EUROPEAN COUNCIL ON REFUGEES AND EXILES

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ECRE Information Note

on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

1. Introduction

The Directive on common standards and procedures in Member States for returning illegally staying third country nationals ('the Directive') was approved by the European Parliament on 18 June 2008, formally adopted by the Council on 9 December 2008 and published in the Official Journal on 24 December 2008.[1] The Directive applies to all EU Member States except the United Kingdom, Ireland and Denmark.[2] It also covers Iceland, Norway, Switzerland and Liechtenstein within the meaning of the agreements concluded between the European Union (EU) and those countries as regards their association with the Schengen *acquis*. Member States are required to bring the domestic legislation necessary to comply with the Directive into force by 24 December 2010, except for legislation concerning Article 13(4) on legal assistance and representation, which must be in place by 24 December 2011.

This paper outlines ECRE's views on the adopted Directive of the European Parliament and of the Council, and provides detailed analysis of some of its key provisions.[3]

2. Background

The 'Hague Programme', adopted by the Brussels European Council meeting on 4/5 November 2004, called on the European Commission to present by early 2005 a proposal on minimum standards for return procedures, including minimum standards to support effective national removal efforts.[4] On 9 September 2005 the European Commission published its proposal for a Directive with a view to '*provide for clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, which*

[1] OJ L 348, 24.12.2008, p. 98. The Directive will enter into force on the twentieth day following the date of publication.
[2] In accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty of the European Union, this Member State will decide within a period of six months from the adoption of the Directive whether to implement it in its national law.
[3] For more information on ECRE's position on the Directive and return-related issues, see ECRE http://www.ecre.org/topics/return: http://www.ecre.org/topics/return.
[4] Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, OJ C 53, 3.3.2005, p. 6.

take into full account the human rights and fundamental freedoms of the persons concerned'.[5] The Directive constituted the first major piece of legislation in the field of immigration and asylum to be decided under the co-decision procedure, in which the European Parliament (EP) legislates on equal footing with the Council.[6]

The negotiations on the proposal put forward by the European Commission proved particularly lengthy and difficult both at the Council level and at the European Parliament. The EP Civil Liberties Committee (LIBE) did not adopt a report on the Directive until 20 September 2007,[7] two years after the publication of the Commission proposal. This followed several postponements of the vote in the Committee due *inter alia* to the difficulty of reaching an agreement among the political groups on a number of compromise amendments. In general the modifications to the Commission proposal suggested in the LIBE report enhanced fundamental rights safeguards, for example by prohibiting the detention of unaccompanied children, allowing a minimum of four weeks for third country nationals to independently prepare their departure, making the application of entry bans optional and establishing a number of mechanisms for the active monitoring of returns. Nevertheless, some amendments included in the report worsened the Commission original draft, such as the ones allowing administrative authorities to issue detention orders and providing that detention could be extended to up to one and a half years.

The proposal from the Commission also raised controversy in the Council, particularly as regards its scope, the length of the detention period and the rules on judicial review. In February 2007, for example, the German Presidency suggested a complete reconsideration of the Commission draft which, if taken forward, would have removed almost completely any potential harmonising impact.[8] Unlike the September 2007 LIBE Report, the drafts negotiated in the Council tended to lower the human rights standards and procedural safeguards recognised to persons subject to return procedures, and sought to maintain or increase the discretion of national authorities in the handling of return. Following prolonged and complex negotiations between the Parliament's *Rapporteur* and the Council Presidency, political agreement was reached in June 2008 on a text which substantially amended the Commission initial draft. This agreement paved the way for the endorsement of the Directive by the European Parliament at first reading during the 18 June plenary sitting.

3. Overview of the Directive

The Directive aims to set out common standards and procedures in the Member States for returning irregularly staying third-country nationals, *'in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations'* (Article 1). Illegal stay is defined as the presence on

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[5] European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals*, Brussels, 1.9.2005, COM (2005) 391 final, p. 2.

[6] Under the co-decision procedure, legislation is initiated by the Commission and neither the European Parliament or the Council can adopt it without the other's assent. See http://ec.europa.eu/codecision/stepbystep/glossary_en.htm

[7] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007.

[8] See Council document 6624/07. The implications of the German approach have been analysed in detail in Statewatch, *Revising the Proposed EU Directive*, April 2007. Available at: http://www.statewatch.org/news/2007/apr/eu-expulsion-sw-analysis-II.pdf

the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry, stay or residence in that Member State (Article 3 (3)). The fact that the starting point for the applicability of the Directive is the notion of 'illegal stay' means that it does not address the grounds or procedures for ending legal residence.[9] Importantly, Article 4 confirms the right of the Member States to adopt or maintain more favourable provisions, as long as they are compatible with the Directive.

The preamble to the Directive lays down a number of fundamental principles which underpin the legislation as a whole and which therefore should be taken into account in the implementation of its provisions. Paragraph (6) asserts that '*decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria implying that consideration should go beyond the mere fact of an illegal stay'*. In line with ECRE's position,[10] Paragraph (8) of the Preamble asserts that it is legitimate for Member States to return irregularly staying third country nationals, '*provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement'*. Paragraph (16) provides that detention is justified only *'if the application of less coercive measures would not be sufficient'*, while Paragraph (17) emphasises that persons under detention '*should be treated in a humane and dignified manner with respect for their fundamental rights'*. Paragraph (22) provides that the best interest of the child and respect for family life should be a primary consideration of Member States when applying the Directive, whereas Paragraph (23) asserts that its implementation should be '*without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees'*. Respect for the rights included in the Charter of Fundamental Rights of the European Union is reaffirmed in Paragraph (24). Paragraph (19) provides that *'the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value'*.

The Directive lays down common rules on a number of issues relevant to return proceedings. It regulates the issuing of return decisions (Article 6) and entry bans (Article 11), and stipulates that irregularly staying third country nationals should be granted a period ranging between seven and thirty days to independently organise their departure before measures to carry out forced return are taken (Article 7). A number of procedural safeguards are granted to persons subject to return procedures, for example the right to appeal or seek review of decisions related to return (Article 13) and to receive essential health care and, in the case of children, to access education while removal is pending (Article 14). The Directive also sets out provisions on the detention of third country nationals pending removal, including the maximum length of time during which a person can be detained (Article 15) and the conditions of detention (Article 16), and establishes particular rules for the detention of children and families (Article 17). In addition, it is provided that Member States would have to possibility to derogate from some of their obligations towards detained third country nationals in the event of emergency situations (Article 18).

A number of statements were annexed to the Council minutes at the moment of adoption of the Directive.[11] In a first statement, Malta emphasises its view that the subject of detention

[9] European Commission, *Staff Working Document: Detailed comments on Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* SEC(2005) 1175, 4.10.2005, p. 3.
[10] See ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 2; ECRE, *Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals,* May 2006, p.3.
[11] See Council document 16166/08, 2 December 2008.

should remain in the hands of the Member States, while agreeing to support the Directive on the basis that Member States can decide whether or not to apply its standards to certain categories of third country nationals. Importantly, the Council statement declares that *'the implementation of the Directive should not be used in itself as a reason to justify the adoption of provisions less favourable to the persons to whom it applies'.* The Commission statement refers to the prospect of establishing an obligation to register entry bans issued under the Directive in the Schengen Information System (SIS) as part of the revision of the SIS II Regulation.[12] The Commission also commits itself to assist Member States in finding possibilities for mitigating the costs of implementing Article 13(4) on legal aid and underlines that national actions promoting the application of this provision in the Member States can be co-financed up to 75% under the European Return Fund.[13]

