



UNHCR Observations on the European Commission's Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals
(COM(2005) 391 final)

Introductory Remarks

The Office of the United Nations High Commissioner for Refugees (UNHCR or 'the Office') welcomes the efforts of the European Union to adopt common standards on return. Such standards are a key component of a comprehensive migration management policy which takes into account the responsibilities of States of origin, transit and destination as well as the rights of the affected individuals.

The European Union's multiannual programme in the area of freedom, security and justice (the "Hague Programme")¹ provides that common standards on return must ensure that persons are returned "in a humane manner and with full respect for their human rights and dignity". This is important in view of the extensive existing operational co-operation at EU level with respect to return. Proposals for the 2007-2013 EU financial perspectives include significant funds to support returns of third country nationals with no legal right to enter or stay in the EU.² Common standards, including effective human rights safeguards, should be a prerequisite for these plans.

UNHCR welcomes the fact that 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 nationals³ requires that its provisions be applied in line with international law, including refugee protection and human rights standards. However, the Office believes that these standards, as well as appropriate procedures to ensure their implementation, need to be set out in more detail. UNHCR strongly recommends that the draft Directive explicitly state that no return decision may be issued and no removal be carried out, which would violate the *non-refoulement* principle in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) or in human rights instruments such as the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).

¹The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3.3.2005.

² "Solidarity and Management of Migration Flows", COM (2005) 123 of 6.4.2005.

³ COM(2005)391 final of 1.9.2005, hereinafter "the proposed Directive".

Furthermore, particular safeguards need to be put in place for the return to third countries of asylum-seekers whose applications have not been determined on substance in a Member State. In those cases, removal should be implemented only if access is assured to an asylum procedure in the relevant country and to effective protection in cases where it is needed.

UNHCR welcomes the fact that the Directive expresses the preference for voluntary return, but suggests that this important principle should be reiterated through an operative provision encouraging Member States to provide counselling, material assistance and other appropriate forms of support to voluntary return. UNHCR recognizes that the return of persons who are not in need of international protection and who have no compelling humanitarian or other grounds justifying stay is important for ensuring the credibility and viability of national asylum systems.⁴ Nonetheless, UNHCR stresses the need to ensure the sustainability of returns, which States are urged to promote through the provision of concrete support to voluntary returnees in line with good practice.

There is at present a lack of consistent and independent monitoring of the safety and welfare of individuals who are removed from the territory of EU Member States. UNHCR recommends that the EU consider setting up effective monitoring mechanisms, in order to be able to assess the effectiveness of the safeguards it establishes.⁵

Detailed Comments on the proposed Directive

Preamble

UNHCR particularly welcomes the references in preambular paragraphs 1, 7, 9, 18, 19 to the international obligations of Member States, including references to the 1951 Convention relating to the Status of Refugees and the 1989 UN Convention on the Rights of the Child. Reference could also usefully be made to two other fundamental instruments, the UN Convention against Torture (CAT) and the ECHR, as well as to Guidelines on Forced Return adopted recently by the Council of Europe.⁶ Given their importance for the implementation of the Directive, UNHCR strongly encourages a reiteration of these fundamental legal instruments in the operative parts of the proposed Directive.

UNHCR furthermore welcomes the explicit preference for voluntary rather than forcible return expressed in paragraph 6. Voluntary return, supported by appropriate counselling and material assistance, presents fewer risks of human rights violations and of individual hardship.⁷ Accordingly, and as stated above, UNHCR suggests the insertion of an

⁴ This approach is reflected in the Executive Committee (EXCOM) Conclusion No. 96 (LIV) of 2003 on the return of persons found not to be in need of international protection.

⁵ This is also recommended in the “Guidelines on Forced Return” adopted by the Council of Europe Committee of Ministers, CM (2005) 40 final, 9 May, Guideline 20, “Monitoring and remedies”.

⁶ Ibid.

⁷ Ibid, Guideline 1, “Promotion of voluntary return”.

operative provision encouraging Member States to offer practical forms of support to voluntary return.

