a) hold or at the time of entry held a valid visa or residence authorization issued by Albania; or (b) entered the territory of the Member States after having stayed on, or transited through, the territory of Albania.*

Subject of this clause are the TCN that have transited through Albania for EU MS. However, the clause does not cover the TCN who, prior to or after entering EU MS, have been issued a residence permit or visa to the said MS[54]. Also, pursuant to article 10 of the RA, MS can not return in Albania any TCN one year after they *have gained knowledge that a third-country national or a stateless person does not, or does no longer fulfill the conditions in force for entry, presence or residence.* (art.10)

***Application** by MS is a condition sine qua non* readmission of TCN, which means that Albania can not readmit any TCN without prior application. While Albania readmits Albanian nationals contrary to procedures foreseen by the RA, this can not be the case for TCN. The (ECHR) obligation to allow entry to its territory to the citizens is an obligation towards the citizens and not towards the sending county. As such, it can not be extended to the TCN. Albania should not readmit any TCN, without prior application by MS, in accordance with the RA provisions, regardless of the lack of implementing protocol.

The TCN readmitted who do not have legal /valid documentation are detained pursuant to the Albanian Law on Foreigners (LoF)[55] in the closed reception center, until the finalization of preparations for removing them back in the country of origin or any country that is ready to accept them. While the minors, pursuant to said law, can be stopped only in the social centers established for this purpose. The maximum length of detention stipulated by the LoF is 6 months.

It should be highlighted that the new LoF was approved after several years of discussion and work by the relevant structures. Adoption of such law was raised as

[54] See Article 3.2 of RA.

[55] LoF approved in July 2008, entered into force in December 2008.

obligation in most of the EC progress reports for Albania and was part of the SAA. Its drafting process followed the developments in this area on the EU acquis. In this perspective, the initial period of detention of 6 months is pursuant to the Proposal for the Return Directive (by the time the law was being drafted the Directive was not approved yet). However, given the practical difficulties in returning irregular migrants, and in particular the experience of MS which quite often are obliged to extend the detention period LoF envisages the possibility of extending the detention period up to 12 months. However the wording of the law is not clear whether the period of extension is 12 months, which means in total the detention can go up to 18 months or, the whole detention period can go up to 12 months, 6 of them initial period of detention and other 6 months extension. If we take in consideration the EU Return Directive, MS can extend the detention period for further 12 months. Whatever was the objective of the legislator, it needs to be genuinely interpreted or clearly specified in the respective bylaws, so as to avoid discrepancy and subjective interpretation/implementation by detention authorities of this delicate legal provision.

LoF stipulates that the detained migrants have the right of humane and dignified treatment, health care, legal assistance, and translator, the right to appeal the order of detention or on the conditions of detention. However, the actual conditions of detained migrants are quite different from legal provisions. Irregular migrants are detained in a separate building of the Center for Victims of Trafficking in Albania (Linza), given the fact that the building envisaged for this purpose is not finalized, even though it was expected to be functional in 2008.[56] The construction of the center is financed by the EC, within its holistic approach for financially supporting countries of origin to meet standards on migration management. A serious problem remains also the accommodation of the unaccompanied minors, who pursuant to LoF should be kept in social centers, but as of September 2009, there is not any such center.

Detention of migrants in the building within the Center for Victims of Trafficking is problematic due to its confidentiality nature. Irregular migrants can not have visits by friends, family members of legal advisor. Another concern is the lack of translators. Most of irregular migrants in Albania are citizens of countries such as Afghanistan, Nepal, India, which are considered to have a rare language for Albania and it is quite impossible to find a translator for those languages. Lack of means of communication definitely impairs the proper enjoyment of rights of immigrant.

[56] Construction of the closed reception center was financed by EU in order to assist Albania with adequate infrastructure for implementing the TCN clause, after its entry into force in may 2008.

Actually, if the immigrant is not informed on his/ her rights and duties, their exictence is mainly virtual rather than concrete.

The legal framework does not clarify what happens with the TCN with the expiration of the allowed detention timeframe. Due to the difficulties for return in their country of origin, it is the risk that Albania falls in the so called 'readmisison trap', in particular if the number of returnees will be increased. It should be pointed out that since the entry into force of the third country nationals clause, in May 2008, the number of returns from MS has not been increased significantly. However it is more likely that this number will be increased in the future, and the risk of the readmission trap will be present. In such conditions, Albania must start negotiations for concluding RA with countries of origin, however the chances are failure limited. We say limited, as these are countries with whom, EC itself has in a way or another failed to conclude, regardless of its diplomatic leverage. That is the reason why member states will return TCN in Albania, the country of transit and not directly in the country of origin.

4. Conclusions

Readmission agreement is indeed a very important tool in the fight against irregular migration as it facilitates the cooperation between the returning country and that of origin or transit on one side and guarantees respect of human rights and a dignified treatment of irregular migrant during return process on the other. Through clear and transparent procedures, it enables the parties to organize and plan in advance the return/readmission process. However, the impact of the EC-Albania RA is not clear for the return of the own nationals. Three years after its entry into force, MS continue to return migrants using the same *modus operandi* as before conclusion of such agreement.

Contrary to the initial public opinion in Albania, observance of RA provisions from MS would facilitate the work of Albanian authorities during the readmission process, which in turn would result in a better treatment of returnee, in particular in case of 'massive' returns from Greece which is the main returning country. Albania should increase the pressure in the Joint Readmission Committee established to monitor the implementation of the RA, with participation of Albania and MS, in particular given the fact that it was EU which conditioned the conclusion of this agreement.

Pacta sund servanda.

It is recommended that Joint Readmisison Committee commissions a study on whether at the current stage, full compliance with RA is feasible for member states, and provide guidelines in case a more flexible approach would be needed. If that would be the case, Joint Committee should emphasise the obligation of the MSs for a prior notification on the generalities of the retunees, as a less formal obligation on their side.

Regarding the readmission of TCN, currently there is not any increase in the number of returnees, which might be also due to the hesitation of MS to return in Albania as long as there is not an adequate reception facility. However, the readmission trap remains a serious concern as Albania lacks the diplomatic leverage to foster conclusion of RA with the countries with whom, EC has failed. We say this, as if EC would have concluded RA with third countries, it would not return their nationals in Albania, the country of transit, but in the country of origin. Thus, the challenge for Albania authorities is the conclusion of RA with countries of origin, in order to avoid the risk that Albania becomes the surrogate destination of the irregular migrants.

The conditions of detention are not adequate and in compliance with the legal requirements, due to the lack of a specific closed reception centers. As such, immediate measures should be taken in order to start the functioning of the envisaged building for this purpose. In parallel, Albanian institutions should start the recruitment and training of the staff of the closed reception center and draft the framework regulation of center.

Immediate measures should be taken for identification of the translators through a public call/advertisement, and if no one can be found in the country, support should be sought with international organizations or counterparts in EU to obtain written translation at least of the regulation of the center, rights and duties of the detainees.

Albania should also allocate relevant budget for translation and medical services for detained migrants as well as for the running/daily maintenance of the center, once it is functional. In this framework, it should consider application for financial support from EU in the framework of EU Programms of Assistance for third countries so as to partially alleviate the financial burden from the (tight) state budget.

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