4. Summary Analysis

While ECRE does not dispute that it is legitimate for states to return asylum seekers whose claims have been rejected, the prerequisite for that assumption is that fair asylum systems, which properly examine whether a person will face a risk of persecution if returned, are in place. Such a precondition has been explicitly reaffirmed in the Directive's Preamble (Paragraph 5, see above). Nevertheless, the reality is that at present we cannot take for granted that a person whose asylum claim has been rejected in a European country does not have a case for refugee or other forms of humanitarian or subsidiary protection status, in view of the significant shortcomings in Member States' asylum systems.[14] Regrettably, the asylum legislation adopted by the EU to date offers no solution to this problem.[15] This has been explicitly recognised by the European Commission, which in its June 2008 'Policy Plan on Asylum' stresses that the broad differences in recognition rates regarding applicants from the same countries go against '*the principle of providing equal access to protection across the EU'*.[16] ECRE emphasises that failure to protect those in need fatally undermines the credibility of Member States' removal systems. Consequently, measures directed to improve Member States' asylum procedures are essential so that negative decisions on protection claims can inspire greater confidence.[17]

Furthermore, as UNHCR notes, by establishing that each Member State is to recognise the decisions related to return adopted by other Member States, the Directive is in fact requiring the mutual recognition of negative asylum decisions.[18] In contrast, in the EU asylum *acquis*

[12] Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006.
[13] Established by the Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, OJ L 144, 6.6.2007.
[14] ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 13-4.
[15] See ECRE, *'Broken Promises - Forgotten Principles': ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection*, June 2004; ECRE, *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301),* September 2007.
[16] European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, COM (2008) 360 final, 17 June 2008, p. 3.
[17] See ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 13-4.
[18] UNHCR, *Position on the Proposal for a Directive on Common Standards and Procedures for Returning Illegally Staying Third Country Nationals*, 16 June 2008, p. 4.

there is no comparable obligation concerning the reciprocal recognition of positive decisions.[19] ECRE agrees that this imbalance constitutes a serious gap in EU asylum legislation that needs to be resolved.[20] The incoming reform of the EU asylum instruments should serve to not only address this inconsistency, but also the current flaws of the Common European Asylum System (CEAS).[21]

ECRE acknowledges the importance of establishing common standards and procedures for the return of persons found not to be in need of protection. As the first instrument dealing with the expulsion of those third country nationals who are staying irregularly in the EU, the Directive represented a unique opportunity to guarantee and improve the necessary human rights safeguards in the return procedures in a majority of Member States. It also constituted the first opportunity for the European Parliament to ensure that EU migration legislation fully respects fundamental rights by effectively using its mandate in the co-decision procedure. ECRE believes, however, that this Directive falls short of the standards needed to guarantee that the return of irregularly staying third country nationals takes place in safety, dignity and full respect of their fundamental rights. ECRE has closely followed legislative developments since the Commission tabled its proposal in 2005 and has reiterated on several occasions its serious concerns about a number of provisions.[22] ECRE is profoundly disappointed that these recommendations, as well as those put forward by other NGOs and UNHCR, were in the end not taken into account either by the Council or the European Parliament.

ECRE remains particularly concerned with the following provisions:

- The discretion afforded to Member States not to apply the Directive to third country nationals refused entry or who are apprehended or intercepted in connection with the irregular crossing at a Member State's external border (Article 2): crucial safeguards in the Directive such as the right to an effective remedy would not be guaranteed for these individuals.
- The fact that transfers to a transit country or another third country are included under the definition of return (Article 3(3) (3)).
- The obligation for Member States to issue a return decision to any irregularly staying third country national as a principle of European law (Article 6(1)), while there is no obligation for Member States to grant legal status to those people for whom return is not feasible.
- The possibility to issue a return decision at the same time as a removal order and an entry ban (Article 6 (6)).
- The provision of an extremely short period for a person to prepare to return: between seven and thirty days (Art. 7(1)).
- The inclusion of a provision allowing Member States to return unaccompanied children to '*adequate reception facilities in the State of return*' (Article 10).

[19] Ibid.
[20] Ibid.
[21] See ECRE, *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301),* September 2007.
[22] See ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006; ECRE and Amnesty International, *Letter to LIBE MEPs - Vote on the draft EP Report by Mr. Manfred Weber (PE 374.321v02-00) Commission Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals(COM(2005)0931-C6-0266 – 2005/0167(COD)),* 6 September 2008; ECRE and Amnesty International, Letter to MEPs - Forthcoming plenary vote on the proposal for a directive on return of illegally staying third country nationals (Returns Directive), 13 May 2008.

- The obligation to include entry bans of up to 5 years in return decisions in circumstances which are broadly defined (Article 11).
- The non-suspensive character of legal remedies and the insufficient safeguards concerning access to legal assistance (Article 13).
- The low level of protection against destitution provided during the period for voluntary departure and postponement of a return decision (Article 14).
- The lack of an obligation for Member States to provide for an automatic judicial review where detention is ordered by administrative authorities (Article 15 (2)).
- The possibility to detain third country nationals, including families, unaccompanied children as well as other vulnerable persons, for up to eighteen months for reasons beyond their control (Article 16 (6)).
- The discretion afforded to Member States to provide for longer periods of judicial review and to derogate from certain obligations concerning detention conditions in so-called 'emergency situations' (Article 18).

ECRE notes with concern that the language used in the Directive is generally vague and ambiguous, particularly in those provisions referring to rights safeguards, and that this compromises the objective of providing for '*clear, transparent and fair common rules'* with which to regulate return procedures.[23] ECRE also calls into question whether the Directive would have a systematic impact in terms of harmonising national legal frameworks in a positive direction. ECRE observes with regret that protracted negotiations have resulted in the lowering of many of the standards outlined in the report adopted by the LIBE Committee in September 2007 and even in Commission original proposal. Considering that some of the standards adopted are actually lower than the current practices in several EU countries, ECRE urges Member States to abide by their commitment to refrain from using the Directive as a pretext to justify the adoption of harsher return measures. ECRE would also encourage those Member States introducing legislation to transpose the Directive to provide for higher standards including all necessary safeguards for persons involved in return procedures.

ECRE also reminds Member States that the implementation of the Directive must take place in compliance with those international human rights obligations that they have signed up to. These include, first and foremost, the principle of non-*refoulement*, as laid down in Article 33 of the 1951 Refugee Convention.[24] The jurisprudence of the European Court of Human Rights (ECtHR) has expanded the scope of protection against deportation by interpreting Article 3 of the 1950 European Convention of Human Rights (ECHR) as prohibiting expulsion where there is a risk of torture or inhuman or degrading treatment, or of execution.[25] Other relevant international human rights norms include Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the 1984 Convention against Torture (CAT), Article 5 ECHCR regulating the right to liberty and security of the person, Article 4 of Protocol No. 4 ECHR prohibiting collective expulsions and Article 3 of the 1989 United Nation Convention on the Rights of the Child (UNCRC) providing that the best interest of the child should be a primary consideration in all actions concerning children. A number of these rights have been reaffirmed in the Charter of Fundamental Rights of the EU. While the Charter is not binding, Paragraph (24) of the Directive's Preamble stresses compliance with its principles.

[23] European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals*, Brussels, 1.9.2005, COM (2005) 391 final, p. 1.
[24] The Geneva Convention relating to the status of refugees.
[25] See e.g. Vilvarajah vs. United Kingdom, ECHR (1999), Series A, No. 215.

Furthermore, there are people for whom return appears impossible in the short to medium term.[26] These persons often find themselves in so-called 'limbo situations' and/or facing destitution, with few or no rights and without any possibility of working in order to survive. While such an obligation is not established in the Directive, Member States should grant a legal status to certain categories of people, especially those who are vulnerable or cannot be returned for reasons beyond their control. In the case of asylum seekers whose applications have been rejected and who have been resident in a host country for some years, due to for example an unduly long or backlogged asylum procedure, the time spent in the host country should be taken into account when states are considering whether to pursue their return. When these persons have been residing in the host community for three years or more, Member States should give them the opportunity to apply for a permanent legal status

Finally, the Directive lacks any provisions guaranteeing that returns will be properly overseen in order to evaluate whether they are safe, dignified and sustainable. ECRE reaffirms that in the absence of systematic monitoring mechanisms examining the outcome of return policies, it is impossible to know if the persons returned have been *refouled* (directly by the sending state or indirectly by the country of return) and if they have been able to (re-) integrate in the receiving community.[27] The report adopted by the LIBE Committee in September 2007 provided that all returns were to be registered and monitored with a view to assess their impact on the persons concerned and on the country or society to where they were returned,[28] but regrettably this amendment was not retained in the final text. ECRE believes that collecting information on the outcome of return is necessary as a check on the correctness of return decisions and on Member States' compliance with their international obligations.[29] Such monitoring would also be useful on a pragmatic basis, since it would instill confidence in potential returnees and help evaluate the success of return policies by revealing whether returns have been sustainable or the persons concerned had to migrate again.[30] It is therefore crucial that specific mechanisms be developed and maintained in the Member States for the effective monitoring of returnees within the countries of origin. The establishment of such mechanisms should be supported through allocations from the European Return Fund.

