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The removal of failed asylum seekers: international norms and procedures

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Introduction

This paper reviews existing norms and best practice in removals procedures and asylum/appeals procedures relevant to the removal process in chosen countries. It is informed by regional and international standards and refers to the particular situation in the 15 pre-enlargement EU member states, Norway, Switzerland and Australia and with some references to law and practice in New Zealand and Canada. It concentrates on standards that impact the removal process, in binding international and regional treaties, regional directives and recommendations, UNHCR Excom conclusions and other guidelines.

The paper also focuses on those state removal practices that represent best practice when judged against these standards and in the light of the acknowledged need to secure removals as efficiently and humanely as possible once individuals have become failed asylum seekers. It notes specific and generic bilateral or multilateral agreements of varying kind (including tripartite agreements between UNHCR, host country and country of origin concerning collaborative return arrangements) that govern removal to and readmission to countries of origin, reflecting best practice standards. Finally throughout the paper, the range of EU practices is noted where they relevantly illustrate the continuum of existing state practice.

For the purpose of this paper, the term "failed asylum seeker" or "rejected asylum seeker" means a person whose asylum application has been rejected, with no appeals outstanding and who has not been granted permission to stay on any other basis.

This paper does not deal with practices concerning categories of persons whose international protection has ended, displaced persons under temporary protection or illegal overstayers or criminals subject to deportation (although some return practices which concern the first two of these groups are mentioned). It should be noted that invariably national legislation in member states of the European Union does not distinguish between these different categories of persons in the context of removal and return procedures; instead general aliens laws apply.

Background

Any discussion of the removal of failed asylum seekers best practice is predicated on the existence of a fair, efficient, timely process of refugee determination involving a full and inclusive application of the Geneva Convention definition that specifically maintains the principle of *non-refoulement*.¹ Article 33 provides: 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The importance of this principle "has been emphasised in many official documents, declarations and statements, Plans of Action under Maastricht, in the Treaty of

¹ *Green Paper on a Community Return Policy on Illegal Residents* (COM/2002/0175 final of 10 Apr. 2002 ("Green Paper") 5.

Amsterdam, at the Tampere European Council, in virtually all acts of the European Commission, which have been carried out pursuing the goal of gradually creating an Area of Freedom, Security and Justice, in its Proposals for Council Directives and its Communications “² It is axiomatic that a determination system that lacks some or all of the qualities of fairness, efficiency, timeliness and transparency exacerbates the difficulties often associated with removals.

The adoption of common return policies within the EU is coupled with the establishment of joint admission policies, organisation of joint frontiers, the establishment of a Common European Asylum System (CEAS)³ based ultimately upon a single procedure (common asylum procedure) and uniform status (based on a common definition and application of the relevant Convention criteria), including minimum standards of granting subsidiary protection, and efforts to integrate admitted refugees. These are all factors that will facilitate the end process of removal of those deemed not in need of international protection.

In the short term, the focus of EU attention is upon harmonisation⁴ and/or approximation of eligibility rules for refugee status and measures relating to subsidiary forms of protection,⁵ common procedural standards, and workable mechanisms to determine which state is responsible for an asylum application. It is accepted by member states that they will continue to implement the existing directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

The directive emphasises the need for Community-wide measures in this regard⁶ and must be seen as an initial step towards the enforceability of an expulsion decision made in one member state in another state without the necessity for a fresh expulsion decision.⁷ Care must be taken, however, to ensure that a pre-condition to such agreed common practices throughout the Community is due process involving at least a genuine evaluation of protection claims in the first examining state.

Recognised as vital to the promotion of voluntary return at the special meeting of the European Council at Tampere in October 1999 is an important exogenous factor of making the process of return more attractive to failed asylum seekers and thus more

² ICMPD, 16-17.

³ The first building block of the First Stage of the Common European Asylum System is the Asylum Procedures Directive the final text of which has now been agreed and will be formally adopted once a process of re-consultation with the European Parliament has been undertaken (see Justice and Home Affairs Council Communique 28 Apr. 2004).

⁴ See also, ICMPD, 30-31. Implications for the move to harmonisation of the shared competence of the EC and the MS and the need to observe the principles of subsidiarity, proportionality and effectiveness of European law making.

⁵ Proposal for Council Directive on Minimum Standards for the Qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection COM (2001) 510; ICMPD 34.

⁶ COM 2000, 757 final of 22.11.2000; ICMPD 42; See Green Paper, 12; Hailbronner, Perspectives of Legal Harmonisation of Return Policy in an EU context, Dec. 7, 2001 6 in ICMPD

⁷ Green Paper 16, 3.1.5; The Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents (COM(2002) 564 final of 14 Oct. 2002 (“the Green Paper Communication”), 17.

effective.⁸ The Council in Thessaloniki in June 2003 re-iterated the Tampere principles and noted the importance of integrating migration issues in EU relations with third countries.⁹ Similarly as UNHCR has pointed out¹⁰ the lack of a removal end to asylum processes may constitute a “pull-factor” for irregular migrants to countries of destination and transit. To be consistent with principles of international protection and state responsibility, UNHCR also considers that return to a country of origin and/or nationality of claimants whose refugee claims have been denied is preferred to policies of “non-arrival” or “deflection”.

The proposed EU wide reforms seek to combat the sometime protracted asylum procedures in member states, including various levels of appeal and/or review (and judicial review) of initial decisions, in most states with some form of suspensive effect, or suspensive effect being granted upon the making of an application at later stages of the review or appeal process, or upon an appeal on constitutional grounds on the grounds of grave risk on return being made.¹¹ Where rejection occurs in a manifestly unfounded procedure, as in Germany, an appeal normally does not have any suspensive effect unless a specific application is made.¹²

The Asylum Procedures Directive only guarantees the right to remain during the first instance procedure, allowing member states the discretion to decide whether a remedy has suspensive effect and whether and which exceptions will apply. Similarly under the Directive the rules governing the designation of “safe countries” will allow EU countries to deport certain categories of asylum seekers before their appeal has been heard, as the Directive does not ensure that all applicants have an effective opportunity to rebut the presumption that a third country is safe in their particular cases.

It is commonly accepted that the longer an asylum seeker stays in the country of asylum, the greater the reluctance to return home if the claim is ultimately unsuccessful.¹³ There is no common approach in the EU to distinguish between co-operative and un-cooperative returnees. (This seems to cause greater concern to recognised refugees or holders of temporary protection status than to rejected asylum seekers.) Several national legislative schemes make no distinction between these groups.¹⁴

In the context of the right to remain pending appeal (suspensive effect) the Justice and Home Affairs Council of the Commission has noted that a remedy cannot be

⁸ Note Green Paper on a Community Return Policy on Illegal Residents (COM/2002/0175 final of 10 April 2002, 11.

⁹ European Parliament Texts adopted by Parliament P5_TA-PROV(2003)0320 European Parliament Resolution on the Thessaloniki European Council of 19-20 Jun. 2003.

¹⁰ UNHCR:Legal and practical aspects of the return of persons not in need of international protection, Geneva, May 2001; UNHCR- Executive Committee Conclusion on the return of persons found not to be in need of international protection (No 96 (LIV) – 2003).

¹¹ For example, Austria ICMPD 61.

¹² ICMPD 87. Note that to avoid immediate removal, an applicant must file an “express request” before an administrative court within one week. If rejected, a second application can be lodged with the Federal Constitutional Court within four weeks. This appeal will not have suspensive effect.

¹³ ICMPD 153. G. Noll, ‘Rejected Asylum Seekers: The Problem of Return’ (1999) 37 *International Migration, Quarterly Review* 273.

¹⁴ ICMPD 15.

considered effective if it does not allow applicants with an arguable claim to remain in the member state pending the appeal.¹⁵

Core principles

Any asylum procedure in the EU must take account of the traditional European human rights and humanitarian standards in protecting against the *refoulement* of persons at risk of persecution.¹⁶ The obligation upon a failed asylum seeker to leave the receiving country rests on and is a consequence of a full and inclusive application of the Geneva Convention definition and a full and fair procedure.¹⁷

Until such time as the CEAS is operational, asylum regimes must ensure that any other relevant aspect, which could amount to persecution in the country of origin (e.g. non-Convention related threats or acts of persecution in a situation of communal violence) is dealt with by way of subsidiary forms of protection.¹⁸ In some countries removals are not enforced and/or are suspended if there is reason to believe a prospective returnee will face a risk of serious human rights violation.¹⁹

Removals are to be in accordance with prevailing human rights norms and states should avoid any acts that infringe the dignity of the returnee.²⁰ There is a duty of sending states to treat returnees in accordance with human rights principles in general (as enshrined in the Universal Declaration on Human Rights) and the standards set forth in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the Convention Against Torture (CAT)²¹. These four instruments inform some of the principal subsidiary forms of protection available in each of the member states.²²

¹⁵ See Justice and Home Affairs Council Communique 28 Apr. 2004.

¹⁶ ICMPD 17 fn 1. The fundamental rights guaranteed by ECHR contribute to the EU's constitutional order: as indicated by art 6(2) TEU; ICMPD 40 fn 33 concerning Article 19 (2) of the Charter of Fundamental Rights in the European Union re-affirming the standard of non-refoulement; Green Paper 8.

¹⁷ See the Communication from the Commission to the Council and the European Parliament 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum COM (2000) 755 final; ICMPD 40-41; The Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents (COM(2002) 564 final of 14 Oct. 2002. ("the Green Paper Communication") 4 notes "...the effectiveness of Community action for return of illegal residents...to be effective....require(s)...an effective and generous asylum system based on rapid procedures offering access to true protection for those needing it..."

¹⁸ ICMPD 17.

¹⁹ ICMPD 64 (Austria).

²⁰ ICMPD 16 , Green Paper 10 - includes availability of appeal during return to be consistent with Article 6 of the ECHR and respect for the principle of judicial control over detention in accordance with Article 5 of ECHR.

