



## Statewatch Analysis

### The Proposed EU Returns Directive

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January 2008

#### Introduction

The controversial proposal for a Directive regulating expulsions from EU Member States was the subject of more serious discussion during the Portuguese Presidency of the EU's Council in the second half of 2007. Unlike the previous German Presidency, the current Presidency did not try to remove almost the entire content of the Directive, although the latest version of the text under discussion (dated 7 December 2007) would still generally have set a significantly lower standard than the Commission's initial proposal.

For its part, the European Parliament (EP) has reached an initial position on the Directive, in the form of a report adopted by the EP's civil liberties committee. In most respects the EP report raises standards as compared to the Commission proposal, although with some important exceptions, most obviously the much lower standards applicable to detention (which would be subject to a six-month maximum in the Commission's original proposal, and an 18-month maximum in the EP's version). This report has not yet been voted upon by the EP plenary, due to ongoing negotiations between the EP and the Council. Discussions between the Council and the EP have apparently been continued under the new Slovenian Presidency of the Council, although no information on these talks is yet available.

It appears that the Council has been prompted into a more serious discussion of the Directive by the EP's decision to freeze the money which would be available to Member States under the EU's new Return Fund until there is a deal on the Directive. Nevertheless, the latest Council text makes only minor concessions to the EP position (mostly concerning the preamble and definitions), and is still far apart from the EP's version on many crucial points. For instance, the Council version has managed to set an even lower standard than the EP as regards detention - a possible *indefinite* period of detention.

The following analysis first summarises the most important points of the EP and Council positions, then sets out the positions in more detail, then reaches certain conclusions.

### Summary of the positions

- a) the Council wants to exclude much bigger categories of people entirely from the scope of the Directive, whereas the EP and Commission want to exclude only those in transit zones or rejected at the borders - and even those two groups would be able to access some of the standards of protection;
- b) the EP and the Council would each more clearly limit the countries which a person could be 'returned' to than the Commission, although the EP version would be more restrictive than the Council's;
- c) the EP's version contains the safeguard that people cannot be presumed to be at risk of absconding, and therefore detained, just because they are illegal entrants;
- d) the Council would delete the Commission's general human rights safeguard, whereas the EP would expand upon it;
- e) both the Council and the EP would delete the Commission's proposed human rights safeguard from the basic rules on return decisions; otherwise the EP would maintain more mandatory protections against return decisions than the Council, along with protection of the reception conditions of failed asylum-seekers;
- f) the EP would strengthen the Commission's list of grounds which would require mandatory postponement of a removal, whereas the Council would make the Commission's entire list optional, inserting instead only a mandatory postponement on grounds of non-refoulement;
- g) the EP would make the proposed EU-wide re-entry ban following a removal order optional, rather than mandatory, but the Council would make the ban mandatory at the earlier stage of the return decision; the EP would also set a higher threshold for the application of bans for longer than five years;
- h) the EP would add additional standards binding upon Member States when they returned a person by force, whereas the Council would weaken the Commission's proposal slightly;
- i) the Council would require Member States to provide information to persons affected by re-entry bans - the sole point where it would set a higher standard than either the EP or the Commission - but it would provide an exception in certain cases to the requirement to give information to persons concerned by return decisions, removal orders

or re-entry bans, as well as provide for an ‘accelerated procedure’ in which the explanation for the decision would be given only by means of a standard form;

- j) the EP and the Commission support an effective judicial remedy against return decisions, removal orders and (for the EP) re-entry bans and detention, including the suspensive effect of challenges in some form and access to legal aid; the Council does not support a judicial remedy, full suspensive effect, or the right to legal aid, and persons subject to ‘accelerated procedure’ would lose their right to remedies under the Directive entirely;
- k) the EP and the Commission support (very) basic rights for persons pending return, which the EP would extend to persons arranging for voluntary departure, whereas the Council only refers to more limited forms of protection as ‘principles’ to be ‘taken into account as far as possible’;
- l) as noted above, the Commission supports a six-month maximum detention period, while the EP supports a 3-month period which can be extended to 18-months in certain cases and the Council supports a 6-month period which can be extended indefinitely in even more circumstances; the Commission proposal provides that Member States must justify the detention by reference to a ‘risk of absconding’, whereas the EP and the Council refer instead to the ‘necessity’ principle, and the EP additionally requires continued efforts by the expelling State to carry out the expulsion in order to justify expulsion; the Council would also weaken the text as regards judicial approval of and review of detention; and
- m) the Council would weaken the Commission’s proposals on detention conditions slightly, while the EP would strengthen them somewhat.