5. Analysis of the key articles of the Directive

Chapter I – General Provisions

Article 2 Scope

Article 2(2)(a) allows Member States to exclude from the scope of the Directive potentially large categories of third country nationals staying irregularly in their territory. Under this provision, a Member State may decide not to apply the Directive to third country nationals who do not fulfill entry conditions and therefore are subject to a refusal of entry under the

[26] For further discussion on alternatives to return for certain categories of persons, see ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, pp. 26-7.
[27] See ibid, pp. 36-7.
[28] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 72, Article 17, subparagraph 2 b (new).
[29] ECRE, *The Way Forward: The Return of Asylum Seekers whose Applications Have Been Rejected in Europe,* June 2005, September 2005, p. 36.
[30] Ibid.

Schengen Borders Code,[31] '*or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State'*.

While its wording is highly ambiguous, the rationale behind this provision seems to be that of making a distinction between those third country nationals who have entered the territory regularly, for example by being in possession of a visa, and those who have not managed to do so because they have been apprehended in crossing the border irregularly. ECRE emphasises that there is no objective justification as for why these groups of persons should be treated differently. The inclusion of such exception indicates that the Directive, which in principle was intended to regulate the situation of those third country nationals staying irregularly in the Member States, has been developed into a non-entry tool to complement EU border management instruments. Most importantly, while refugees are often forced to enter the EU irregularly and without valid documents, according to the 1951 Refugee Convention they should not be penalised for this.[32]

ECRE is seriously concerned that for persons falling in the categories set out in Article 2(2)(a), and thus possibly excluded from the scope of the Directive, very limited safeguards would apply. Article 4(4) obliges Member States to ensure that those third country nationals to whom the Directive is not applied receive at least an equal level of protection as set out in a number of provisions, namely those on the use of coercive measures, the postponement of removal, the obligation to provide emergency health care and to take into account the needs of vulnerable persons while return is pending, as well as detention conditions. Member States' obligation to ensure that those persons are not *refouled* is also reaffirmed. Regrettably, this provision excludes crucial safeguards with regard to an effective legal remedy and the judicial review of detention, and also fails to refer to Article 10 on the return and removal of unaccompanied children. In particular, these often arrive alone in the EU through irregular routes and are sometimes trafficked into the Member States without legal documents.[33] If they are excluded from the application of the Directive, these children may not benefit at all from the specific safeguards envisaged for them.[34]

ECRE also emphasises the negative impact that lack of access to effective legal remedies as well as lack of sufficient guarantees with regard to judicial oversight of detention decisions may have on third country nationals who have been stopped at the border. Reports from human rights organisations evidence that the lack of transparency of return procedures often raises concerns about the procedure's lawfulness.[35] It is not uncommon for persons to be detained after apprehension and then returned expeditiously at the external border of the EU without their identity being recorded and/or any protection needs ascertained.[36] Another

[31] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement across borders, OJ L 105, 13.4. 2006.
[32] Geneva Convention relating to the status of refugees, Article 31.
[33] See Save the Children, *Letter to MEPs on the Forthcoming Plenary Vote on the Proposal for a Directive on Common Standards and Procedures for Returning Illegally Staying Third Country Nationals,* 11 June 2008.
[34] Ibid.
[35] Hungarian Helsinki Committee, *Access to Protection at Airports in Europe: Report on the Monitoring Experience at Airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw,* 2008, p. 51.
[36] Human Rights Watch, *Ukraine: On the Margins – Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union*, November 2005; Amnesty International, *Spain and Morocco: Failure to Protect the Rights of the Migrants – Ceuta and Melilla One Year On*, 26 October 2006; Pro Asyl, *The Truth Might Be Bitter, but It Must Be Told*, October 2007.

obstacle concerns the practical difficulties faced by third country nationals refused entry in application of the Schengen Border Code to appeal decisions on non-admission to the territory, due *inter alia* to lack of access to the legal assistance offered by lawyers and human rights organisations.[37] This means that, while formally reaffirming the obligation to respect the principle of non-*refoulement,* the Directive actually allows national authorities not to put in place the very mechanisms that are key to ensure that the persons excluded from the scope of the Directive are not *refouled* in practice. In order to comply fully with their international obligations, Member States should ensure that third country nationals have the right to effectively challenge return and detention decisions and are granted access to legal advice. In this regard, ECRE is extremely concerned about Malta's statement suggesting that this Member State will not apply the Directive to the categories of third country nationals listed in Article 2 (a) and (b) of the Directive.

Article 3 Definitions

Article 3(3) defines **return** as the process of going back to one's country of origin, to a country of transit or to another third country to which the third country national concerned voluntarily decides to return and in which that person will be accepted. ECRE welcomes the recognition that in order to conduct returns to a third country Member States should obtain the explicit acceptance of that country and the voluntary consent of the person concerned, but nevertheless believes that identical requirements should apply when transfers take place to a transit country. ECRE also emphasises that the specific situation of asylum seekers whose applications have been rejected should be taken into account, as the existence of a risk of persecution would generally have been assessed exclusively in relation with their countries of origin. Consequently, when transferring persons in this situation to a country different from their own, Member States should ensure that the human rights of the individual concerned will be respected and that this leads to sustainable reintegration in the country of return. [38]

Article 3(7) establishes that a **risk of absconding** exists when there are '*reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond*'. While the explicit recognition that the assessment of such a risk should be carried out on individual and objective grounds is to be welcomed, ECRE notes with concern that the wording of Article 3(7) is not in accordance with Paragraph (6) of the Preamble, which states that as regards decisions taken under the Directive '*consideration should go beyond the mere fact of an illegal stay*'. A similar formulation was envisaged in the definition of risk of absconding included in the report adopted by the LIBE Committee,[39] but was unfortunately not retained in the final text of the Directive. The definition of Article 3(7) remains rather vague, as the Member States are free to determine which 'objective criteria' should apply. Considering that the risk of absconding constitutes a key notion affecting the enjoyment of important safeguards throughout the Directive, ECRE urges the Member States not to deduce that such a risk exists for the sole reason that a person has failed to comply with their immigration laws.

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[37] Hungarian Helsinki Committee, *Access to Protection at Airports in Europe: Report on the Monitoring Experience at Airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw,* 2008, p. 51-4.

[38] See ECRE, *Position on Return*, October 2003; ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p. 6.

[39] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 19, Article 3, point (g a) (new).

Article 3(8) defines **voluntary departure** as '*compliance with the obligation to return within the time-limit fixed for that purpose in the return decision*'. ECRE reiterates that a distinction should be made between three different categories of return: voluntary return/repatriation, mandatory return and forced return.[40] Voluntary repatriation is the term used to describe the return of persons with a legal basis for remaining in the host state who have made an informed choice and have freely consented to repatriate. In contrast, the term mandatory return should be used for persons who no longer have a legal basis for remaining in the territory of the host state and are thus required by law to leave the country. It also applies to individuals who have consented to leave, or have been induced to leave by means of incentives, threats or sanctions. Forced return describes the return of persons who are required by law to leave but have not consented to do so and therefore may be subject to sanctions or force in order to effect their removal. Considering that the scope of the Directive is strictly limited to the return of third country nationals staying irregularly in the territory, ECRE considers that the use of the term 'voluntary departure' is misleading as it obscures the real – mandatory- nature that return has within this context. In this regard, ECRE stresses the importance of adhering to unambiguous definitions in order to build trust with all relevant stakeholders, including civil society organisations and the returnees themselves.