²¹ The Green Paper Communication 8 cites relevant articles of the applicable Conventions and Charters.

²² ICMPD 40; Note also fn 33 at 40 'article 18 of the Charter of Fundamental Rights in the European Union which stipulates that the right of asylum is to be guaranteed in compliance with the rules of the Refugees Convention and in accordance with the treaty establishing the European Community' Green Paper 9.

It is universally accepted amongst EU states and international government organisations such as UNHCR that effective return policies and practices are essential to the maintenance of credible asylum determination systems and that claimants who do not succeed in establishing an entitlement to protection must expect to be removed.²³ The Communication from the Commission to the Council and the European Parliament ‘Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum’ [COM (2000) 755 final] proceeds on the assumption that the effective implementation of the principle of return will contribute to the effectiveness of the asylum system and protect its integrity.²⁴

All states that were the subject of the ICMPD study (all EU member states except Greece; Norway and Switzerland) accept the primacy of voluntary return²⁵ (compliance with an order to leave a country rather than an option to stay or leave). However, the ICMPD also notes that definitions of voluntariness itself differ in scope and meaning throughout the EU and there is a need for an approximation between states of what the concept involves.²⁶

IOM, which assists nine of the ICMPD study countries with removals, considers voluntariness is an irreducible minimum to their involvement. This is ‘when the migrant’s free will is expressed at least through the absence of refusal to return e.g. by not resisting boarding transportation or otherwise manifesting disagreement. From the moment it is clear that physical force will have to be used to effect movement, national law enforcement authorities would handle such situations.’²⁷

It is important to recognise that there is no clear-cut dichotomy between ‘voluntary’ and ‘non-voluntary’ returns in practice. Conduct appearing to be voluntary may be the product of a threat of a sanction, contrasted with ‘will-formation in the absence of such threats’.²⁸ The linking of incentives, such as benefits offered in connection with return, a gradual reduction of benefits enjoyed in the returning country, limited by a definite time period within which any offer must be accepted and a requirement of

²³ ICMPD 40-41; Note especially Point 2.6 of the Communication from the Commission to the Council and the European Parliament ‘Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum COM (2000) 755 final; The Green Paper Communication 8.

²⁴ ICMPD 41.

²⁵ ICMPD 15; See The Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents COM (2002) 564 final of 14 Oct. 2002 (“The Green Paper Communication”) 8; It is recommended priority should be given to voluntary returns ‘for obvious humane reasons, but also due to costs, efficiency, and sustainability’.

²⁶ ICMPD 45.

²⁷ IOM, Return Policies and Programmes: A contribution to combating irregular migration: 5 Nov. 1997.

²⁸ See the useful discussion by Noll, n.15 above, 269-70. Note that in Australia there were issues as to the degree of pressure being exerted by DIMIA on detainees from Iran who had been in long-term detention in order to secure ‘voluntary’ returns (*The Age*, 18 Feb.2003,); Iran would not accept returns that were involuntary and until the commencement of 2003 the situation was a stalemate with approximately 277 (as at 18 Feb. 2003) Iranians who are rejected asylum seekers refusing to return. Iran then agreed (*The Age* Mar.12 2003,) to take both voluntary and forced returns as part of an agreement under which Australia would allow 2000 young Iranians to study under a work and holiday scheme. Iranians in Australia were offered the choice of a package of up to \$10,000 per family or \$2,000 per individual or forced removal. Most Iranians in detention have now been returned to Iran.

cooperation, would probably be considered a legitimate form of “compliance pressure.”²⁹

UNHCR considers that sensitive counselling at all stages of the asylum procedure is essential for persons concerned or affected by a return measure.³⁰ The conclusions of the UNHCR Global Consultations on International Protection, Regional Meeting, Budapest, EC/GC/01/14, 15 June 2001 stated that in promoting the voluntary return of persons not in need of international protection, the value of counselling should not be underestimated especially if counselling measures are undertaken early in the process with NGOs having a particularly important role to play.³¹

The Tripartite Voluntary Repatriation Agreements signed by UNHCR, Afghanistan and respectively the United Kingdom, France and the Netherlands involve UNHCR in monitoring the voluntariness of returnees prior to departure.³² It is also a basic principle that states preserve the right to return failed asylum seekers involuntarily (involving force as a last resort³³) if other measures to secure voluntary return fail. It is commonly accepted that measures of detention to secure the physical presence of the person to be removed are necessary in appropriate circumstances.³⁴ Detention pending removal is employed to facilitate identification or to hinder absconding before removal.³⁵ Control of the physical presence and departure of the failed asylum seeker will legitimately involve the following escalating range (and mix) of measures graduated according to the degree of interference:³⁶

²⁹ Noll, above 271-72.

³⁰ UNHCR :Legal and practical aspects of the return of persons not in need of international protection, Geneva, May 2001 6.

³¹ par 11 of the conclusions

³² Tripartite Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland, the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and UNHCR; Tripartite Agreement between the Government of the French Republic, the Government of the Islamic Transitional State of Afghanistan and UNHCR.

³³ Green Paper 8; Austria: Gagging and medication are not allowed (ICMPD 61); Belgium: Use of handcuffs if necessary; straightjackets and gagging strictly forbidden; medication only for medically indicated reasons (ICMPD 68) Finland: In case of physical resistance, resort to handcuffs and tranquillisers prescribed by a physician; gagging not allowed (ICMPD 76); France: Force to overcome physical resistance conforming to principles of proportionality and human dignity; handcuffs once removal aborted (ICMPD 82) Germany: Hand and feet-cuffing obeying the strict principle of proportionality (ICMPD 95) Ireland: Handcuffs allowed; forced medication and gagging not used (ICMPD 99) Norway: Handcuffs and strips permitted in order to secure removal (ICMPD 111) Spain: Handcuffs (ICMPD 121) Switzerland: Persons forcefully removed may be hand- and feet-cuffed; sedation may only be used if medically indicated, diagnosed and supervised by a physician (measures which can block the respiratory system are prohibited by police regulations (ICMPD 131); Australia: Flexi-cuffs are the maximum level of restraint permitted; Netherlands: Recourse to use of force permitted; hand-cuffs, carrier-cuffs, and/or straightjacket, stretcher or taped blanket, as well as medication (tranquillisers) on request of deportee and on medical indication (ICMPD 139; as at date of report (Jan 2002) under review) UK: Contractor may use reasonable force..... only where necessary to keep detainee in custody to prevent violence and to prevent the destruction of property; this may include application of mechanical restraints where such restraint is proportionate to and is the minimum necessary to ensure continued and safe removal; leg restraints must not be used without prior approval by the Government or the commander of the craft when on board the craft (ICMPD 145). Note serious issues concerning methods of application of physical restraint resulting in positional asphyxia (the cause of some fatalities during removal) – see document “Amnesty International : Switzerland: Death during forcible deportation: An exchange of correspondence following the death of Samson Chukwu” .

³⁴ ICMPD 51.

³⁵ Green Paper 14.

³⁶ Noll, above 273.

- simple address checks³⁷
- regular reporting mechanisms
- limitations on residence or domicile
- orders to present oneself at a departure point at a fixed time
- collection of the rejectee from his/her place of residence
- detention for the purposes of removal.

All these approaches may be coupled with:

- supervised departure (escort and assistance) throughout check-in formalities. This is only relevant in cases of voluntary removal.
- full escorted return (escort and assistance) for the whole itinerary, (or to a transit point). This is relevant in cases of voluntary and involuntary removal.
- escorted return with resort to force (handcuffing or even medical sedation). Involuntary removal only.

See footnote 33 for the prohibition or strict limits which are placed by some countries and by carriers on the use of force.

As the ICMPD report suggests, detention measures which practically amount to indefinite detention do not satisfy best practice norms.³⁸ The absence of any automatic review has been contentious in the United Kingdom and in Australia (which was considered by the Human Rights Committee to have contravened the International Covenant on Civil and Political Rights (ICCPR) in a number of cases of prolonged non-reviewable detention).

In all actions related to children, the child's best interest must be the primary consideration.³⁹ The EC Communication on a Community Return Policy on Illegal Residents [COM (2002) 564 final] has acknowledged the need for member states to provide for the possibility of detention pending removal. The Commission has proposed minimum standards at EU level which would cover the grounds on which detention orders for children could be issued; the groups of vulnerable persons

³⁷ For example, in the Netherlands and Australia, the latest known address of the rejected asylum seeker is determined. In Australia, detection of the whereabouts of a failed asylum seeker is usually conducted through the last known address, through Centrelink (Commonwealth Social Security agency), Medicare (National Health Insurer) or community co-operation. There is a high level of inter-agency co-operation, including on data sharing. In the Netherlands, if a failed asylum seeker disappears from their last known address, there is no further obligation of Dutch authorities to pursue investigations. In the national statistics, such disappearances are accounted for as 'removals under address control.' Clearly, if such people are subsequently encountered within the country they will be dealt with, as appropriate, but measures specifically to detect and apprehend them are not taken.

³⁸ ICMPD 154.

³⁹ The Green Paper Communication 8 citing Convention on the Rights of the Child.

including children who should generally not be detained, or should be detained only under specific conditions.

As a general rule most member states make special provision for unaccompanied minors (specifically defined as such or under the rubric of minors generally), with a range of measures that include total exclusion from a forced removal process, removal conditioned upon satisfactory arrangements being in place upon return,⁴⁰ case by case analysis before removal can take place (with avoidance of forced removal)⁴¹ and account being taken of their special needs⁴² during detention and removal. There is no uniform approach for the treatment of groups requiring special protection such as minors, the elderly, the mentally ill, or pregnant women.