### **Preamble, scope, definitions and human rights safeguards**

The Council text takes over seven amendments to the Directive’s preamble from the EP’s report, although a few of these have been adapted.

The first crucial question is the **scope** of the Directive, as defined in Article 2. The Commission’s proposal applies the Directive to all third-country nationals who are staying illegally on a Member State’s territory (Article 2(1)), except for persons with free movement rights under EU law or association agreements (Article 2(3); this exception is not disputed) and for persons who have been ‘refused entry in a transit zone’ (Article 2(2)). The latter exclusion is only an option for Member States, and even if Member States apply it, they must ensure that such persons are covered by Articles 8, 10, 13 and 15 of the proposal, therefore guaranteeing their rights as regards postponed expulsion, forced removal, safeguards pending return and conditions of detention.

In the EP's version, Member States may also exclude persons who were refused entry at the border (although probably the Commission intended to exclude such persons from its proposal anyway), although again this is only an option for a Member State and those basic standards applicable to persons in transit zones must also be applicable to this category of persons. The EP's version also defines this exclusion by reference to the rules on special borders procedures in the EU's asylum procedures Directive, although it should be recalled that that Directive does not apply to Schengen associates (who will be partly covered by the returns Directive) and that the returns directive will not just apply to asylum-seekers. Furthermore, the EP's version contains a definition of 'transit zones' (Article 3(aa)), and specifies that pre-existing re-entry bans are not affected by the Directive (Article 2(3a)).

The Council's version permits Member States to apply a much broader exclusion, without any obligation to apply any safeguards at all to any of the categories of person who are excluded. In the Council version, Member States may exclude persons subject to exclusion as a result of a criminal law sanction, who are subject to extradition procedures, who are subject to a refusal of entry (by reference to the Schengen Borders Code), or who are 'intercepted at, or in the vicinity of the external border of the Member States while trying to enter or are apprehended in circumstances where there are reasons to believe that they have illegally entered' the Member States' territory within the last 72 hours (three days).

As for the **definitions** (Article 3 of the Directive), the EP version adds a definition of 'transit zone' (as noted above), along with definitions of 'risk of absconding', 'temporary custody facilities' and 'vulnerable persons'. The EP also amends the definition of 'return', which in the Commission's proposal is defined as the process of 'going back to one's country of origin, transit or *another third country...*' (Article 3(c)), leaving open the absurd possibility that a person could be required to 'return' to a country that he or she has never lived in or even visited. In the EP's version, a 'return' can only be imposed to a country or origin or a country of transit in which a person 'has solid established ties'.

The Council's version does not include the EP's definition of 'transit zone' or 'temporary custody facilities', and does not follow the EP's revised definition of 'return', instead revising the definition to refer to any country where the third-country national will be accepted (which would impose a limit *de facto* on issuing return decisions). The Council would accept the EP's definition of 'vulnerable persons', with the added proviso that there must be an individual evaluation before accepting that a person must be considered vulnerable, and the Council would accept the EP's definition of 'risk of absconding' with some changes, including dropping the safeguard that it cannot automatically be assumed that there is a risk of absconding merely because a person is are illegally resident.

Article 4, which provides that Member States can establish **more favourable provisions**, is retained by both the EP and the Council.

Article 5 of the Commission's proposal sets out a **human rights safeguard**, specifying that when implementing the Directive, Member States must take account of the nature and solidity of family relationships, the duration of stay in the host State, and the strength of ties with the country of origin (the broad definition of 'return' is overlooked here). Member States must also 'take account of the best interests of the child in accordance with' the UN Convention on the Rights of the Child.

In the EP's version, Article 5 also refers to the principle of non-refoulement and protection of seriously ill persons, who must be allowed to stay in certain circumstances; the EP's version also elaborates upon the protection of family life and children, setting some limits upon the treatment of families and children.