Article 4 More favourable provisions

This article allows Member States to apply more favourable provisions laid down not only in other EU legislation on asylum and immigration, but also in bilateral or multilateral agreements and national legislation. ECRE emphasises that, in line with Paragraph (19) of the Directive's Preamble, the promotion of best practices is necessary for the implementation of the Directive to provide European added value. Consequently, ECRE welcomes this provision and encourages Member States with higher standards to maintain or improve rather than lower them. Similarly, those countries introducing new legislation should provide for higher return standards that include all necessary rights and safeguards.

Article 4 also notes, however, that the adoption of higher standards by the Member States is conditional on such provisions being compatible with the Directive. In ECRE's view, this should never lead Member States not to apply more favourable measures when it is required under international law. This pertains also to those situations in which national authorities are executing mandatory provisions of the Directive, such as the ones establishing an obligation to issue return decisions (Article 6) and entry bans (Article 11). In this respect, ECRE would insist that these articles should never be applied in such a way as to prevent access to protection to those in need or to return people to countries where they may suffer from persecution or other human right violations

Article 5 Non-refoulement, best interest of the child, family life and state of health

Article 5 obliges Member States to take due account of the best interest of the child, family life and the state of health of the third country national concerned, as well as to respect the principle of non-*refoulement* when applying the Directive. ECRE's view is that the mentioned elements constitute crucial factors that should underpin the implementation of the legislation at the national level and therefore welcomes this provision.

Nevertheless, ECRE believes that, unlike Paragraph (22) of the Preamble, this provision does not accurately reflect the obligation to ensure that the child's best interest is a primary

[40] See ECRE, *Position on Return*, October 2003, p. 4; ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p. 4.

consideration as provided in Article 3 of the UNCRC.[41] This principle applies to all children without discrimination of any kind, including on the grounds of their status as migrants.[42] ECRE also reminds Member States that the best interest principle should override any other considerations of a political or financial nature and requires that the child's developmental needs are at the forefront of decision-makers' minds.[43]

Similarly, ECRE notes that the requirement that Member States take into account family life falls short of establishing an obligation to respect family unity. The right to family unity is inherent to the universal recognition of the family as the fundamental group unit of the society and protected under international and regional human rights law.[44] The separation of families is a particular risk within the context of return procedures, especially when family members have different nationalities. ECRE reiterates that families should not be separated during the return process and should in principle be returned as a unit.[45]

ECRE is also concerned that Article 5 fails to take into account the impact of return on the well-being of vulnerable persons. Article 3(9) defines this category as including not only children but also *'disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence'*. For these persons, Member States should seriously consider delaying return proceedings or even stopping them altogether when it cannot be established within a reasonable period that their rights would be respected and their needs met in the country of origin.[46]

Chapter II Termination of Illegal Stay

Article 6 Return Decision

Article 6 (1) sets down an obligation for Member States to issue a return decision to any third country national staying irregularly on their territories, without prejudice to a number of exceptions listed in subsequent provisions. ECRE reiterates its fundamental opposition to the introduction of such an imperative as a new principle of EU immigration and asylum law.[47] Member States should take into consideration all relevant circumstances in each individual case before issuing a return decision.

Article 6(4) allows Member States to grant at any moment an autonomous residence permit to an irregularly staying third country national, which will prevent a return decision from being issued or lead to its suspension/withdrawal. This provision grants flexibility for Member States to offer a right to stay to persons subject to return procedures for compassionate, humanitarian or other reasons, and it is therefore welcomed by ECRE. Nevertheless, it is unfortunate that, unlike the original proposal from the European Commission, the Directive

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[41] See also UNHCR, *UNHCR position on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 June 2008.
[42] Article 2 UNCRC.
[43] ECRE, *Position on Refugee Children*, November 1996.
[44] It stems *inter alia* from Article 16 of the Universal Declaration of Human Rights, Article 8 of the ECHR, Articles 17 and 23 of the ICCPR and Articles 9, 10, and 22 of the UNCRC.
[45] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p.7.
[46] ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, September 2005, p. 27.
[47] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p.8.

does not explicitly prohibit Member States to issue a return decision where they are subject to obligations derived from fundamental rights.[48] Regardless of this change, ECRE reminds Member States that they are always under the obligation to respect all rights and fundamental freedoms as laid down in international and regional human rights instruments, such as the 1951 Refugee Convention, the ECHR, the UNCRC, the ICCPR and the CAT.

Article 6(5) provides that a Member State '*shall consider refraining'* from adopting a return decision when a third country national irregularly staying is the subject of a pending procedure for renewing his residence permit or another permit offering the right to stay. ECRE regrets the ambiguous wording of this provision, as it allows Member States to start return proceedings against persons who may be offered an authorisation to stay through another procedure. ECRE believes that it is not reasonable or cost-effective to issue a return decision while a procedure for obtaining a residence permit is still pending, since the aim of such a procedure is precisely to examine whether the individual is entitled to stay on the territory on a legal basis.[49] Consequently, ECRE urges Member States to simply abstain from issuing a return decision to persons in these circumstances.

Article 6(6) allows Member States to adopt in one administrative or judicial act a decision on the ending of legal stay together with a return decision, a removal order and an entry ban. This provision is to be applied without prejudice to the procedural safeguards recognised in Chapter III of the Directive and in other relevant provisions of Community and national law, which is to be welcomed. Nevertheless, ECRE believes the issuing of a return decision and a removal order together is problematic, as it may lead to situations where there is not sufficient time for individuals to make use of their right to an effective legal remedy.[50] All necessary safeguards should be in place to ensure that protection concerns are thoroughly taken into account, irrespective of the stage of the procedure at which they happen to arise.[51] ECRE therefore encourages Member States adopting legislation for the transposition of the Directive to establish separate procedural steps in their return procedures.

Article 7 Voluntary Departure

The notion that mandatory return is preferable to enforced removal was one of the key principles underpinning the proposal of the European Commission and explicitly endorsed by the LIBE Committee. While ECRE reiterates that the use of the term 'voluntary' is in itself inappropriate in this context, it welcomes the general idea that third country nationals under an obligation to leave the territory of a Member State should be given the opportunity to do so of their own accord. ECRE notes with concern, however, that the final text of the Directive seriously undermines the notion that persons subject to return procedures should in principle be given freedom to organise their own departure.

Article 7(1) establishes a period ranging from seven to thirty days during which the return decision will not be enforced. ECRE regrets the considerably shortening of this time frame from a minimum of four

[48] European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals*, Brussels, 1.9.2005, COM (2005) 391 final, Article 6.4.
[49] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p.10.
[50] Ibid, p.2.
[51] See also UNHCR, *Observations on the European Commission's Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, December 2005, p. 4.

weeks suggested by the LIBE Committee in September 2007.[52] Furthermore, Member States are allowed to introduce national legislation providing that such a period will only be granted following an application of the third country national concerned. Although in that case Member States are obliged to inform the individual of the possibility of lodging such a request, in practice it would clearly be very difficult to monitor compliance by the responsible national authorities with this obligation. ECRE therefore urges Member States to refrain from setting additional legal requirements which may prevent third country nationals from choosing a more humane form of return.

Article 7(2) allows for the extension of the thirty-day maximum deadline taking into account individual circumstances, such as the length of stay, the presence of children attending school and the existence of other family or social links, a possibility that ECRE strongly welcomes. In particular, ECRE believes that allowing children to complete the current school period should constitute a key consideration for Member States when deciding on the timing of return.[53] Such a principle, which is conducive to greater sustainability, is already part of the EU asylum *acquis*.[54] ECRE also reiterates that for asylum seekers whose applications have been rejected a period allowing for independent return of less than one month would usually be too short.[55] These persons may have resided in the host country for a long period and their departure is therefore likely to require considerable administrative preparation.