Standards

At the level of states, the General Assembly of the United Nations has underlined the responsibility of countries of origin for the return of their nationals who are not refugees (Resolution 45/150 of 14 December 1990, 46/106 of 16 December 1991, 47/105 of 16 December 1992). UNHCR's Executive Committee reaffirmed this principle in its Conclusion No. 85 (XLIX) of 1998.⁴³

In the Conclusion on the Return of Persons Found Not to be in Need of International Protection (No 96 (LIV) – 2003), UNHCR's Executive Committee reiterated the following core propositions, principles and concerns in relation to failed asylum seekers:

- the efficient and expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons.
- the obligation of states to receive back their own nationals, as well as the right of states, under international law, to expel aliens while respecting obligations under international refugee and human rights law;
- the term "persons found not to be in need of international protection" is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law;

⁴⁰ For example, United Kingdom ICMPD 144.

⁴¹ Portugal concerning "minors" generally. ICMPD 116.

⁴² ICMPD 154.

⁴³ See also UNHCR: Legal and practical aspects of the return of persons not in need of international protection, Geneva, May 2001 3.

- the right of everyone to leave any country, including his or her own, and to return to his or her own country as well as the obligation of states to receive back their own nationals, including the facilitation thereof;
- as regards the return of persons found not to be in need of international protection, some countries continue to restrict the return of their own nationals, either outright or through laws and practices which effectively block expeditious return;
- the credibility of individual asylum systems is seriously affected by the lack of prompt return of those who are found not to be in need of international protection;
- the return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law;
- in all actions concerning children, the best interests of the child shall be a primary consideration;
- the importance that persons found not to be in need of international protection cooperate with return arrangements;
- that states cooperate regarding the efficient and expeditious return of persons found not to be in need of international protection, to their countries of origin, other countries of nationality or countries with an obligation to receive them back, notably by: cooperating actively, including through their diplomatic and consular offices, in establishing the identity of persons presumed to have a right to return, as well as determining their nationality, where there is no evidence of nationality in the form of genuine travel or other relevant identity documents for the person concerned and by finding practical solutions for the issuance of appropriate documentation to persons who are not or no longer in possession of a genuine travel document;
- that states parties to the 1951 Convention and the 1967 Protocol facilitate the return of persons found not to be in need of international protection by providing facilities for the transit of such persons taking into account, where applicable, agreements concerning the mutual recognition of asylum determination decisions;
- that Annex 9 to the 1944 Convention on International Civil Aviation requires that states, when requested to provide travel documents to facilitate the return of one of its nationals, respond within a reasonable period of time, and not more than 30 days after such a request is made, either by issuing a travel document or by

satisfying the requesting state that the person concerned is not one of its nationals;

- the importance of ensuring the sustainability of returns and of avoiding further displacements in countries emerging from conflict,
- that phasing returns of persons found not to be in need of international protection can contribute to avoiding further displacement;
- that once a person found not to be in need of international protection has made an informed decision to return voluntarily, this should take place promptly.

Regional standards

At EU level, the main founding policy document is the Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration [COM(2001)672 final 15.11.2001]. The Communication proposes, in particular, that a common EU return and readmission policy be based on three elements: common principles (for example the priority of voluntary return over forced return and strengthening of the obligation under international law to readmit own nationals⁴⁴), common standards, and common measures with an emphasis on internal co-ordination, exchange of information, statistics and administrative co-operation amongst member states in the areas of identification and the provision of travel documents for return purposes.⁴⁵

The Communication calls for the development of minimum EU standards for detention orders (defining the competence of responsible authorities and the preconditions for detention); minimum rules on the conditions of detention (e.g. accommodation standards); and time limits for detention before removal. It also makes two further significant points regarding the issue of concluding bilateral or multilateral transit and readmission agreements by member states; the human rights situation in countries of origin and transit should be taken into account before the negotiation of transit and readmission agreements. Further, readmission clauses should be included in all future Community association and co-operation agreements.⁴⁶

The Communication also acknowledges the significance of the EU/Schengen visa sticker as a document with the highest security standard. There is a further Commission proposal⁴⁷ for integration of a highly secure photograph into the uniform

⁴⁴ Note ECOSOC of the EC submission at Hearing on a Community Return Policy on Illegal Residents Brussels, 25 Jul. 2002, A2/JS/CK D (2002) Synthesis 3.

⁴⁵ ICMPD 32-3.

⁴⁶ ICMPD 34; See also Paragraph 3.3

⁴⁷ OJ L 81 of 21 Mar. 2001, 1 noted at 4.1.2 of the Communication on a Common Policy on Illegal Immigration.

format for visas. The development of a common European Visa Identification System is considered essential.

Expanding on these broad principles, the Green Paper on a Community Return Policy on Illegal Residents (COM/2002/0175 final of 10 April 2002) (“Green Paper”) formulates the following additional recommendations of relevance:⁴⁸

- the identification of measures to improve cooperation between receiving states, countries of origin and UNHCR, IOM and NGOs with a view to facilitating voluntary and involuntary returns.
- the development of services providing information and preparing people for return (which might include evaluating the merits of exploratory visits).
- the identification of ways of improving the number of expulsion decisions that are actually enforced, possibly by setting specific targets and assessing their practical impact.
- the preparation of guides to good practice on the various issues raised by the return of individuals, including involuntary repatriation (escorts, means of transport, detention conditions prior to removal, etc.), which might serve as a basis for EU-wide guidelines.

The Green Paper further recommends that common standards be established in four areas:

- final safeguard of non-refoulement requirements according to obligations under international law.
- basic requirements for the physical state and mental capacity of the persons removed, to include treatment of vulnerable groups such as minors, and issues of separation of members of family units.
- security standards for the removal itself, such as on the use of restraints and on the competencies of escorts.
- mechanisms for member states to streamline their return practices in relation to specific countries of origin where the present situation makes removals questionable due to compelling humanitarian reasons (this proposal implies that the member states prepare a common list of countries to which persons should temporarily not be removed).

⁴⁸ Green Paper 9.

Another important recommendation in the Green Paper concerns detention for removal. It recommends that the setting of minimum standards for detention orders be set at an EU level, defining the competence of responsible authorities and the preconditions for detention covering:

- identification of groups or persons who should generally not or only under specific conditions be detained.
- issue or confirmation of the order without delay within statutory limits by a judicial authority.
- minimum rules on the conditions of detention, in particular on accommodation standards.
- if specific detention facilities are unavailable, detention in an ordinary prison to involve separation from the normal prison population.
- member states are to give indications of the regular and maximum duration of detention for return purposes and an assessment of technical or legal alternatives to detention.

The Green Paper also recognises the need to establish a clear legal framework for transit through another member state during the return process⁴⁹ for example, the use and competencies of escorts in transit and regulations on failure of return (en route) and the development of a secure standard travel document for voluntary returnees who might otherwise need a visa to transit through another member state.

The Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents (COM(2002) 564 final of 14 October 2002 (“the Green Paper Communication”)) reiterates the central features of the Green Paper. It stresses:

- Operational cooperation between member states.
- adoption of common standards for return operations, in particular full mutual recognition of removal decisions.
- emphasis on preparation and follow-up of return to enhance sustainability.
- improvements in administrative and organisational cooperation with countries of origin concerning documentation and reception, and with transit states.⁵⁰
- intensive joint training for those involved in return enforcement that should be carried out by a specialised service. Skills necessary include: knowledge of the legal competencies, adequate treatment

⁴⁹ Green Paper 18.

⁵⁰ The Green Paper Communication 5, 24.

of detainees, the management of incidents, intercultural understanding and negotiation techniques; use of restraints to be governed by common standards laid down in guidelines.

- establishment of a clear legal framework for transit procedures (in case of other member states) such as the use and competencies of escorts and regulations on failure to return⁵¹ and for removal of returnees who are nationals of countries under a visa obligation to other member states through whose territory transit must be made.
- enforcement of an expulsion decision issued by one member state in another without the latter having to issue a new decision.⁵²
- proper assessment of those subject to removal as to suitability especially vulnerable groups.
- development of standards covering the intensity of coercive measures.⁵³
- development of minimum standards defining the competencies of responsible authorities and the preconditions for detention:
 - i. Grounds for detention pending removal should be based upon the need to obtain return travel documents or to prevent absconding during removal.
 - ii. Identification of groups of persons who should generally not or only under specific conditions be detained: unaccompanied children and minors, elderly, pregnant women (unless threat of absconding and medically approved), those suffering serious medical conditions or mentally ill, those who according to independent evidence have been tortured in detention, people with serious disabilities.
 - iii. Rules concerning the issuing of a detention order: proportionality of detention and possibilities of suitable alternatives to detention such as reporting duties, obligatory residence, bail bonds or electronic monitoring.
 - iv. Provisions on judicial control; competence of body to issue or revise a detention order.
 - v. Provision for absolute time limits on duration of detention and time limits for judicial review on the continuation of detention.
 - vi. Rules on conditions of detention in particular accommodation standards and legal assistance; separation of returnees from the criminally convicted.

⁵¹ Green Paper 15. Note German initiative for a Council Directive on assistance in cases of transit for the purpose of return by air and annex 9 of the “Chicago Convention” (The Convention on International Civil Aviation) of 7 Dec. 1944.

⁵² Green Paper Communication 17.

⁵³ *ibid.* 18.

- satisfactory proof of exit.⁵⁴
- creation of return programmes involving all or most of:
 - i. pre-return advice and counselling
 - ii. training/employment assistance
 - iii. assistance for travelling to and/or re-establishment in the country of origin/housing
 - iv. follow-up assistance and counselling post – return
 - v. back-up facilities in the field in the country of origin
 - vi. making information available as early as possible for potential returnees on the possibilities for voluntary return to the country of origin⁵⁵ on return programmes, and on the situation in country of origin
 - vii. vocational or other training before return or in the country of origin
 - viii. incentives for return which are flexible and adapted to the general circumstances on the ground.

It should be noted that the Seville European Council of 21-22 June 2002 agreed to the adoption by the end of that year of the main components of a repatriation programme based on the Commission's Green Paper. The 'Return Action Programme' (referred to in the 'Communication on a Community Return Policy for Illegal Residents') was approved by the Council in early December 2002.

The 1997 EU Resolution on Unaccompanied Minors reiterates in Article 5 (1-2) the key principle that member states may only return a separated (or unaccompanied) child to his country of origin or a third country, if on-arrival adequate reception and care is available.