Article 1: Subject Matter

UNHCR welcomes the reference in Article 1 to obligations of Member States under international refugee and human rights law. Reference could usefully also be made here to existing international and regional standards on return such as those which are outlined in UNHCR's EXCOM Conclusion 96(LIV) of 2003 on the return of persons found not to be in need of international protection, as well as in the Council of Europe Guidelines on Forced Return.

Articles 2 and 3: Scope and Definitions

Article 2(1): Where the Directive is applied to asylum-seekers being removed under a "safe third country" procedure or a "responsibility sharing" agreement, minimum safeguards should apply. This pertains, in particular, to assurances from the third country that the person will be admitted to a full and fair asylum procedure and have access to protection if required. UNHCR refers in this respect to its comments on Article 27 of the Asylum Procedures Directive.⁸

Article 2(2): UNHCR recommends deletion of Article 2(2) which allows States the option not to apply all standards of the draft Directive to persons refused entry in transit. Although some of the Directive's standards remain applicable to persons in transit zones, other important safeguards are missing, including: those provided by Article 5 (family relationships and best interests of the child); Article 6 (the right to comply voluntarily with a return decision); Article 12 (judicial review of the return decision and/or removal order) and Article 14 (mandatory judicial oversight of detention).

The Directive's safeguards should be applied without distinction. This is in line with the jurisprudence of the European Court of Human Rights which has affirmed that States remain bound by their international obligations also in "transit zones".⁹ Some current practices observed by UNHCR in the removal of people from border areas or transit zones give rise to serious concern and underline the need for clear safeguards at border entry points.

Article 3 (b): UNHCR recommends further clarification of the definition of "illegal stay" to exclude from the scope of the Directive asylum-seekers on whose applications a final decision has not yet been issued at first instance or on appeal¹⁰.

⁸ UNHCR Provisional Comments on the Proposal for a European Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004). 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, 13.12.2005).

⁹ See ECHR, *Amuur v. France*, 19776/92, Reports of Judgments and Decisions, 1996-III, no. 11, 25 June 1996.

¹⁰ See also comment on Article 12, below.

Article 3 (c): UNHCR recommends further clarification of the definition of “return” to ensure that asylum-seekers whose claims have not been considered on their merits are not sent to countries in which they have never been and with which they have no connection.

Article 4: More Favourable Provisions

Article 4(2): UNHCR recommends an explicit reference to the Asylum Procedures Directive¹¹ as another instrument from which higher standards should prevail.

Article 4(3): The specific reference to the entitlement of States to apply more favourable standards is welcomed. It is UNHCR’s understanding of this provision that more favourable national standards which reflect international obligations and standards are always compatible with the Directive.

Article 5: Family Relationships and the Best Interest of the Child

UNHCR recommends strengthening the reference to the best interest of the child. Article 3 of the Convention on the Rights of the Child¹² requires States to ensure that the child’s best interest is “a primary consideration” in all actions concerning the child. It is further important for States to set up an appropriate process for assessing within a reasonable timeframe what is in the child’s “best interest”. No return or removal decisions should be issued without completion of such assessment.¹³

Article 6: Return Decision and Article 7: Removal Order

Article 6(4): UNHCR recommends the addition of an explicit reference to the 1951 Convention. The *non-refoulement* principle of Art. 3 ECHR and Article 33 of the 1951 Convention are complementary and both need to be taken into account for the return decision to be in line with international law.

Article 7: UNHCR also strongly recommends a stipulation that the issuance of removal orders must be in line with international obligations, in particular the *non-refoulement* principle contained in Article 33 of the 1951 Convention and Article 3 ECHR. This would also be in line with the Guidelines on Forced Return.¹⁴ According to the approach taken by the proposed Directive, the return decision and removal order are separate administrative acts which are not necessarily issued at the same time. Valid protection concerns may arise at any stage of the process, and safeguards need to be in place to ensure that they are considered.

¹¹ OJ L 326/13, 13.12.2005.

¹² UN Document A/44/49 (1989), adopted 20 November 1989, entered into force 2 September 1990.

¹³ See recommendations of the Committee on the Rights of the Child: General Comment No. 6(2005): Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, Chapter VII(c), Return to the country of origin.

¹⁴ Supra, note 5, Guideline 2, “Adoption of the removal order”.