ECRE notes with concern that Article 7(4) allows Member States to refuse a period of so-called voluntary departure or to grant a period shorter than seven days for instance *'If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent'*. ECRE has observed with concern that in recent years Member States have extended the range of criteria under which asylum claims can be designated as 'manifestly unfounded'.[56] In addition, the Asylum Procedures Directive[57] allows Member States to label an asylum claim as such even in circumstances that are clearly not related to its merits, e.g. when the application has not been lodged immediately after arrival.[58] Widespread use of this practice could mean that many asylum seekers would be deprived of the possibility of complying with a return decision autonomously, before such decision is enforced through coercive measures. It is similarly unfortunate that the length of the period for autonomous departure and even the granting of such a possibility are subject to the existence of a 'risk of

[52] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 26, Article 6, paragraph 2.
[53] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006.
[54] See Article 23 (2) of the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L.212-223 7.8.2001.
[55] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals*, May 2006, p.8.
[56] ECRE, *The Way Forward. Europe's Role in the Global Protection System. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, p. 15.
[57] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005.
[58] For further discussion, see ECRE, *Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,* October 2006.

absconding'. In this respect, ECRE reiterates that there should be no automatic assumption that a person will abscond when confronted with the obligation to return.

Article 8 Removal

Article 8(1) establishes that Member States should enforce the return decision if no period for voluntary departure has been granted or if the obligation to return has not been complied with within that period. Paragraph (2) specifies that the return decision is to be enforced only after the period for voluntary departure has ended, unless a risk of absconding emerges during that time frame. Again, ECRE reaffirms the need for Member States to conduct an individualised and thorough examination of the circumstances of the individual case before taking a decision that would deprive a person of the opportunity to autonomously organise his/her own departure from the host country.

Paragraph (3) allows Member States to adopt a removal order as a separate administrative or judicial decision. ECRE reiterates its comments in relation to Article 6(6) stressing that the issuing of a return decision and the adoption of a removal order should constitute different stages of the return procedure. In particular, ECRE emphasises the need for Member States to ensure, before issuing a removal order, that the person concerned will not be exposed to the risk of being *refouled* or subject to other inhuman or degrading treatment.

ECRE welcomes the fact that Article 8(4) explicitly states that coercive measures should be used only as a last resort, as well as being proportional and not exceeding reasonable force. However, it is unfortunate that, unlike the report adopted by the LIBE Committee,[59] the final text of the Directive does not prohibit the application of coercive measures when removing vulnerable persons. ECRE emphasises that Member States should always avoid using physical force when removing persons with special needs, such as children, older persons and people with disabilities or serious health conditions.

Paragraph (6) requires the establishment of effective forced return-monitoring systems in the Member States. While broadly welcoming this provision, ECRE is disappointed that nothing is provided concerning how such systems are to be organized, thus leaving complete discretion for the Member States. The evaluation of the implementation of EU asylum law has evidenced that, in the absence of precise requirements, Member States tend to rely on their general inspection systems rather than establishing specific monitoring arrangements, which makes it difficult to judge the practical efficacy of national control mechanisms.[60] ECRE encourages Member States as a matter of good practice to put in place specific mechanisms for overseeing forced returns, as well as to involve UNHCR and relevant NGOs in their operation. This is essential to promote transparency and to ensure that increased efforts to enforce deportations do not lead to further lowering human right standards.[61]

Article 9 Postponement of removal

ECRE broadly welcomes Article 9(1) explicitly stating that a removal should be postponed when it would violate the principle of non-*refoulement* or whenever a remedy against a return

[59] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 47, Article 10, paragraph 1.

[60] Odysseus Academic Network, *Comparative Overview of the Implementation of the Directive 2003/9 Of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States,* October 2006, p. 54.

[61] ECRE, *The Way Forward. Europe's Role in the Global Protection System. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, pp. 35-6.

decision has suspensive character. Executing a removal when there is a risk of *refoulement* would obviously constitute a violation of Member States' international obligations. It would also run counter to the inherent nature of a suspensive remedy to expel someone before a final decision has been taken on his/her appeal. Unfortunately, the amendment included in the September 2007 LIBE Committee Report providing that Member States should postpone a removal when it would lead to collective expulsion in contravention of Article 4 of Protocol 4 to the ECHR was deleted from the final text of the Directive.[62] Nevertheless, Member States must of course respect their obligations under international human rights law without exceptions.

Paragraph (2) of this Article establishes that Member States 'may' postpone a removal for an appropriate period taking into account the specific circumstances of the individual case, such as the person's physical state or mental capacity. It is ECRE's view that under no circumstances should a removal take place when it entails a risk for the physical and mental health of the person concerned. ECRE also reminds Member States that Article 9(2) does not exhaust the situations in which it would be appropriate to defer a removal and thus urges them to use this provision in all necessary cases.

Article 9 does not specify the duration of any postponement, which means that the individuals concerned could be facing the prospect of return for an indefinite period of time. ECRE considers that it is unacceptable to maintain third country nationals in situations of semi-legal, tolerated stay, as it further enhances the insecurity and instability these persons are facing. In particular, for asylum seekers whose applications have been rejected and who sometimes have been through long asylum procedures, the prospect of yet another period of uncertainty may simply be unbearable. When a removal cannot be executed within a short period for reasons beyond the control of the individual, Member States should withdraw the removal order and grant some form of legal status to the person concerned.[63]

Article 10 Return and removal of unaccompanied minors

Unaccompanied children may have escaped human rights violations or serious socio-economic deprivation in their countries of origin, and may have been trafficked for sexual, labour or other exploitative purposes.[64] Their particular vulnerability is explicitly recognised in Article 20 UNCRC, which provides that children deprived of their families are entitled to special protection and assistance on the part of the state. While Article 10 of the Directive grants unaccompanied children the right to receive '*assistance by appropriate bodies other than the authorities enforcing return'*, ECRE and other civil society organisations remain disappointed that they are not ensured access to basic legal representation in the EU, which is critical for the protection of their rights.[65] ECRE also urges Member States to ensure that decisions on the return and removal of unaccompanied children are well informed, and have properly assessed the child's best interests in consultation with specialised social services and the legal guardian responsible.

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[62] European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 36, Article 8, paragraph 2, point (c a) (new).

[63] ECRE, *The Way Forward. Europe's Role in the Global Protection System. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, p. 26.

[64] See Save the Children and the Separated Children in Europe, *Programme Position Paper on Returns and Separated Children*, September 2004, p. 3.

[65] See Save the Children, *Letter to MEPs on the Forthcoming Vote on the Proposal for a Directive on Common Standards and Procedures for Returning Illegally Staying Third Country Nationals*, 11 June 2008; *Press Briefing on the Approval of an EU Returns Directive by the European Parliament*, 18 June 2008.

Article 10(2) allows Member States to return unaccompanied or separated children to a third country -not necessarily the country of origin- as long as they are satisfied that *'adequate reception facilities'* are in place. The ambiguity of such a wording may potentially have very negative implications for the rights of children. For example, nothing in this provision prevents Member States from considering that a camp in a transit country represents an adequate reception facility.[66] ECRE reaffirms that unaccompanied children's best interest are only likely to be met if their return is to the legal guardianship of a family member or foster parent in the country of origin.[67] Member States should never return an unaccompanied child without ensuring that proper care and custodial arrangements are in place.[68]

Article 11 Entry ban

Article 11 of the Directive sets down an obligation for Member States to impose an entry ban on irregularly staying third country nationals if no period of voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, the issuing of an entry ban remains optional. Given that the circumstances under which a period of voluntary departure can be refused are broadly defined, it is quite conceivable that the combined application of Articles 7 and 9 may lead to the systematic imposition of entry bans on persons subject to return procedures. While under Paragraph (2) an entry ban may in principle not exceed five years, a longer ban can be imposed *'if the third country national represents a serious threat to public policy, public security or national security'*. ECRE is concerned that, since no definition is given of the notion of '*serious threat'*, Member States may use this provision to impose a permanent entry ban on returned third country nationals.