Recommendation No. R (99) 12 of the Committee of Ministers of the Council of Europe to member states on the Return of Rejected Asylum-Seekers provides a general background source of principles against which the policies and practices of member states of the Council of Europe are evaluated.⁵⁶ While stating that voluntary return is preferable, it acknowledges the necessary resort to mandatory return on occasion, provided this takes place in a humane manner with full respect for fundamental human rights and without the use of excessive force, and taking account of the principle of family unity.

It additionally makes recommendations affecting the countries of origin: that they respect their obligations under international law to readmit their own nationals without formalities, delays or obstacles; refrain from applying sanctions against returnees on account of their having filed asylum applications or sought other forms of protection in another country; take into account the principle of family unity, in

⁵⁴ See Green Paper Communication 21.

⁵⁵ *ibid.* 22.

⁵⁶ This recommendation is premised upon: fair and full determination procedure; no right of stay upon final rejection; expectation of cooperation by failed asylum seeker to facilitate return; implementation of removal measures to be in accordance with applicable Human Rights standards and obligations.

particular as it concerns the admission of such family members of the persons to be returned who do not possess such nationality; do not arbitrarily deprive the person concerned of his or her nationality; do not permit renunciation of nationality. Both host country and country of origin should cooperate in concluding readmission agreements and in determining nationality. All or most of the above principles clearly should form part of any return or readmission agreement.

The Treaty of Amsterdam has integrated the ⁵⁷ Schengen acquis on return issues into the EU, in particular Article 23 of the Convention implementing the Schengen Agreement. Certain features of the EU Schengen Catalogue, External borders control, Removal and readmission: Recommendations and best practices, Council of the European Union, 28 February 2002 ⁵⁸ should be noted as it covers all classes of removals but is pertinent to the situation of failed asylum seekers.

- i. Removal measures to comply with the rule of law; removal to be coupled with a ban on return for sufficiently long period to be dissuasive, non-compliance to incur sanctions.
- ii. Guaranteed appeal for detainee to appeal measures imposed.
- iii. Request to leave the country to be followed up by check on departure.⁵⁹
- iv. Deliberate resistance to removal may be subject to specific sanctions.
- v. Removal of unaccompanied minors as soon as possible⁶⁰ while ensuring and preserving the best interests of the child and respect for the provisions of the International Convention on the Rights of the Child; as far as possible ensuring minors are accompanied and taken charge of upon arrival.
- vi. Identification, particularly by fingerprinting of those subject to removal measures.
- vii. Detention of minors only in specific cases and in compliance with the Convention but appropriate alternatives to detention to be provided.⁶¹
- viii. Duration of detention to be primarily guided by what is strictly necessary for the practical organisation of departure by the responsible agency.
- ix. Laissez-passer to be obtained from consular authorities within time limits compatible with the periods of detention in viii) through the use of all appropriate means including consular visits to detention centres.

⁵⁷ Green Paper 5.

⁵⁸ Note the references in The Green Paper Communication 10,12 and footnote 11.

⁵⁹ Assumes the existence of exit controls.

⁶⁰ Note some countries do not allow removal of unaccompanied minors in any circumstances, forcible removal (Belgium-ICMPD 67) or detention (Belgium; Luxembourg; Switzerland – of minors if under 16) or removal of minors per se (France –ICMPD 81). Ireland requires children to be accompanied by welfare officials (ICMPD 99); Sweden protects children against deportation (ICMPD 126). Note that unaccompanied minors in the UK who submit a formal asylum application are granted exceptional leave to remain until they reach 18. At that point they must reapply to have their claims processed as an adult.

⁶¹ Austria (ICMPD 62) Less invasive restrictions for minors is the rule unless reason to believe measure will not facilitate removal.

- x. Where necessary, specially trained escorts to be provided preceded by a risk assessment of the person to be removed to determine whether escorts are required and how many; carrier to be informed of the results of the assessment in accordance with the Chicago Convention and the standards and recommendations adopted by the International Civil Aviation Organisation (ICAO); introduction of special European charters for group removals.
- xi. Concluding readmission agreements or introduction of readmission clauses into other kinds of agreement or other practical measures dealing with country's own nationals or nationals of third countries (or regarding transit).
- xii. Decision to re-admit to be accompanied by contemporaneous physical acceptance by the re-admitting state; Response to initial request to be timely.

The removal process: norms and best practice

Australia provides a range of powers to immigration officers to locate and take action against, inter alia, failed asylum seekers. Production of information and documentation is required where there is reasonable or good cause to suspect a person is in the country unlawfully or premises are occupied by such a person.

The powers given to immigration officers are broad. They may detain a person suspected of being unlawful, their powers of investigation (search and seizure) are subject only to an administrative warrant and there is no limitation in cases of non-cooperation regarding identity of having to be brought before a judge. Unlike the United Kingdom which expressly enables entry to premises by detainee custody officers for the purpose of detention and removal if need be by reasonable force to carry out a search,⁶² there is no explicit reference to the use of force in the Australian statutes.

Detention and alternatives to detention

At present the treatment of failed asylum seekers ranges from short-term detention for the purposes of making necessary arrangements for removal (and establishing identity) or detention due to risk of absconding because of past behaviour or reasonable suspicion,⁶³ to mandatory detention for all failed asylum seekers who were originally unauthorised arrivals (Australia), without any automatic right of review (subject now to the obligation to release families which include children from detention centres).

While the prohibition against release before removal is qualified in the above instance of families with children, detention generally remains of indefinite duration unless voluntary return can be negotiated with the individual and the state of origin – and in

⁶² Nationality, Immigration and Asylum Act 2002 c 41 s64.(UK)

⁶³ ICMPD 88. (Germany)

the case of involuntary return, with the state⁶⁴ - or pursuant to the recently enacted s195A of the Migration Act in circumstances where in the Minister's unfettered discretion he or she personally grants a visa enabling release believing it is in the public interest to do so or if the Minister invites a person to apply for a Removal Pending Bridging Visa. In this latter situation the detainee will remain in the community until granted a substantive visa or the visa is withdrawn and he or she is removed from Australia or detained and then removed.

The same process of nomination (by an immigration officer or a judge) occurs where a minor who without a parent to act for him is detained. A minor (whether accompanied or not) may only be detained in exceptional circumstances. In Australia there is a perceived conflict between the role of the Minister as guardian of unaccompanied minors in detention/alternative detention and the role of decision maker and custodian. The principle that detention of children is a last resort was enshrined in Australian law in 2005.

In the case of detention for removal, security regimes with varying levels of freedom for detainees within the centre and visiting rights are employed. Detention for the purpose of removal is otherwise subject to fixed time limits (with few exceptions) and is reviewable at or after fixed time intervals. However the actual duration and limits of detention pending removal, rights of appeal and the nature of available review rights in relation to detention vary between member states according to legal and political traditions.

Possible time limits for detention pending removal range from statutory limits of a few days or set periods of months, extendable limits of several months (to a finite maximum) to no explicit statutory limits⁶⁵ at all⁶⁶ or with a specified maximum

⁶⁴ There was a possible qualification of release if removal was not reasonably practicable *Minister for Immigration & Multicultural & Indigenous Affairs Al Masri* [2003] FCAFC 70 (2003) 126 FCR 54 197 ALR 241 73 ALD 609 but the judgment of the High Court on an appeal on the same issue *Al-Kateb v Godwin* [2004] HCA 37 (2004) 208 ALR 124 78 ALJR 1099 sanctioned indefinite detention in these circumstances. Long term detention over a period of two years is now the subject of formal administrative scrutiny by the Commonwealth Ombudsman although as of the last quarter of 2005 processes were still being worked through; Australia has been found to be in breach of the ICCPR (article 9 par.1) because of the absence of review rights for a person held for deportation for a prolonged period (2 years). The unanimous view of the Human Rights Committee in Communication No. 900/1999 CCPR/C/76/D/900/ 1999, 6 Nov. 2002) 8.2.

...the author [of the complaint]'s detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit...the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends...by, for example, the imposition of reporting conditions, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, continuance of immigration detention for over two years, without individual justification and without any chance of substantive judicial review was arbitrary and constituted a violation of article 9, paragraph 1.

Note that while there is still no substantive judicial review of detention, the Minister may on certain specified grounds release a person (being an unauthorised arrival) who would otherwise remain in detention, but will not do so in the case of failed asylum seekers who are eligible for removal. These discretionary exceptions are for specified 'special categories' – youth, aged, torture/trauma, medical treatment In the case of failed asylum seekers in detention

⁶⁵ Finland: Alien may be detained for preparatory reasons to removal but practically only when this is feasible. Similarly in some German States, detention will not be imposed where removal can not be implemented.

duration subject to the stipulation that it is exceptional both in terms of conditions and time limits i.e. if, for example, removal is finally impossible then the failed asylum may no longer be lawfully detained.⁶⁷ On a practical level assuming the exhaustion of remedies to challenge removal, travel arrangements might be made prior to informing and detaining a failed asylum seeker to minimise the length of time in detention.⁶⁸

In a few states⁶⁹ recourse to judicial review may be accessed by a detainee at different levels of the national judicial hierarchy. (in addition, sometimes, initially there may be access to internal administrative review⁷⁰). Removal detention facilities range from normal remand prisons (where separation from “prisoners” is not always respected) to special or purpose-built detention facilities (where family unity is not guaranteed in some countries).⁷¹ In view of the mandatory detention regime operating in Australia, asylum seekers and failed asylum seekers usually are mixed together in detention centres.