In the Council's version, the human rights safeguard is simply deleted from the main text of the Directive, and inserted in part into the preamble instead.

### **The Expulsion Process**

Article 6 of the proposal sets out the **basic rules on issuing a return decision**. In principle, Member States are obliged to issue a return decision to an illegal resident, but there are mandatory exceptions on human rights grounds, when a person voluntarily returns to a Member State where he or she holds a residence permit and when an application to renew a residence permit is pending. There are also options to grant a residence permit to an illegal resident at any time on any grounds (which will either prevent a return decision or extinguish a pending return decision) and to refrain from issuing a return decision where an initial application for a residence permit is pending.

In the EP's version, the mandatory exception on human rights grounds is deleted, and the mandatory exception for voluntary return to another Member State becomes optional. The mandatory exception for renewing residence permits is qualified by a proviso that any permit issued will be valid only on the territory of the issuing State (although in fact it is the normal rule that a residence permit is valid as such only on the territory of the State which issued it). The optional exception for pending applications for residence permits becomes mandatory, and the optional exception to issue a permit for any reason at any time is qualified by a requirement to inform other Member States about the withdrawal of the return decision (although it is not clear how the other Member States would have become aware of that decision in the first place). The EP would also require that failed asylum-seekers would keep receiving the reception conditions which they had previously received.

The Council's version would also delete the human rights exception, and would furthermore delete the optional exception for applications for an initial residence permit. The mandatory exception for renewal of residence permits would become optional, and the exception for voluntary departure to another Member State would not apply where non-compliance with the obligation to leave 'may be assumed' or where departure was required for national security or public policy reasons.

The proposal also provides for a period for voluntary departure (unless there is a risk of absconding) of up to four weeks, retained by the Council (the EP version refers to *at least* four weeks). The Council has taken on board the EP's suggestion that this period can be extended in appropriate circumstances, although it has added a new clause providing that Member States may permit this period for voluntary departure only following an application. It has not accepted the EP's amendment referring to possible assistance and counselling in order to facilitate voluntary return.

Next, Article 7 of the proposal sets out the **basic rules concerning removal**, if no voluntary return was permitted or took place. Neither the Council nor the EP suggests major changes to this clause.

Article 8 of the proposal concerns **postponement of expulsions**. The Commission's proposal included a general option to postpone removal in each particular case, with an obligation to postpone removal in the case of the person's inability to travel on health grounds, technical reasons such as lack of transport making it impossible to remove a person humanely and with full respect for his or her rights and dignity, or lack of assurance that an unaccompanied minor will be handed over to a family member or another specified person who can be trusted to look after the child.

The EP's version would add another mandatory ground for postponement: collective expulsion. However, the Council's version would make all of the Commission's proposed mandatory grounds for postponement only optional, although there would be a mandatory obligation to postpone expulsion where the expulsion would infringe the principle of non-refoulement.

Article 9 sets out the rules concerning an **EU-wide re-entry ban**. In the Commission's version, the imposition of a removal order would, as a rule, include the imposition of a re-entry ban with a maximum of five years. Return decisions *may* include such a ban. The length of the ban would depend on the factors of each case, with a non-exhaustive list of factors set out. A ban of more than five years would be possible if the person concerned 'constitutes a serious threat to public policy or public security'. The ban could be withdrawn, in particular in the event of specified good behaviour by the person concerned, and could be 'suspended on an exceptional and temporary basis in appropriate individual cases'. Finally, the ban was to be without prejudice to the right to seek asylum in a Member State.

The EP's version would change the mandatory re-entry ban into an optional ban, raise the threshold to consider a person to be a threat to public policy or public security, add the express possibility of withdrawing the ban on asylum-related grounds, add further possibilities of withdrawal or revocation of the ban, specify that Article 9 is further without prejudice to the right to seek international protection other than asylum, and provide that the ban can be withdrawn by the Council for a group of persons in the event of a 'human disaster'.

The Council version would make a re-entry ban mandatory in the event of a *return decision*, therefore significantly increasing the number of people who would be covered by such a ban and reducing the incentive for voluntary return. The five year maximum period of the ban would only apply 'in principle', and the threshold for a longer period of application would be lowered. There would be a general power for Member States to refrain from issuing a ban or to withdraw or suspend it in individual cases.