ECRE reiterates its disagreement with the imposition of an entry ban on asylum seekers whose applications have been rejected and who are facing return, as removal should be considered a sufficient resolution to their situation.[69] Furthermore, in practical terms such a measure may have far-reaching negative consequences for persons seeking asylum in the EU. A EU-wide entry ban constitutes a blunt instrument because it does not take into account possible changes in the countries of origin that may entail risk of persecution and force individuals to leave again after they have been returned. Despite the assertion in Article 11(5) that the provisions regulating entry bans will apply without prejudice to the right to international protection as defined in the EU Qualification Directive,[70] the lack of tangible guarantees safeguarding such a right, combined with the possible imposition of an obligation to register the entry bans in the SIS in the future, would very likely be to the detriment of people with protection needs. Since guaranteeing access to protection is of the utmost importance, ECRE urges Member States not to impose entry bans on asylum seekers whose applications have been rejected solely on formal grounds.[71] In addition, the possibility provided under Article 9(3) of refraining from issuing, withdrawing or suspending an entry

[66] Ibid.
[67] ECRE, *Position on Return*, October 2003, p. 18.
[68] Committee on the Rights of the Child, *General Comment No. 6 (2005) – Treatment of unaccompanied and separated children outside their country of origin*, 39th session, 17 May-3 June 2005, p. 22.
[69] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 11-12.
[70] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal L 304 , 30.9.2004.
[71] See also UNHCR, *Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals*, 16 June 2008.

ban for humanitarian reasons should be applied in all necessary cases. This should be combined with swift and clear procedures at the borders as well as in Member States' embassies abroad allowing for the withdrawal or suspension of entry bans for persons wishing to seek asylum.[72]

Chapter III Procedural Safeguards

Article 12 Form

ECRE broadly welcomes Article 12(1) imposing an obligation on Member States to issue any return, removal and entry-ban decisions in writing, stating the reasons in fact and in law and the legal remedies available. ECRE nevertheless regrets that translations of the main elements of such decisions, including information on appeal possibilities, are to be provided by the Member States only upon request, as well as the fact that such translations can be issued in a language that third country nationals *'may reasonably be presumed to understand'* instead of guaranteeing that they are in a language that the person actually understands. ECRE emphasises that it is a prerequisite for a fair and transparent procedure that all persons concerned receive appropriate information on the possibility of seeking remedy against return-related decisions.

Whereas this is already problematic, Article 12(3) further undermines this procedural safeguard as Member States may choose not to provide such translation or information with regard to persons *'who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay'*. ECRE reaffirms its comments to Article 2 stating that excluding some categories of persons from relevant safeguards included in the Directive lacks justification and constitutes discriminatory treatment in favour of certain third country nationals, such as visa overstayers.

Furthermore, in the scenario described above decisions related to return will be given in a standard form as provided in national legislation. Reports from civil society organisations have shown the extent to which the standard form used for refusal of entry as set down in the Schengen Borders Code may potentially lead to arbitrariness and *ad hoc* interpretations by the responsible national authorities.[73] The use of standards forms within the context of return is also problematic in light of the ECtHR's jurisprudence. In a case related to the prohibition of collective expulsions, the Court ruled that Article 4 of Protocol 4 to the ECHR requires States party to demonstrate that *'the personal circumstances of each of those concerned had been genuinely and individually taken into account'*.[74] By definition, standard forms do not allow any elaboration on the specific circumstances of the individual. Consequently, their generalised use would be below the standards laid down in international human rights law and incompatible with ECtHR case-law.

Article 13 Remedies

ECRE broadly welcomes the fact that under Article 13(1) third country nationals are to be afforded '*an effective remedy to appeal against or seek review of decisions related to return'*,

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[72] See ibid and ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 12-3.

[73] See Hungarian Helsinki Committee, *Access to Protection at Airports in Europe: Report on the Monitoring Experience at Airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw,* 2008.

[74] Conka v. Belgium, ECtHR (2002) par. 61.

but nevertheless regrets the loss of a similar provision included in the proposal from the European Commission and in the September 2007 LIBE report establishing that such a remedy should have judicial nature.[75] The final text of the Directive provides, instead, that third country nationals should be able to lodge an appeal '*before a competent judicial or administrative authority or a competent body composed of Members who are impartial and who enjoy safeguards of independence*'. In ECRE's view, the ambiguity of this formulation risks allowing Member States to accommodate practices which may run counter to the objective of granting third country nationals a genuinely effective remedy.

While Article 13(2) provides that the responsible authority will have competence to suspend the enforcement of decisions related to return, ECRE reiterates that a remedy without automatic suspensive effect is problematic in the case of asylum seekers whose applications have been rejected.[76] A judicial remedy against a removal decision remains meaningless if the asylum seeker has already been sent to the country where there is a risk of persecution, torture, or inhuman or degrading treatment. ECRE wishes to remind Member States that the right to an effective remedy before a court or tribunal is embodied in EC law, Article 47 of the Charter of Fundamental Rights of the EU and in Article 13 of the ECHR.[77]

Paragraph (4) lays down an obligation for Member States to ensure the provision upon request of free legal assistance and/or representation in accordance with national law. This safeguard may also be subject to the conditions set out in Article 15(3) to (6) of the Asylum Procedures Directive. In ECRE's view, this provision severely circumscribes the ability of asylum claimants to access free legal assistance by allowing Member States to introduce a series of limitations, such as excluding legal aid for judicial review of administrative decisions, limiting the granting of assistance to where the appeal or review is likely to succeed, and introducing monetary and temporal restrictions to the provision of legal aid.[78] Being an essential safeguard in the asylum process, ECRE urges Member States to offer legal aid and representation to persons subject to return procedures and to ensure that such assistance is free of charge for those in need. In line with the Commission statement attached to the Council minutes, Member States should give priority to promoting the application of Article 13(4) in deciding their priorities and programmes for the use of the European Return Fund.

Article 14 Safeguards pending return

This Article lays down a limited set of principles to be taken into account by the Member States during the period for voluntary departure or when a removal order has been postponed: family unity, provision of essential health care, access of children to the basic education system, and consideration for the special needs of vulnerable persons. There is now a clear trend on the part of EU Member States of compelling asylum seekers whose applications have

[75] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals*, Brussels, 1.9.2005, COM (2005) 391 final, Article 12; European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, Amendment 51, Article 12, paragraph 1.

[76] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 14.

[77] See Conka v. Belgium, ECtHR (2002), par.79.

[78] See Immigration Law Practitioners' Association (ILPA) *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status,* June 2004, p.20; ECRE, *Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,* October 2006, p. 15.

been rejected to leave through the withdrawal of all forms of support, with dramatic social and personal consequences.[79] While in ECRE's view Member States should ensure that people do not fall into destitution whereas removal is pending, the formulation of Article 14 severely restricts the practical effectiveness of this fundamental principle.

The Commission proposal established an unambiguous obligation for Member States to guarantee that conditions of stay pending removal are not less favourable than those established in a number of relevant provisions included in a binding legal instrument, the Directive on Reception Conditions.[80] Instead, under the final text of the Directive Member States must only ensure that the principles listed *'are taken into account as far as possible'*. In practice this provision may become meaningless, as Member States can simply decide not to apply it in potentially every circumstance. Furthermore, Article 14 does not cover detained third country nationals. ECRE reminds Member States that such withdrawal of support risks violating their obligations under the ECHR, specifically Article 3 providing that no-one shall be subject to inhuman or degrading treatment or punishment, and Article 8 on the right to respect for private and family life.[81]

Concerning the right of children to access the basic education system, this will be *'subject to the length of their stay'*. ECRE strongly believes that, as a rule, it should be the other way round, namely that education should not be unnecessarily interrupted. The best interest of the child should be carefully served by the avoidance of sudden returns that are likely to have a dramatic emotional and psychological impact on children.[82] Member States should thus be open to negotiate a time of returns that does not impinge on children's needs, for example by allowing them to complete the school period and to attend exams.[83]

ECRE also considers Article 4 to be inappropriate in relation with the needs of vulnerable persons. The inclusion of a mere reference to the fact that these needs are to be taken into account, without the backing of specific safeguards, is insufficient. For individuals who are vulnerable, the likelihood of suffering from mental health problems, a feeling of being lost and marginalisation is greatly increased.[84] ECRE urges Member States to ensure that the treatment of vulnerable persons within the context of return is not less favourable than set out in Articles 17-21 of the Reception Conditions Directive.