Detention pending removal may be used to prepare an individual for departure. NGOs or caseworkers⁷² can provide valuable counselling services or enable escorting personnel to meet their charges prior to removal.⁷³

Alternatives to detention in the case of failed asylum seekers may involve regular reporting and/or residence at designated places as in Austria (with varying levels of security⁷⁴), reporting coupled with restriction of movement to within the local municipality where they live,⁷⁵ or of employment or occupation⁷⁶ or an obligation to

⁶⁶ ICMPD “Country Reports”; Green Paper 14; Netherlands: ICMPD 141, if detention is ordered when foreign national has a legal residence and is awaiting a final decision, the detention may not exceed four weeks (or six weeks in exceptional cases). In other cases there is no time limit set by law. UK law does not provide for maximum period of detention.

⁶⁷ Norway (ICMPD 111-12); Germany: Note that detention “to safeguard/guarantee the removal” cannot be authorised, however, if it appears that the removal will not be implemented within a period of three months, for reasons beyond the control of the removable foreign national.

⁶⁸ Note the PRRA notification in Canada. The trigger for this is suggested to be various stages along the continuum of obtaining a valid travel document depending on the circumstances of each case: *Immigration Manuals*, Citizenship and Immigration Canada, Chapter ENF 10, Removals 15.2-15.3.

⁶⁹ Belgium: (subject to review by Committals Division of the Criminal Court can only check the legality of the decision to detain). Finland, France, Germany: (appeal) The first decision to arrest and detain a foreign national/failed asylum seeker is made by a judge of the local court. Thereafter, there is the possibility of an “immediate administrative appeal” at a regional court within fourteen days after the first decision to arrest a failed asylum seeker has been taken. This can be followed by an “immediate further administrative appeal” at a higher regional court within 14 days after the decision of the regional court. Italy; Switzerland (within ninety six hours).

⁷⁰ Sweden: (review and judicial appeal), ICMPD 128. Detention is subject to review by the authority that has taken the decision to detain. A judicial Court or Tribunal is only involved if an appeal against the detention decision is lodged. The county administrative court reviews appeals. Its decisions can be appealed to the administrative appeal court and exceptionally to the Supreme administrative court.

⁷¹ ICMPD 100.

⁷² G. Mitchell, ‘Asylum Seekers in Sweden, An integrated approach to reception, determination integration and return’ Aug.2001 3-6. (unpublished) This paper deals with the introduction of a sensitised approach to issues of returns in Sweden as a response to serious difficulties in the asylum determination system. The success of Sweden in relation to voluntary return programmes is due to its multi-agency approach. (‘Mitchell’)

⁷³ ICMPD 154-55.

⁷⁴ ICMPD 23.

⁷⁵ Germany, ICMPD 90.

hand over a passport⁷⁷ or bail bonds or electronic monitoring.⁷⁸ The US position is to develop alternatives to detention through monitoring.⁷⁹

At the point of final rejection of asylum claims, claimants who have been at large in the community will display varying levels of resistance to removal. Various stratagems can be employed to bring persons into a removal process at certain points; e.g. at time of reporting in cases of regular mandatory reporting, at the time of a scheduled interview, when a decision is being communicated, on renewal of benefit entitlement or residence status, or following inquiries through arrest. An individual in some cases will pass through various centres involving graduated levels of restraints or restrictions on freedom of movement culminating in detention for the purposes of removal.

In the case of systems of universal mandatory detention for unauthorised arrivals such as is still the “model” in Australia individuals are notionally in a pre-removal process in the event their claims are finally rejected unless the Minister exercises a non-compellable discretion to grant a visa enabling their release if it is in the public interest to do so or if the Minister invites a person to apply for a Removal Pending Bridging Visa (see above). The Swedish model of “motivational counselling” prepares the asylum seeker for all possible immigration outcomes and assesses the risk of absconding on a negative decision. This may lead to pre-removal detention of persons who have been living in the community during the determination process (after initial periods in detention, and then at a reception centre, pending investigation of identity if this is required or in the case of families, single women and unaccompanied youth.⁸⁰)

Where there is a practical inability to return a failed asylum seeker due to instability in his or her country of nationality, if the individual is assisting in efforts to effect the removal, his or her situation may be “tolerated”, and may, as in the case of the United Kingdom lead to “exceptional leave to remain” on humanitarian grounds.⁸¹

Documentation problems

The issues of readmission to countries of nationality can be best dealt with by the conclusion of bilateral or EU readmission agreements which regulate matters such as the means to establish identities, the unconditionality of readmissions, time frames for requests and readmissions and general cooperation and technical details.⁸²

Now that the Treaty of Amsterdam has come into operation member states may enter into readmission agreements so long as there is no EU readmission agreement in force. Even in this case, member states may still enter into bilateral agreements if

⁷⁶ United Kingdom, ICMPD 143.

⁷⁷ Norway, ICMPD 111.

⁷⁸ Green Paper Communication 20.

⁷⁹ Intervention by INS, USA at Hearing on a Community Return Policy on Illegal Residents Brussels, 25 Jul 2002, A2/JS/CK D (2002) Synthesis 15.

⁸⁰ Mitchell 7.

⁸¹ ICMPD 144.

⁸² ICMPD 26.

there is a need for more detailed arrangements and procedures. Those agreements already existing will continue to apply. Agreements entered into by the Commission bind member states although they are not contracting parties. The EU also has power to include readmission clauses in all agreements such as association, co-operation and mixed agreements. These will have model readmission clauses.⁸³

When Australia and other countries sign any Memorandum of Understanding with another country on related issues such as people smuggling, clauses are inserted as to the provision of travel documents to nationals of the other country and the timeliness of provision.

The tripartite readmission agreements whose provisions are set out below should also be noted in relation to the documentation issue. Regarding the use of travel documents, it should be noted that only a few EU countries have made extensive use of the Standard EU Removal Document ('the EU travel document') or the standard removal document set out in Appendix 9 of the Chicago Convention ('the Annex 9 removal document'). The UK has used the EU travel document successfully due to the adoption of strict criteria of consistent and uniform formatting, good quality production, using only originals and imposing authenticating seals.

The Agreement on Immigration Matters between the Swiss Federal Council and the Government of the Federal Republic of Nigeria (9 Jan. 2003) sets out a very useful catalogue of documents which will be acceptable for the purposes of establishing nationality where the person to be repatriated does not present nationally recognised documents. The obligation to issue travel documents exists when a person presents one of the following documents or other evidence to establish proof of nationality:

- i. citizenship certificates which can clearly be allocated to a person.
- ii. expired passports of any kind (national passports or surrogate passports).
- iii. identity cards including temporary and provisional ones.
- iv. official documents indicating the citizenship of the person concerned.
- v. seaman's registration books and skipper's service cards.
- vi. unequivocal information provided by the competent authorities.
- vii. a certificate of state of Origin, or an ECOWAS Travel document issued by the Nigerian authorities.
- viii. any other document recognised by the government of the requested contracting party that makes it possible to establish the identity of the person concerned.

Photocopies of these documents, driving licences, company ID cards, birth certificates, statements made by witnesses or by the person concerned, language spoken (although not automatically establishing the fact of nationality) as well as any other matter such as a fingerprint, will be prima facie evidence of nationality.

⁸³ ICMPD 42-3 for examples, Green Paper 23.

Limitations on removal

Asylum seekers are generally not subject to removal until a final determination of their claims, whether as a result of the suspensive effect of appeal itself, or orders made by a court or tribunal, statutory limitations⁸⁴ or as a matter of practice, notwithstanding the absence of any legal bar to removal.

In Canada upon the finalisation of a person's claim for refugee protection (after whatever administrative or judicial review stage the claim reached for it to be characterised as "finalised") when a removal order has been made, a failed asylum seeker must be notified at an appropriate time of his or her opportunity to make an application for a Pre-Removal Risk Assessment (PRRA).

If application is made, the case officer must conduct a risk review⁸⁵ (except in certain cases of ineligibility⁸⁶ such as coming from a designated country or within Article 1F exclusions) against the statutory criteria in the Immigration and Refugee Protection Act (Can). This involves an assessment of possible contraventions of the principle of non-refoulement and broader non-Convention related criteria of risk.⁸⁷

Canada is alone in having this separate mechanism at the conclusion of an asylum determination process. The PRRA also involves an assessment of the different case variables and the need for escorts.⁸⁸ Australia, as a matter of practice conducts an assessment in individual cases where removal of a person in detention is in contemplation (whether voluntary or involuntary), in the case of a forced removal or in those cases of voluntary return where escorts are used. All EU member states engage in similar assessments as required. Voluntary Returns

An essential factor in any removal process is the preparation of the individual for return to his or her country of origin. There is no common practice or accepted norms in the countries being examined as to the extent and quality of counselling, the stage at which this should begin, and the content of any such programme. Many EU states have specific programmes to facilitate voluntary return and sustainable re-integration in countries of origin (but the more sophisticated of these are generally directed solely or primarily to persons other than failed asylum seekers.⁸⁹

The standard to which UNHCR urges states to adhere (in its Paper 'Legal and Practical Aspects of the Return of Persons not in need of International Protection,

⁸⁴ s114Q Immigration Act (New Zealand); 'No person who is refugee claimant may be removed from New Zealand until their refugee status has been finally determined' Y7.1 New Zealand Border Policy ; See also s129D 92 Border Policy D4.45.1 a ; See to same effect United Kingdom, Nationality, Immigration and Asylum Act 2002 c 41 s77, subject to return to a MS which has accepted responsibility for processing the claim (s80).

⁸⁵ See Immigration Manuals, Citizenship and Immigration Canada, Chapter ENF 10, Removals 14-15.

⁸⁶ Immigration and Refugee Protection Act (Can) s 112(1)(2)(3); 101(1)(e).

⁸⁷ *ibid.* s113-115.

⁸⁸ Immigration Manuals, Citizenship and Immigration Canada, Chapter ENF 10, Removals 23-4.

⁸⁹ For example, in cases of mass influx where the need for temporary protection is over ICMPD 26-8, 36-9 and 35-6 regarding those enjoying international protection who wish to return home (only two contexts where exploratory visits arises as an issue). Note also voluntary repatriation schemes directed at asylum applicants ICMPD 45; See Green Paper 21 for factors conducive to the success of such return projects; note Aug. 2002 Afghan voluntary assisted return package in UK is not available to applicants who have been rejected. *The Times* 21 Aug 2002.