Finally, Article 10 sets out standards applicable in the event of forced removal. In the Commission's proposal, Member States' actions would have to be proportionate and use only reasonable force, 'in accordance with fundamental rights and with due respect for the dignity' of the person concerned. Member States would have to 'take into account' the common guidelines on security provisions for joint removals, attached to an earlier EU Decision.

In the EP's version, there would also be an obligation to apply Council of Europe guidelines on forced return, and such measures 'should be open to independent scrutiny' and 'should be avoided when removing vulnerable persons'. A further amendment would require the involvement of international organisations and NGOs during removals, in order to guarantee compliance with legal procedures.

The Council version (moved to Article 7) would simply retain the Commission text, specifying that the Member States need only take account of the guidelines in the existing EU decision when carrying out removals by air.

### **Procedural Rights**

Articles 11-13 concern procedural safeguards for persons subject to return procedures. The Commission's version of Article 11 specifies that return decisions and removal orders must be issued in writing, with explanation of the reasons for expulsion in fact and law and information about the available legal remedies. Member States shall provide, upon request, a translation of the main elements of the decision into a language which the person concerned may be supposed to understand.

The EP's version adds that the information concerning legal remedies must be in a language that the person concerned understands or may be supposed to understand. The Council's version expands procedural protection to include re-entry bans, but permits the information or reasons to be limited

in accordance with national law, ‘in particular’ on grounds of national security or criminal law (or similar grounds).

Article 12 concerns judicial remedies. The Commission proposed that all persons subject to a return decision or removal order ‘have the right to an effective legal remedy before a court or tribunal’ to appeal or review that decision. This remedy shall either entail suspensive effect, or at least require suspending the effect of the order pending a decision on a separate application to suspend its effect. The person concerned has a right to legal advice and legal aid shall be made available to those who lack resources if ‘necessary to ensure effective access to justice’.

In the EP’s version, the right to an effective judicial remedy applies also to detention and re-entry bans.

In the Council’s version, there is no right to a *judicial* review, as the review could be carried out instead by an administrative or other independent body, which should have a ‘possibility’ of suspending the effect of the decision. Legal aid shall only be made available in accordance with national legislation.

Article 13 concerns safeguards pending return. Persons whose expulsion has been postponed are entitled to treatment equivalent to asylum-seekers (in accordance with EC legislation) as regards freedom of movement, family unity, medical screening, health care and protection for special needs (but there is no reference to employment, welfare or accommodation). There must be written confirmation regarding the postponement for the person concerned.

In the EP’s version, treatment (as regards certain conditions) equivalent to that of asylum-seekers must be granted also to persons during the period of voluntary departure or persons awaiting the outcome of appeal proceedings. The information sent to such persons must be in a language they understand or may be reasonably supposed to understand.

In the Council’s version, the ‘principles’ which shall be ‘taken into account as far as possible’ are family unity, health care, basic education and treatment of vulnerable groups, but no longer by reference to the Directive on reception conditions for asylum-seekers. However, Article 13 will apply during the period for voluntary departure.

Finally, the Council (but not the EP or Commission) has inserted a new Article 13a, which provides for an ‘accelerated procedure’ in which certain basic procedural rights are not fully applicable. The procedure (which is optional for Member States) may apply where a person is intercepted at or near the external border when trying to enter illegally, or who is apprehended within fourteen days of illegal entry. In that case, the return decision and re-entry ban will be issued by means of a standard form. There is no requirement for translation of the form, but rather only for general information sheets in five languages widely used or understood by illegal



migrants entering the particular Member State. Article 12 will not apply at all; rather legal remedies will be determined in national legislation.

## **Detention**

Articles 14 and 15 of the original proposal deal with the controversial issue of the detention of irregular migrants. The original Article 14 required Member States to detain a person subject to (or who will be subject to) a return decision or removal order, where there were serious grounds to believe there was a risk of absconding and less coercive measures would be insufficient. A detention order must be issued by the courts, except for urgent cases where an order by the administration must be confirmed by a court within 72 hours of the start of detention. Detention must be reviewed by the courts once a month, and can be extended by courts up to a maximum of six months.

