

UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals¹

In December 2005, the Office of the United Nations High Commissioner for Refugees ('UNHCR') issued observations on the initial proposal for a Returns Directive.² At that time UNHCR welcomed the effort to adopt common standards on return, while emphasizing that any such standards must reflect fundamental refugee and human rights norms. UNHCR regrets that the compromise text, on which the European Parliament is due to vote on 18 June 2008,³ does not incorporate all the safeguards necessary to ensure that returns take place in safety and dignity. For the reasons outlined below, UNHCR is not in a position to support the current proposal.

Risk of violation of international refugee law

UNHCR welcomes the references in the proposal to the principle of *non-refoulement*. However, UNHCR is concerned that the risk of *refoulement* may still arise in practice, in the absence of explicit procedural safeguards for people who may have protection needs.

Although the Directive applies to persons who are not entitled to remain in the EU, UNHCR notes that this may extend to individuals whose applications for protection were rejected by a Member State, **without a determination on substance**. This could for instance be the case of persons whose applications have been rejected on 'safe third country' grounds or for other procedural reasons. If these persons fall in the category of persons set out in Article 2(2)(a) of the Directive, only very minimal safeguards apply. In such cases, the risk of *refoulement* in violation of international obligations could not be ruled out.

Article 2(2)(a) allows Member States to exclude from the scope of this Directive any persons apprehended for **irregular crossing of an external border**, and who have not subsequently obtained authorization to stay, although certain limited guarantees apply to all returns. This could mean that many of the protections contained in the Directive would apply only to third-country nationals who entered the European Union legally.

¹ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter 'Returns Directive'), at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/draftreturndirective/DraftReturnDirectiveen.pdf.

² UNHCR Observations on the European Commission's Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final), December 2005, at: <http://www.unhcr.org/protect/PROTECTION/43a6c2352.pdf>.

³ See: http://www.europarl.europa.eu/sce/server/internet/amend_motions_texts/sce_amend_motions_texts_main_02.jsp?ref=A6-0339/2007.

However, in view of visa regulations and other entry restrictions, many persons seeking protection are compelled to enter the EU in an irregular manner.

The possibility for individuals effectively to appeal against a return decision is undermined by Article 11(3), which allows Member States to opt not to provide a translation or information on the main elements of removal and entry ban decisions. Also, the wording of Article 12(4) does not oblige Member States to provide legal aid to those in need of it. The result of these provisions is an increased risk of removal of people who have protection needs.

Effective safeguards

As indicated above, for third-country nationals excluded from the full scope of the Directive, Member States must still ensure a minimum level of safeguards (Article 4 (4)). However, these relate only to the use of coercive measures (Article 7(4) and (5)), postponement of removal (Article 8(2)), emergency health care, an unspecific reference to the needs of vulnerable persons (Article 13) and detention conditions (Article 15). This effectively undermines the requirement for States to respect the principle of *non-refoulement* also contained in Article 4(4), as it will deprive many persons of access to an effective legal remedy as well as other **guarantees contained in the Directive**, such as judicial review of detention decisions, and certain safeguards pertaining to unaccompanied minors.

The special needs of **vulnerable persons** (as defined by Article 3(j)) are “to be taken into account” (Article 13(2)) in removal situations, but no specific safeguards are set out which would require Member States to address those needs. Member States must take “due account” of the best interest of the child (Article 5), but this falls short of the requirement under the Convention on the Rights of the Child to ensure that children’s best interests are a ‘primary consideration’. The safeguards for **unaccompanied minors** in Article 8(a) are insufficient. These allow return if “adequate reception facilities” are in place, without a definition of what this constitutes, and without requiring the presence of a person or entity legally responsible for the child in the country of return.

The proposed text does little to resolve the absence of standards for the administrative detention of foreigners, which is not regulated in Member States in the same way as criminal detention. **Pre-removal detention** under the draft Directive may extend to 18 months. In 2005, UNHCR expressed concern that the then-proposed six months maximum duration of detention could become the new norm in countries which limit pre-removal detention to shorter periods. This concern is clearly aggravated with the proposed extension to 18 months. The grounds on which detention could be extended to 18 months – lack of co-operation and delays in obtaining documentation -- potentially cover a wide range of cases. The second ground amounts to sanctioning an individual for the unwillingness or inability of a country to provide documentation. The first ground is problematic if the individual is not clearly informed about the implications of failure to co-operate.

Entry bans

In its 2005 comments, UNHCR had made a number of suggestions to ensure that (re)entry bans would not affect an individual's subsequent right to seek and enjoy international protection. Although Article 9(5) states that Article 9(1)-(4) applies without prejudice to the right to international protection, UNHCR's suggestions to ensure this in practice were not accepted. On the contrary, the mandatory nature of entry bans has been strengthened and their scope widened.

Article 9 of the current proposal provides that "return decisions shall be accompanied by an entry ban if no voluntary departure has been granted or, if the obligation to return has not been complied with. In other cases return decisions may be accompanied by an entry ban." Article 6a(4) allows States to withhold the possibility of voluntary departure for a wide number of reasons, including a risk of absconding, or if an application for legal stay was dismissed as manifestly unfounded, encompassing a large range of cases under EC legislation. Thus, an entry ban may be imposed on many people.

Article 14 of the Universal Declaration of Human Rights affirms the right of every individual to seek and enjoy asylum from persecution, and Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum in the EU. UNHCR reiterates that if the circumstances change in the individual's country of origin, or in the individual's profile or activities, resulting in a need for international protection, s/he must realistically be able to seek entry to the EU – whether at Member State representations abroad or at the EU's external borders. A (re-)entry ban should, furthermore, not be issued for persons whose application for protection has been rejected on purely formal grounds. At the very least, a process for withdrawal of an entry ban would need to be available at border posts as well as at consular posts abroad. The possibility to seek withdrawal in cases related to family circumstances, or other situations of humanitarian need, should be provided. Finally, an additional provision would be needed requiring all EU Member States to withdraw and/or recognize the withdrawal, in case one State withdraws the entry ban.

Conclusion

Unlike instruments adopted in the asylum field, the proposed Returns Directive purports to set common rather than minimum standards. Although Member States have the option to adopt or maintain higher standards (Article 4(3)), UNHCR remains concerned that standards on removals are likely to drop as a consequence of this text.

Recital 5 of the proposed Directive affirms the need for fair and efficient asylum systems in the EU as an essential prerequisite for the EU's return policy. Given the widely-acknowledged divergences and concerns around quality in asylum decision-making across the EU,⁴ UNHCR considers that this condition is not met. However, the proposed

⁴ See UNHCR's November 2007 Study on the Implementation of the Qualification Directive: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473050632>.

Directive would effectively require all Member States to recognize and act on removal decisions issued by others. By implication, it thus requires mutual recognition of *negative* asylum decisions, whereas the asylum instruments adopted to date do not include any obligation to recognize *positive* decisions of other Member States. This imbalance – to the detriment of people with recognized protection needs – is reinforced by the current compromise proposal. There are no EU initiatives presently in train to work towards mutual recognition of positive decisions on international protection needs. In UNHCR's view, this remains as an important gap in the asylum *acquis*.

UNHCR encourages the European Parliament and the Council to address these concerns. UNHCR considers that the compromise proposal, in its current form, does not afford a satisfactory level of procedural or substantive safeguards to ensure that removals are not effected contrary to international refugee law obligations or other fundamental rights. UNHCR remains at the disposal of the EU institutions and Member States to discuss the matter further, in order to improve the standards which this important instrument will set.

UNHCR
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