May 2001) is the provision of sensitive counselling at all stages of the asylum process involving inter alia assistance in maintaining contact with their families, skills acquisition/vocational training and NGO support and involvement.

Features of any removal process incorporating elements of best practice for return, would additionally include provision of accurate country information on return conditions (including ‘safety’ and ‘returnability’ assessments such as those conducted by UNHCR),⁹⁰ post-return follow-up (and counselling) and a balanced approach to the issue of whether and when to advise applicants of the consequences of rejection during the application process or after final rejection.⁹¹

The allocation of a case-worker who assists each asylum applicant at every stage of the determination process, coupled with ‘motivational counselling’ preparing the asylum seeker for all possible immigration outcomes and to assess the risk of absconding on a negative decision (leading if necessary to pre-removal detention), as occurs in Sweden, is an important best practice initiative.⁹² A positive feature of this system is the element of ‘choice.’ Three options are presented upon final rejection: voluntary repatriation, escort by case-workers or being handed over to police for removal (and being detained). Adoption of such initiatives can have a measurable impact on the sustainability of return.⁹³

Cooperation of countries of origin

Securing the cooperation of countries of origin in the return process has been identified by all major interested parties⁹⁴ (including governments⁹⁵) as a significant obstacle to achieving best practice in the implementation of removal decisions. This obstruction and uncooperative attitude towards the readmission of own nationals takes the form of delay,⁹⁶ denial or non-recognition of citizenship,⁹⁷ reluctance or refusal to issue travel documents, disputing the individuals entitlement to return as a whole

⁹⁰ ICMPD 157.

⁹¹ Noll 270-271. Note that in some countries such as Norway the relevant immigration authority has a responsibility to provide necessary information to asylum seekers regarding the possible consequences of a rejected application (ICMPD 111); Note IOM submission at Hearing on a Community Return Policy on Illegal Residents, Brussels, 25 Jul 2002 A2/JS/CK D Synthesis 5 ‘Information/counselling about return options earlier in the asylum process’ was stressed.

⁹² Generally G. Mitchell. Note also the role of Belgium’s Centre for Voluntary Return and its contacts with IOM; also the recent development in the Netherlands of Removal Centres.

⁹³ Green Paper 22.

⁹⁴ UNHCR Global Consultations on International Protection, Regional Meeting, Budapest 6-7 Jun 2001; Conclusions EC/GC/01/14, 15 Jun 2001.

⁹⁵ ICMPD 14, 26.

⁹⁶ Despite the fact EU MS have introduced a standard Travel Document for return purposes as a response to this problem, countries of return do not at all, only exceptionally, or only on a case by case basis, accept this laissez-passer and mostly insist on making use of their own return documents (Green Paper 19, 3.4.2). Only a few EU countries have made extensive use of the EU travel document or the standard removal document set out in Appendix 9 of the Chicago Convention (‘the Annex 9 removal document’)

⁹⁷ Executive Committee of the High Commissioner’s Programme Standing Committee 47th Session ‘Return of Persons Not in Need of International Protection’ EC/47/SC/CRP.28 30 May 1997 at [13] notes the results of a major internal survey of UNHCR Branch Offices in Europe in 1996 with respect to difficulties in returning rejected cases in a significant number of European countries.

including non-acceptance of established identities⁹⁸, requiring that returns be staggered⁹⁹ or objecting to the proposed modalities of return.¹⁰⁰ Some countries are reluctant to re-admit their own nationals in cases where removal is involuntary, in cases of undocumented returnees or where large numbers are involved.¹⁰¹ Some states will not readmit their own nationals if they do not return voluntarily.¹⁰²

Outright refusal to re-admit by the authorities of countries of origin or the adoption of a course of action which is tantamount to such a refusal will be seen as contrary to the basic principle of international law and of customary international law that states are obliged to re-admit their own nationals.¹⁰³

Readmission agreements

Bilateral readmission agreements, or multilateral agreements or frameworks for co-operation, which set out the practical procedures and modes for return and readmission are the preferred response to these problems¹⁰⁴ in conjunction with the insertion of readmission standard clauses in the case of EU states in all future Community association or cooperation agreements.¹⁰⁵ UNHCR¹⁰⁶ notes that return policies are positively influenced by these factors as well as by geographical proximity of, and the existence of a broader political and/or economic dialogue with the country of origin, availability of resources dedicated to promotion of voluntary return and assistance of international organisations.

Reducing evidentiary requirements for proof of citizenship by amending domestic legislation in countries of origin may additionally be required.¹⁰⁷ The Independent Commission of Immigration to Germany, appointed by the Ministry of Interior (the paper “Structuring Immigration; Fostering Integration” Berlin 2001), noted that successful readmission negotiations implied an in-depth examination of the motivations behind a country of origin’s reluctance to re-admit its own nationals. The establishment of special units such as within the Swedish Migration Board and in the UK system, known as the OLT (Overseas Liaison Team) are positive examples of the way readmission policies and EU cooperation can be developed.

⁹⁸ Hailbronner, ‘Perspectives of Legal Harmonisation of Return Policy in an EU context’, Dec 7, 2001 2–3; ICMPD Report 3.

⁹⁹ UNHCR, ‘Legal and practical aspects of the return of persons not in need of international protection’ Geneva, May 2001 4

¹⁰⁰ Noll, 268.

¹⁰¹ ICMPD 22-3.

¹⁰² ICMPD 130; See also fn 28 above

¹⁰³ ICMPD 21; Noll, 274; Note Seville European Council of 21-22 June 2002, Conclusions 33-6 regarding readmission by third countries of their own nationals; Recommendation No R (99) 12 of the Committee of Ministers of the Council of Europe to Member States on the Return of Rejected Asylum-Seekers.

¹⁰⁴ Green Paper 11, 22-23; ICMPD 155 noting such agreements contain provisions in regard to time limits for requests, replies and readmissions; they also regulate the degree of proof and the means by which proof can be produced.

¹⁰⁵ Green Paper 24; ICMPD 156

¹⁰⁶ UNHCR, ‘Legal and practical aspects of the return of persons not in need of international protection’, Geneva, May 2001 4

¹⁰⁷ UNHCR, ‘Legal and practical aspects of the return of persons not in need of international protection’, Geneva, May 2001 6

Cooperation of individuals

Difficulties in securing the removal of failed asylum seekers also stem from actions taken by individuals, such as disappearing into an illegal status, deliberately withholding information about their nationality or identity,¹⁰⁸ or by evading their obligation to leave. Concealment or destruction of identification or travel documents (which invariably occurs prior to arrival in the country of asylum) also occurs¹⁰⁹ as does claiming of a completely false identity and/or nationality.¹¹⁰ Additional limitations to return occur according to the ICMPD Final Report such as self-inflicted harm and physical resistance during the return process.¹¹¹

Some asylum legislation exceptionally obligates individuals to cooperate in their return on the basis that the grant of benefits is linked to the degree of cooperation in establishing identity and obtaining travel documents.¹¹² Resort to social workers as an encouragement and support to returnees can serve as a re-enforcement to co-operation in the removal process.¹¹³ The Green Paper Communication notes the importance of carrying out of suitable identification measures during administrative procedures such as at visa posts when the person concerned has an interest in providing correct data.¹¹⁴

Reintegration in countries of origin

Most EU member states (and Australia) employ various forms of repatriation and integration packages targeted usually at particular national groups as an inducement to the return of failed asylum seekers. These involve a mixture of financial incentives, practical assistance on immediate return home (sometimes confined to vulnerable groups¹¹⁵) and (less frequently) vocational training before departure or after arrival in the home country. It is not unanimously accepted that a person without a valid protection claim shall receive financial or other assistance to comply with an obligation to leave.¹¹⁶

¹⁰⁸ Hailbronner, 'Perspectives of Legal Harmonisation of Return Policy in an EU context', Dec. 7, 2001 2-3 in ICMPD Report notes "concealment of true identity by various false names or identities, particularly the allegation to be a national of a certain state in which no deportations are possible for legal or factual reasons; ...lack of cooperation in clearing the identity/nationality and travel documents or refusal to sign an application for travel or other official documents or resistance to appear at an embassy or consulate for clearing the nationality."

¹⁰⁹ ICMPD 152.

¹¹⁰ The Green Paper Communication 13. "as a consequence [of which] lengthy and expensive procedures have often to be carried out which includes presentation at several embassies of neighbouring third countries or a language or dialect analysis."

¹¹¹ ICMPD 14.

¹¹² *ibid.* 21.

¹¹³ ICMPD 67.

¹¹⁴ Green Paper Communication 13 ; Note the European Council Agreement on the establishment of an online European Visa Identification System; The Schengen catalogue published on 28 Feb 2002 is likely to improve efficiency and co-operation at EU level; The EC is also currently developing a secure intranet website for migration management services with a potential to improve intra-EU cooperation at all levels.

¹¹⁵ ICMPD 66, Austria.

¹¹⁶ ICMPD 20, Denmark; Norway, Portugal, Sweden exclude rejectees from Voluntary Assistance Return Packages (VARP) of those countries providing assistance in various forms including financial, travel costs etc include Austria, Belgium, Finland, France, Germany, Spain, Netherlands, United Kingdom.