In the EP's version, detention would be optional, although there would also be a reference to detention on grounds of a 'proven threat to public order, public security or national security'. Detention orders issued by the administration would have to be reviewed within 48 hours. In place of a six-month limit, there would be a three-month limit which could be shortened or extended up to eighteen months if the delay in expulsion is due to the lack of cooperation from the person concerned or from the third country in question, or if the person concerned is a proven threat to public order, public security or national security. The EP text would also end detention if expulsion was impossible or unrealistic or if removal arrangements were no longer in progress; in general detention could only apply for 'as long as necessary to ensure successful removal'.

In the Council version, the general obligation to place persons subject to return in detention is confirmed, 'where this is necessary to prepare return and/or carry out the removal process', unless other less coercive measures can be applied; there is no explicit requirement that there is a risk that the person concerned will abscond. In place of a judicial review of administrative detention within a specified period, there is a requirement only of a 'speedy judicial review, in accordance with national law', and there is no longer a specified period for the subsequent review of detention, which need not be a judicial review, unless detention is 'prolonged'. As for the period of detention, in principle it is six months but can be extended indefinitely if the delay is due to the lack of cooperation from the person concerned or from the third country in question, or due to pending appeal procedures. Detention must end if there is 'no longer a reasonable prospect of removal' or if the conditions for the original detention no longer exist; there is no reference to the behaviour of the expelling state's administration.

Article 15 concerns conditions of detention. The Commission's version states generally that persons in detention should be 'treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law'. They should be allowed to

contact legal representatives, NGOs, family members, consular authorities or international organisations. Detention must be carried out in specialised facilities, or failing that, immigration detainees must be kept separate from the prison population. There must be special treatment of vulnerable persons, with no prison detention for minors and separation as the normal rule between unaccompanied minors and adults. Member States must permit international organisations and NGOs to visit detention facilities to supervise detention conditions.

In the EP's version, Member States have to define and publish a code of practice for prisoners, and there would be special rules in a new Article governing detention for children and families. The Council's version is essentially the same as the Commission's except for the deletion of the general reference to treat detainees in a humane and dignified manner in accordance with human rights principles.

### **Other provisions**

The Commission's proposal, supported by the EP, would repeal Directive 2001/40 concerning the mutual recognition of expulsion decisions, and replace it with a new provision (Article 16). The Council wishes to retain the earlier Directive without amendments.

For its part, the EP wishes to establish a new post of European Ombudsman for Return, to bring forward the date for application of the Directive (from two years to 18 months), to require earlier and more frequent reporting on the Directive, and to insert new provisions concerning monitoring and statistics and the role of the EU Agency for Fundamental Rights.

### **Conclusions**

Any final appraisal of the Directive would have to wait until there is a deal between the EP and the Council - if there ever is one. It is remarkable that despite the positive reports which were offered to the JHA Council by the Portuguese Presidency, there was no sign from the latest Council text that there has been any real movement by the Council towards any significant compromise with the EP - unless the Portuguese Presidency (and now the Slovenian Presidency) is expecting a total capitulation to the Council's position by a majority of MEPs. Perhaps the Council is encouraged by the example of the EP's embarrassing capitulation regarding the data retention Directive?

The Council's version of the Directive sets standards so low that it would be difficult for Member States go any lower - most obviously with the indefinite period of detention (along with the weak rules on judicial control of detention), but also as regards exclusions from the scope of the Directive, the deletion of the general human rights safeguard, the limited grounds for mandatory postponement of removals, the mandatory re-entry ban following a return decision, the lower standards for remedies, the accelerated

procedures without a right to any remedy at all in the Directive, and the nearly non-existent safeguards pending removal.

Several aspects of the Council's version would potentially violate human rights standards, as regards the absence of a human rights safeguard or wider obligation to postpone removals, the longer re-entry bans, the limited rights to a remedy, the weak provisions on judicial control of detention, and the absence of a requirement to end detention where expulsion proceedings are no longer being pursued by the expelling State.

Given the flawed EP position on detention, there seems no prospect that negotiations on the text of this Directive can produce a result that entirely meets the minimum standards of proportionality, fairness and humanity which should apply to EU immigration and asylum law. It remains to be seen whether the EP might possibly convince the Council to accept rules on any other issue which would sufficiently respect those minimum standards.

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