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[79] See Amnesty International, *Down and out in London: The road to destitution for rejected asylum seekers,* November 2006; ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 32; ECRE, *Five years on Europe is still ignoring its responsibilities towards Iraqi refugees*, March 2008, p.5; Human Rights Watch, *Netherlands: Safety of Failed Asylum Seekers at Risk: Letter to the Dutch Immigration Minister,* 13 February 2003. Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK,* October 2006; The Independent Asylum Commission, *Second Report of Conclusions and Recommendations: Safe Return, How to Improve What Happens When We Refuse People Sanctuary,* 30 June 2008.

[80] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. OJ L 31, 6.2.2003.

[81] See *R(Q) v SSHD [2003] EWCA Civ 364, [2003] 2 All ER* concluded that the UK Secretary of State would be in breach of the ECHR art 3 if he failed to provide support to an asylum seeker in circumstances where he would not receive assistance from friends or charity. Denial of support can also engage Article 8 of the ECHR where there is an unjustifiable interference with an individual's physical and moral integrity. In this regard, see R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27.

[82] For further discussion, see The Independent Asylum Commission, *Second Report of Conclusions and Recommendations: Safe Return, How to Improve What Happens When We Refuse People Sanctuary,* 30 June 2008.

[83] Ibid, p. 26.

[84] ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 24.

Article 14(2) establishes that Member States should provide third country nationals with a written confirmation that the period for voluntary departure has been extended or that the return decision will temporarily not be enforced, which is to be welcomed. ECRE reiterates that such document may be useful to prevent confusion in contacts between the individuals and official authorities and may also constitute a relevant tool to prevent authorities from making potentially fatal mistakes in processing removals.[85]

Article 15 Detention

Article 15 regulates the detention of third country nationals subject to return procedures. ECRE reminds Member States that the right to liberty constitutes a key element in the protection of an individual's fundamental rights. Article 9 of the ICCPR establishes that '*no one shall be subjected to arbitrary arrest or detention'*, which is also the overall purpose of Article 5 ECHR.[86] The notion of arbitrariness should not be equated however with 'against the law',[87] as it also encompasses principles such as necessity and proportionality. Therefore, for detention not to be arbitrary, the authorities have to demonstrate that less intrusive measures have been tried and found insufficient in an individual case before the person is detained.[88] The principle of proportionality also requires detention to be for the minimum period necessary, and never prolonged unduly or indefinitely where there is no prospect of removal or where removal proceedings are not carried out with due diligence.[89] Consequently, ECRE welcomes the general recognition of these key principles in Article 15(1) and (4).

Having said that, ECRE is extremely concerned about the broadly defined grounds for detention under Article 15. The Directive refers *'in particular*' to the existence of a risk of absconding and to situations in which a third country national hampers or avoids removal, thus suggesting that this provision is not exhaustive. ECRE's reservations concerning the broad definition of risk of absconding included in the Directive have been detailed above. Member States should not automatically assume that third country nationals who no longer have a legal basis to remain in their territory are likely to abscond and should therefore be detained. If detention is automatic, the principle of proportionality has not been observed.[90]

An equally wide scope for interpretation is granted to Member States concerning the maximum duration of detention. While Article 15(5) establishes that third country nationals subject to return procedures should in principle not be detained for more than six months, under Paragraph (6) Member States will be able to prolong detention up to eighteen months in the event of uncooperative behaviour on the part of the individual or when there are delays in obtaining the necessary documentation from third countries. In ECRE's view, these grounds for extending the detention period would cover a potentially large number of third country nationals.[91] In particular, it is well documented that the reluctance of the countries of origin to

[85] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 16.
[86] See Saadi v. United Kingdom (2006), ECHR, Application No 1329/03, para 40.
[87] A. v. Australia, Human Rights Committee Communication No 560/1993, para 9.2.
[88] C. v. Australia, Human Rights Committee Communication No 900/1999, para 8.2.
[89] This has been recognised in relevant case law. See *Ali v Switzerland* (1999) 28 EHRR 304; *Quinn v France* (1997) EHRLR 167; *Singh v the Czech Republic* (2005).
[90] For further discussion see ECRE & The Aire Centre, *Immigration, Asylum and Detention*, June 2004, p. 9.
[91] See also UNHCR, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 June 2008.

accept their own nationals back constitutes one of the main obstacles to return.[92] Furthermore, under Article 3(3)(3) the country of return is not necessarily the country of origin, but can also be a country of transit or another third country. These countries are likely to be even less willing to accept non-nationals, even if this goes against their readmission obligations. In any case, prolonging detention due to the unwillingness or inability of a country to provide documentation is particularly unjust, as it amounts to penalising individuals for circumstances that are completely beyond their control.

ECRE reminds Member States that deprivation of liberty constitutes an extreme sanction for people who have committed no crime and that therefore should be used only as a last resort and for the shortest period possible. While governments often justify detention as the only way to ensure that removal takes place, existing research shows that, where comparative information is available, alternatives to detention are more cost-effective than detention itself.[93] Furthermore, there is evidence that the effectiveness of detention in terms of facilitating return decreases the longer detention lasts.[94] ECRE urges Member States whose national legislation provides for shorter detention periods to refrain from prolonging them in line with their commitment not to use the Directive to legitimise the lowering of domestic standards.

ECRE is similarly concerned about the provisions on the judicial review of detention. It is disappointing that the original wording of the Commission proposal laying down the principle that decisions on detention should be taken by judicial instances has not been retained in the final text of the Directive.[95] ECRE also regrets the fact that, when detention is ordered by administrative authorities, Member States are not obliged to provide for a judicial review ex officio. Instead, under Article 15(2)(b) the third country national concerned can be granted *'the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review'*, in which case the detainee is to be informed of this possibility. Clearly, such an obligation to inform is open to interpretation, which in practice may render a key safeguard dependent on the 'good faith' of national authorities.

Article 15(3) provides for reviews to be subject to the *'supervision of a judicial authority'* in the case of prolonged detention periods. This provision does not clarify what prolonged detention means and raises the question of whether or not the supervision envisaged refers to actual judicial review. It may also lead to inconsistent situations, in which a detention order adopted by a judge is revised by an administrative authority. Another aspect that constitutes a serious cause of concern is the lack of specific deadlines for revision. Article 15(2) refers to a '*speedy*' judicial review, which should be decided '*as speedily as possible'*. Similarly, Article

[92] See for example European Commission, *Communication on a Community Return Policy on Illegal Residents*, COM(2002) 564 final,14.10.2002, p. 9; Antje Ellermann, 'The Limits of Unilateral Immigration Control: Deportation and Inter-State Cooperation', *Government and Opposition,* 2008, Vol. 43, No 2, pp. 168-189. Matthew J. Gibney (2008) 'Asylum and the Expansion of Deportation in the United Kingdom', *Government and Opposition*, 2008, Vol. 43, No. 2, pp. 146–167.

[93] See UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees,* April 2006.

[94] A Swiss report has shown that between 60 and 80 percent of all ordered detention in all the Cantons do not last longer than one month, and where it does the rate of successful removal is not significantly higher, see Parlamentsdienste /Services du Parlement, *Evaluation der Zwangsmassnahmen im Ausländerrecht, Schlussbericht zuhanden der Geschäftsprüfungskommission des Nationalrates/Evaluation des mesures de contrainte en matière de droit des étrangers, Rapport final à l'attention de la Commission de gestion du Conseil national*, March 2005.

[95] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals*, Brussels, 1.9.2005, COM (2005) 391 final, Article 14.

15(3) provides that detention should be reviewed *'at reasonable intervals'*. ECRE urges Member States to ensure that third country nationals who are detained within the context of return procedures have their detention reviewed by a judge at least once a month, as well as whenever their circumstances change or new elements support their release.