A number of member states offer voluntary return assistance programmes to rejected asylum seekers, and within the category of those who do, some leave eligibility regarding rejectees against whom a deportation order has been made to a case-by-case decision¹¹⁷ Return projects directed inter alia at rejected asylum seekers may cover all persons in the category of rejected asylum seeker or target those from a specific country,¹¹⁸ countries¹¹⁹ or region. Rejectees who lack financial means may receive financial support with travel costs.¹²⁰ The Green Paper in this context notes the need to consider the establishment of a financial aid system for returnees to bridge the initial period after repatriation.¹²¹

Escorted removal

Based on the ICMPD Final Report, there are no common European standards for the treatment of returnees or training of those engaged in escort duties (whether of voluntary or involuntary returnees); in some cases, detailed and/or specialised standards are non-existent.¹²² Escorts may be police officials (from different agencies including quasi-police services¹²³), immigration officers, employees of specialist private removal firms,¹²⁴ or of private detention contractors,¹²⁵ airline security staff,¹²⁶ correctional staff¹²⁷ or IOM personnel.¹²⁸ At EU level, the EC Communication on a Community Return Policy on Illegal Residents [COM (2002) 564 final] has suggested that removals by air are covered by the IATA/CAWG Guidelines on Deportation and Escort and could provide the basis for developing EU provisions on escorting and use of restraints.

Best practice elements in specific training include: psychology, use of force, first-aid, health and safety, English language as a lingua franca, coping with transit difficulties¹²⁹, awareness of legal limits on conduct,¹³⁰ and legal bases of removal, social counselling,¹³¹ evaluation of conditions in country of destination¹³² and C&R training.¹³³

¹¹⁷ ICMPD 46 for general discussion.

¹¹⁸ Such as occurs in Austria

¹¹⁹ ICMPD 103, Ireland; (Nigeria and Romania – but other nationalities may apply) This programme run by IOM is not only for Failed Asylum Seekers but also those who voluntarily choose to leave for various reasons. At present an asylum seeker must withdraw his or her claim before an application to return can be considered by the Repatriation Unit of the Department of Justice..

¹²⁰ ICMPD 61, such as occurs in Austria.

¹²¹ ICMPD 11

¹²² ICMPD Final Report 14, 155 ; Note the EU Council Directive of 22.12.95 and the Schengen Executive Committee's Decision of 21.04.98.

¹²³ For example, Australian Protective Services.

¹²⁴ UK; Australia for removals to Africa.

¹²⁵ One of the options used by Australia requires escort to be a "police type" person.

¹²⁶ ICMPD 87 Germany..

¹²⁷ One of the options used by Australia.

¹²⁸ Used in case of voluntary returns from Australia under re-integration packages such as to Afghanistan.

¹²⁹ Escorts should adopt a sensitised approach to the need to liaise with the authorities of those countries; as to behaviour, duration of transit, limits on authority of escort to restrain and understanding of what they can do in transit if there are delays, liaison with airport security and an understanding of the use to which airport security can be put and what such personnel are able to do.

¹³⁰ ICMPD 61-2 Austria.

¹³¹ ICMPD 68 Belgium.

Relationship with carriers: removal practices

One feature common to removal operations in the member state and Australia by regular carriers is that of the primacy of the pilot commanding the aircraft in the cases of removals (but with specific reference to involuntary removals by escorts), and respect of the regulatory scheme laid down under the Chicago Convention (and the IATA/CAWG (Control Authorities Working Group) guidelines on Deportation and Escort). New Zealand imposes more onerous responsibilities on carriers as regards forced removals.¹³⁴ Australian practice acknowledges that the captain of any craft has responsibility for deciding on the use of restraints once the removee has boarded.

Practical difficulties such as refusal to carry, lack of seats and connections, delay in transit can only be met by the development of continuous liaison with all interested parties (air carriers, transit authorities,¹³⁵ airport security, NGOs and IGOs), by specialised training for escorts and, where appropriate and influenced by other considerations such as the necessity of large group removals, the use of charter aircraft.(again subject to the same standards as regards treatment of failed asylum seekers and training of escorts). Airline, airport authorities, immigration and police at transit points should always be notified where there is an escorted removal.

Where a removal by a regular commercial carrier cannot be carried out due to the physical resistance of the rejectee,¹³⁶ the option of a charter flight with escorts and other personnel is the norm.¹³⁷ Joint charter flights for both voluntary and forced returns are utilised by some member states.¹³⁸ Some countries limit removal to one individual/ family unit per flight.¹³⁹ Stopovers and transit best occur at hubs from which there are scheduled commercial flights to most onward destinations (and

¹³² ICMPD 139 Netherlands.

¹³³ ICMPD 145 fn 39 sets out the range of matters included in the training programmes for UK service providers. In addition to or as more specific components of those items listed – legal framework including documentation, race relations, interpersonal skills, suicide and self-harm awareness and prevention, cultural awareness; management of the anxieties and stress of detention including vulnerable detainees, security procedures and practice; immigration practices and human rights training; escorting procedures including child care protection, hostage taking situations, searching procedures, defensive driving, death in custody, specialist first aid, conflict management. Note also the legislative provisions for the authorisation of Detainee Custody Officers that is provided in the Immigration and Nationality Act 1999 is not mirrored elsewhere.

¹³⁴ Note that pursuant to s125 of the Immigration Act, New Zealand imposes responsibility on carriers to allow on board a craft any person subject to a removal order so long as the safety of the craft or other persons on board is not endangered, and if the police deliver such a person to the craft taking all reasonable steps (including the use of reasonable force) necessary to detain that person on board until the craft has left New Zealand.

¹³⁵ Relevant information on the removal should be provided to authorities in the country of transit

¹³⁶ Note Airlines refuse to Carry Failed Asylum Seekers, Andrew Woodcock, Press Association (U.K.) January 28 2003 citing cases of deportees in the UK who screamed or shouted being refused access on planes by captains or , where unescorted, stripped naked and refused to put their clothes back on who were ejected by captains

¹³⁷ ICMPD p 62 (Austria – three escorts, independent human rights observer and physician)

¹³⁸ e.g Germany with Austria and Netherlands and with France and the Netherlands; Switzerland with Austria; Netherlands with France and Belgium

¹³⁹ e.g. France, Spain; mostly are effected singly or in family groups e.g United Kingdom (ICMPD 144) or regularly remove on an individual basis (Portugal –ICMPD p 116) or generally individually (in special cases 2-4)-Switzerland(ICMPD p 131); two –unless exemption from government department and airline consent- Australia;

agreements and/or airport liaison officers are in place¹⁴⁰) or removals are routed via countries with which formal transit agreements have been concluded.¹⁴¹

Transit agreements

Returning states may negotiate agreements with non-EU transit states (en route of the migration path), or with other EU member states, on the readmission, or at least the transit of third country nationals who are being returned to their countries of origin.¹⁴² Logistical and other problems occurring with transit return have been addressed by dedicated clauses in such agreements to the effect that a requested (transit) state affects an escorted return transit of a returnee from the requesting (sending) state to the country of origin or another transit state.¹⁴³

Removal on charter flights

Virtually no country employs military aircraft for removals¹⁴⁴ and it appears that EU states increasingly resort to chartered carriers because of difficulties with commercial airlines.¹⁴⁵ There are a series of multilateral and bilateral arrangements between member states¹⁴⁶ for joint chartering in mass/large group returns. Canada has done several joint removals with the US, where persons being removed from Canada have been put on US charter flights to a given country.¹⁴⁷ Australia has not undertaken joint removals

UNHCR involvement: tripartite arrangements

The involvement of UNHCR in removal and return processes depends on whether it can be shown that this directly or indirectly contributes to the fulfilment of its protection responsibilities stemming from the Statute.¹⁴⁸ While recognising that return is primarily a bilateral matter between states, and its participation is ideally as part of an inter-agency arrangement¹⁴⁹ there are now in existence tripartite

¹⁴⁰ Australian practice; note the Green Paper Communication p 15 noting the importance of Immigration Liaison Officers (ILOs) to assist in hand-over procedures for readmission and for escorts in transit; see too Immigration Manuals, Citizenship and Immigration Canada, Chapter ENF 10, Removals 22.1; note also the recognition at the Thessaloniki European Conference of the importance of setting up a network of ILOs in third countries (see Footnote 11)

¹⁴¹ ICMPD – p 62 (Austria)

¹⁴² ICMPD – p131 –Switzerland has concluded specific readmission and transit agreements with France and Italy who also regulate questions of the competence of escorting staff abroad

¹⁴³ Noll, supra, p 276 , ICMPD p 156

¹⁴⁴ e.g Belgium until 2004 ; being planned in the Netherlands.

¹⁴⁵ ICMPD p154

¹⁴⁶ e.g Austria, Switzerland and Germany, Germany and other Schengen States (ICMPD p 95)

¹⁴⁷ e-mail communication from Bob Brack, Senior Strategic Advisor/Removals Enforcement Branch, Citizenship and Immigration Canada (11 March 2003)

¹⁴⁸ ICMPD p 49; Executive Committee of the High Commissioner's Programme Standing Committee 47th Session; "Return of Persons Not in Need of International Protection" EC/47/SC/CRP.28 30 May 1997

¹⁴⁹ ICMPD p. 49; EC/47/SC/CRP.28 par 15 in Return of Persons not in need of International Protection

Memoranda of Understanding (MoU) between UNHCR, Afghanistan and respectively France, the Netherlands and the United Kingdom¹⁵⁰ that set out standards to be implemented in the case of voluntary repatriation.

The groups to whom the Memoranda apply include those whose applications for refugee status or a subsidiary form of protection have been denied. Best practice features of the UK/Afghan agreement (which, with appropriate modifications, have equal application to bilateral return agreements) are: (paragraph numbers refer to UK Memorandum):

- i. acknowledgment that alternatives to voluntary repatriation, recognised as being acceptable under international law, will be examined in cases where there is no protection or compelling humanitarian need justifying prolongation of the person's stay in the receiving state but where he or she continue to refuse to avail themselves of the programme. (par. 3)
- ii. such alternatives will be in all cases an option of last resort and prior to considering these alternatives, various defined steps are to be taken. (par. 3)
- iii. the return process is to be phased, orderly and humane and accomplished in manageable numbers and will take account of the availability of accommodation. (par. 3)
- iv. Afghan national authorities will re-admit their nationals and assist where necessary in determining the nationality of those intending to benefit from assistance under the MoU in the shortest possible time-span. (par. 4);
- v. Afghan national authorities will with other bodies provide security safeguards for returnees. (par. 5)
- vi. the role of UNHCR in assisting, facilitating and monitoring repatriation in order to ensure it is carried out in a manner consistent with its mandate and the terms of the MoU will be fully respected by the other parties. An appropriate programme of information, counselling and registration will be operated by UNHCR in the host country in cooperation with its partners (including as necessary NGOs), as well as a programme in the country of origin. (par .8)
- vii. objective and accurate information relevant to the returnees repatriation and reintegration will be provided so that decisions to repatriate can be taken in full knowledge of the facts. UNHCR will conduct a targeted information campaign in the host country. (paras 9 &10)
- viii. duly completed Voluntary Repatriation Forms (VRFs) issued in the host country by the relevant government authorities in cooperation with UNHCR, signed by each male and female Afghan, will be recognised as

¹⁵⁰ Tripartite Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland, the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and UNHCR; Tripartite Agreement between the Government of the French Republic, the Government of the Islamic Transitional State of Afghanistan and UNHCR; Tripartite Agreement between the Government of the Netherlands, the Government of the Islamic Transitional State of Afghanistan and UNHCR.

valid travel documents for the purpose of return to their final destination under the MoU. VRFs will be signed by a representative of UNHCR to attest to the voluntary character of the individual's decision to return. (par. 10)

- ix. Afghan authorities will, in cases where individuals do not hold documents establishing their identity, issue identity documents without delay through diplomatic posts in the host country. (par. 10)
- x. where all members of a family are covered by the MoU, every effort will be made to ensure repatriation of families as units and involuntary separation is avoided. Where this fails, mechanisms will be established for re-unification as appropriate in the host country or country of origin. (par. 11)
- xi. non-Afghan spouses and/or children of repatriating Afghans (and of deceased Afghans) will be permitted to enter Afghanistan and their stay will be regularised by the Afghan national authorities. (par. 11)
- xii. special measures will be adopted to ensure that vulnerable groups receive adequate protection, assistance and care throughout the return and reintegration process; unaccompanied minors will not be returned without successful tracing of family members or without specific and adequate reception and care-taking arrangements having been put in place in Afghanistan. (par. 12)
- xiii. UNHCR will be allowed free and unhindered access to all Afghans falling under the scope of the MoU in the host country, and to all returnees in Afghanistan (par. 13)
- xiv. Afghan national authorities will inform UNHCR of any exceptional 'penal' cases as defined in the MoU. (par. 13)
- xv. responsibilities for the safe nature of return travel, depending on the phase in question, are allocated to the host country government, the carrier (and if applicable the international organisation implementing travel) and the Afghan national authorities (par. 14)
- xvi. immigration and customs formalities will be streamlined at both ends of the process (par. 16)
- xvii. appropriate reception facilities (with unhindered access to UNHCR and the organisation implementing return travel) for those in transit on arrival in Afghanistan (particularly vulnerable groups) will be provided. (par. 17)
- xviii. the host country will meet the costs of return travel together with a financial repatriation package to facilitate re-integration (with special consideration given to the needs of women, children and other vulnerable groups). (par. 19)
- xix. the host country will favourably consider provision of support to re-integration projects, including where necessary and appropriate vocational skills training, as well as employment-generating programmes for individuals in areas of return. (par. 20)

UNHCR can support states in their efforts to return rejected asylum seekers provided its involvement is fully consistent with its humanitarian mandate to protect refugees by:¹⁵¹

- taking a clear public position on the acceptability of return of the rejected group
- facilitating dialogue between countries of asylum and origin
- promoting awareness among national authorities in the host country willing to assist rejectees and facilitate return
- providing information on locally available possibilities on post-return reintegration assistance
- promoting with states those principles that bear on their responsibility to accept back their citizens or long-term residents, as well as the principles of reduction of statelessness.

Sustainability of removal

The existence of a universal visa system and entry and exit controls (and satisfactory proof of exit)¹⁵³ is clearly relevant to the issue of control by states of their asylum determination and post-determination removal processes and to the consequential issue of sustainability of removal. Although there may be rare exceptions where failed asylum seekers succeed in re-entry under false identities, the Australian model usually prevents return of failed asylum seekers after removal.

Conversely, systems which lack one or more of these characteristics (especially exit controls), and in relation to which accurate statistics are lacking regarding those persons not in need of international protection who still remain on national territory despite being 'liable to removal',/subject to expulsion orders¹⁵⁴ (or the destination of persons who have left and/or have moved on to the territory of another member state), will by definition have lower levels of sustainable removals. Such systems will also, in all probability, have lower levels of initial detection of failed asylum seekers who have been living in the wider community throughout the asylum determination process, and thus lower rates of removal. The ICMPD report noted the large disparity in all member states between orders to leave and actual expulsions carried out.¹⁵⁵

Satisfactory proof of exit from the sending state and re-entry to the country of origin is crucial to the sustainability of voluntary returns¹⁵⁶ (whether escorted or not) and involuntary removals (although this invariably is confirmed by the escort). A

¹⁵¹ Refugee Protection and Migration Control: Perspectives from UNHCR and IOM; EC/GC/01/11 31 May 2001 Global Consultations on International Protection UNHCR's perspective par 4.4

¹⁵³ Green Paper Communication p 21

¹⁵⁴ ICMPD p 24

¹⁵⁵ ICMPD p 24

¹⁵⁶ See generally Note Hearing on a Community Return Policy on Illegal Residents Brussels, 25 July 2002, A2/JS/CK D (2002) Synthesis p 3

certificate of crossing the border¹⁵⁷ only provides confirmation of departure from a member state in the case of voluntary returns, not that the returnee has reached his or her country of origin.

An alternative is to provide incentives for returnees, such as payments for different purposes made in the country of destination, so that they will report back to a consular post of the returning member state or to the organisation conducting the voluntary return (or for that body to issue proof of exit).¹⁵⁸ The Green Paper raises a variety of issues concerning the “principle of priority of voluntary return” in cases of subsequent lawful re-entry to the host or returning country.¹⁵⁹ The ICMPD report notes that the lack of reliable data on numbers of departures from

EU states after a final negative decision, and their destinations demonstrates the need for a coherent system of monitoring of overall in- and out-flows.¹⁶⁰ One factor that can contribute to sustainability of return is the inclusion in Voluntary Assistance Return Programmes of provision for education, vocational training and start-up grants.¹⁶¹ Coupled with incentives of this kind,¹⁶² the effectiveness of the case-worker system (and the intelligent use of ‘motivational counselling’) in Sweden has reduced the use of coercion to a rarity.¹⁶³

Detention and removals: a summary of best practice

1. Alternatives to detention should be the norm. Detention measures that amount to indefinite detention should be avoided. Detention pending removal should be based upon the need to obtain return travel documents or to prevent absconding pending or during removal.
2. A fixed maximum time limit for the duration of detention which takes account of the need to implement enforcement of removal orders within a reasonable period of time but which does not involve indefinite detention if removal can not be effected within that period; subject to judicial supervision or control.
3. Special detention centres for removal purposes; failed asylum seekers to be only held in normal prisons in exceptional circumstances, and then only separated from the prison population; family unity to be preserved, unaccompanied minors not to be detained except in exceptional circumstances and as a last resort, and then in appropriate conditions; minimum standards of conditions of accommodation to be set.
4. Special provision for vulnerable groups, especially minors (unaccompanied or accompanied); unaccompanied minors not to be returned

¹⁵⁷ which can only be delivered at external border posts since the abolition of internal border controls see Green Paper p 16

¹⁵⁸ Green Paper p 16

¹⁵⁹ Green Paper p. 17

¹⁶⁰ ICMPD p 152

¹⁶¹ ICMPD p 47

¹⁶² See Mitchell p 12

¹⁶³ See Mitchell p 6 quoting a Swedish Migration Board spokesperson.

unless there are arrangements in place for care on arrival in country of origin; appointment of a responsible independent adult for unaccompanied minors at least at the stage where removal is contemplated but preferably throughout the determination process; the child's best interests must be the primary consideration.

5. Fair, efficient and timely process of asylum determination; suspensive effect in practice until completion of the asylum determination process.

6. The existence of subsidiary and complementary forms of protection harmonised and consistently interpreted; alternatively a discrete post-determination risk assessment against broader protection criteria and the non-refoulement principle.

7. Clear legal rules and administrative practices concerning assisted/escorted return of failed asylum seekers including balanced risk assessment concerning the need and nature of escorted return.

8. Comprehensive special professional training for escort personnel with tailored content designed to prepare them for all eventualities including, knowledge of the legal competencies, appropriate treatment of detainees, the management of incidents, inter-cultural understanding and negotiation techniques. Use of restraints and the intensity of coercive measures to be governed by common standards laid down in guidelines incorporating best practice standards.

9. Negotiation of re-admission agreements with countries of origin and transit (using the tripartite agreements, and best practice aspects of the Schengen Catalogue and Green Paper recommendations) and provisions on co-operation in MoUs dealing with cognate areas such a controlling trafficking of persons; a common approach to bilateral agreements with other EU states to simplify transit procedures.

10. Voluntary return assistance programmes for all failed asylum seekers including practical, financial, vocational and travel assistance (not dependent on having held residence status). Issues regarding the type, beneficiary and mode of delivery of financial assistance need to be addressed in specific return contexts. Provision of accurate information about country of origin conditions from a reliable source should always form part of such a programme. A balanced approach to psychological preparation for return involving sensitive "motivational" counselling provided throughout the process.

11. Warning and suitable pre-flight arrangements with carriers; regular consultative process with carrier representatives at domestic centres and at hubs through which returnees transit.

12. Powers to bring failed asylum seekers at large in the community into a removal process should be adequate and tailored to obtain information regarding their whereabouts. In such cases, there should be some judicial supervision where removals cannot be effected within a reasonable period of

time, and in the situation of unaccompanied minors or other vulnerable groups.

13. Sustainability of removals to be improved by entry and exit controls, motivational counselling and broad-ranging assistance to returnees and development assistance to countries (and regions) of origin.

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