Article 16 Conditions of detention

Article 16(1) provides that detention should be carried out as a rule in specialised detention facilities, but nevertheless allows Member States to resort to prisons when specialised premises are not available. Furthermore, under Article 18 Member States will be able to derogate from the general rule concerning detention conditions in *'emergency situations'*. ECRE reiterates its strong opposition to the use of prisons for the detention of third country nationals within the context of return procedures.[96] It is clearly unacceptable to detain in the same facilities two groups of people whose needs are likely to differ so widely.[97] Such a measure would amount to the criminalisation of persons detained for migration reasons, contribute to the stigmatisation of asylum seekers and reinforce the growing tendency in public opinion to fuse together immigration and asylum with security issues.[98]

The Directive lacks sufficient safeguards concerning the needs of vulnerable persons in relation to detention. Article 16 (3) simply states that *'Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided'*. Consequently, this Article implicitly allows the detention of *inter alia* disabled and older people, pregnant women and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence, including in ordinary prison accommodation and potentially for a period of up to eighteen months. There is evidence, however, that the special needs of vulnerable persons are not adequately protected in detention.[99] Holding pregnant women in custody, for example, has a negative impact on their health and well-being.[100] ECRE reiterates its view that vulnerable persons should never be detained.[101]

Finally, Article 16(4) provides that '*Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities'*. While ECRE welcomes this provision, it is unfortunate that Member States are allowed to subject those visits to prior authorisation. ECRE reiterates that there is no objective reason why an authorisation should be required for relevant organisations to assess the adequacy of detention conditions.[102] In order to increase the effectiveness of any monitoring efforts and to

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[96] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 18.

[97] See The Independent Asylum Commission, *Third Report of Conclusions and Recommendations: How to Improve the Way We Treat People Seeking Sanctuary,* 10 July 2008.

[98] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, pp. 18.

[99] See, for example, The Independent Asylum Commission, *Interim Findings, Fit for Purpose Yet?,* 27 March 2008, pp. 66-84.

[100] Ibid, p. 83.

[101] ECRE, *The Way Forward: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe,* June 2005, p. 31.

[102] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),* May 2006, p. 19.

ensure that returns are carried out with all necessary guarantees, Member States should allow for spontaneous visits of such organisations to their detention facilities.

Article 17 Detention of minors and families

ECRE strongly regrets the fact that this Article allows Member States to detain unaccompanied children and families with children, although specifying that this can only happen *'as a measure of last resort and for the shortest appropriate period of time'*. ECRE believes that, as a general rule, children should never be detained for reasons related to their migration status.[103] In particular, the detention of unaccompanied children can never be in the best interest of the child, as required by Article 3 of the UNCRC. It is well documented that detention has a detrimental effect on the development and emotional and physical well-being of children, triggering problems such as depression, changes in behaviour and confusion in addition to refusal to eat, weight loss, lack of sleep, skin problems and persistent respiratory conditions.[104] In addition, children in detention are provided with inadequate access to education and health care.[105] Even when accompanied by their parents, detention can have damaging effects on their psychological health as well as on parental authority as such.[106]

Article 17(2) specifies that Member States should provide detained families with separate accommodation that guarantees adequate privacy. Nevertheless, Member States can also derogate from this obligation in emergency situations as set out in Article 18. As for unaccompanied children, Paragraph (4) establishes that accommodation should be provided *'as far as possible'* in institutions in which adequate personnel and facilities are available. In ECRE's view, this provision grants Member States a wide scope for discretion and implicitly allows them to detain children in prison accommodation, which is completely unacceptable. Furthermore, Article 17 provides no exception for unaccompanied children and families with children with respect to the excessive time limit of eighteen months. This is a serious cause of concern, as during a series of visits to detention centres in various Member States the LIBE Committee has documented in some cases appalling detention conditions, including for families with children, and extended use of ordinary prison accommodation.[107]

Article 18 Emergency situations

This Article allows Member States to derogate from specific obligations set out in previous provisions. In particular, when they are confronted with '*situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff',* national authorities may decide to allow for longer periods of judicial review or derogate from the principle that detention must be carried out in specialised detention facilities and that families detained pending removal shall be provided with separate

[103] See also Save the Children, *Letter to MEPs on the Forthcoming Plenary Vote on the Proposal for a Directive on Common Standards and Procedures for Returning Illegally Staying Third Country Nationals,* 11 June 2008.
[104] John Bercow MP, Lord Dubs and Evan Harris MP, *Alternatives to immigration detention of families and children,* July 2006.
[105] Editorial, 'Health Care for Children in UK Detention Centres', *The Lancet,* Vol. 32, 22 November 2008.
[106] See Save the Children, *No place for a child. Children in UK immigration detention: Impacts, alternatives and safeguards*, 2005, p 13-25.
[107] See, for example, European Parliament, *Report from the Committee on Civil Liberties delegation on the visit to the Temporary Holding Centre (THC) in Lampedusa (IT),* 19 September 2005; *Report on the LIBE committee delegation visit to Paris (FR),* 22 March 2006; *Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta*, 30 March 2006; *Report from the LIBE Committee Delegation on the Visit to Greece (Samos and Athens)*, 17 July 2007.

accommodation guaranteeing adequate privacy. This derogation can be maintained for '*as long as the exceptional situation persists'*.

The Directive does not define what exactly constitutes *'an exceptionally large number of third country nationals to be returned'* nor does it clarify what can be deemed *'an unforeseen heavy burden'* on Member States' detention facilities or administrative and judicial personnel. Consequently, national authorities enjoy complete discretion to decide if they are confronted with an emergency situation under which such derogations are justified. The only requirement placed on Member States is the obligation to inform the Commission, which nevertheless lacks any ability to determine whether or not the adoption of exceptional measures is justified. ECRE considers such absence of oversight particularly worrying, as this provision allows Member States to opt for less '*speedy*' judicial review procedures, resort to more generalised detention of third country nationals in ordinary prisons as well as to withdraw from their obligation to guarantee separate accommodation to families held in detention. The result is that Article 18 subverts a number of already inadequate provisions. In ECRE's view, it is wrong and unwarranted to assume that any emergency situations may be resolved by downgrading the rights of third country nationals.

Chapter IV Final Provisions

Article 19 Reporting

This Article establishes an obligation for the Commission to review the application of the Directive every three years. Its first report will be published five years after the publication of the Directive in the official journal, by 24 December 2013, and will focus on the implementation of Articles 11 (entry ban), 13(4) (legal aid) and 15 (detention). ECRE considers that the time frame envisaged in this provision is too long, particularly considering that the adopted EU asylum instruments provide for shorter reporting periods.[108] ECRE nevertheless hopes that the Commission will take the opportunity afforded at this time to consider the concerns raised in this paper. In particular, regarding the provision on legal aid, ECRE believes that the Commission should not only assess its administrative and financial implications for the Member States but also whether third country nationals in need are having access to free legal assistance. ECRE also recommends that the Commission should pay particular attention to detention conditions in the Member States, as well as to the impact that the Directive has on vulnerable persons. Finally, ECRE emphasises that the criteria for assessment must primarily be based on the importance of safeguarding human rights and ensuring that the return of third country nationals takes place in a safe, sustainable and dignified manner.

Article 20 Transposition

Under this provision, Member States are required to adopt national legislation necessary to comply with the Directive within twenty-four months from the date of publication of the Directive in the Official Journal, by 24 December 2010. A period of up to thirty-six months is allowed, however, for Member States to bring into force the legislation required to comply with Article 13 (4) relative to the provision of legal aid. It is regrettable that such a delay is admitted, as poor or no legal advice and representation will obviously be at the disadvantage of the persons subject to return procedures. ECRE reiterates its call on the Member States to implement this and other provisions of the Directive in a manner which complies with their obligations under all relevant international and regional human rights instruments

[108] The expected reporting time was around four years from the date of adoption, both in the case of the Qualification Directive and of the Asylum Procedures Directive.