Where persons are removed under “responsibility sharing” arrangements or “safe third country” rules, the receiving State should be informed of the fact that the claim has not yet been examined on its merits. UNHCR recommends the inclusion of a reference to this requirement.

Proposed New Article: Confidentiality

UNHCR recommends the introduction here of a new article to ensure that the confidentiality principle is respected, and information relating to an asylum application is not shared with the individual’s country of origin.

Proposed New Article: Prohibition of Collective Expulsion

UNHCR recommends the insertion here of a reference also to the prohibition of collective expulsion according, inter alia, to Article 4 of Protocol No. 4 to the ECHR and the Guidelines on Forced Return.¹⁵

Article 8: Postponement

UNHCR welcomes the positive obligation in Article 8(2) to postpone execution of a removal order in certain cases. It is suggested that a reference be included to the need, in cases where the individual has applied for asylum, to postpone removal until a final decision has been taken on the application, including on appeal. The suspensive effect of appeals is necessary to ensure the effectiveness of judicial remedies, and exceptions to this vital principle should be made only in extremely narrow and precisely-defined cases, where the possibility should nonetheless exist for the applicant to seek postponement of removal in the particular circumstances of his or her case.¹⁶

It is further suggested that reference be included in Article 8(2)(b) to cases where the third country fails to co-operate in the issuance of travel documents.

Article 9: Re-entry Ban

UNHCR welcomes the confirmation in Article 9(5) that a re-entry ban shall not prejudice the right to seek asylum in the European Union, as well as the possibility set out in Article 9(4) to suspend the re-entry ban under certain circumstances. However, to ensure these provisions are effective in practice, clarification and certain guarantees are needed.

UNHCR suggests that any re-entry ban under Article 9(1) be the subject of an individual examination and be discretionary. Furthermore, UNHCR recommends setting clearer rules for determination and for remedies available against the imposition of a re-entry ban, its withdrawal and suspension. These should indicate the responsible body, the procedures involved, and the timeframes for decisions. There should be a clear and realistically accessible opportunity to request and obtain withdrawal of a re-entry ban in

¹⁵ Supra, note 5, Guideline 3, “Prohibition of collective expulsion”

¹⁶ See also comment on Article 12, below.

case of an asylum claim or refugee resettlement request. If circumstances change in the country of origin, or in the individual's profile or activities, resulting in a need for international protection, s/he must realistically be able to seek entry to the EU through a speedy procedure – including at Member State representations abroad as well as at the EU's external borders. A re-entry ban should, furthermore, not be issued for asylum-seekers whose claim has been rejected on formal grounds.

A process for withdrawal of a re-entry ban would need to be available at border posts as well as at consular posts abroad. The possibility to seek withdrawal in cases related to family circumstances, or situations of humanitarian need, should be provided. Finally, an additional provision would be needed requiring all EU States to withdraw and/or recognize the withdrawal, in case one State withdraws the re-entry ban.

Article 10: Removal

UNHCR welcomes the proposed limits on use of force but calls for greater clarity and binding standards in this provision.¹⁷

Article 11: Form

It should be specified that the return decision must be supplied in writing (or in oral translation) in a language which the recipient understands (as opposed to “may reasonably be supposed to understand”). Legal advice must be available to enable the recipient to understand the implications of the decision, as well as possible avenues of appeal.

Article 12: Judicial Remedies

UNHCR notes with concern that Article 12(2) does not ensure automatic suspensive effect of appeals, even if the applicant raises arguments based on protection needs against the deportation decision. A judicial remedy against a removal decision is ineffective if the third country national is not allowed to await the outcome of an appeal. Where arguments based on protection needs are raised against the removal, exceptions to suspensive effect should be permitted only in very narrowly defined cases, and an application for the suspension of the enforcement decision must remain possible¹⁸.

The wording of Article 12(3) should be adjusted in line with the broader entitlement conferred by Article 15(2) of the Asylum Procedures Directive¹⁹, which establishes the right to free legal assistance for all asylum-seekers whose claims have been rejected at

¹⁷ In particular, reference could be made to the Conclusion of UNHCR's Executive Committee 96 (LIV) 2003 para (c) and the Council of Europe Guidelines on Forced Return (supra, note 5, Chapter V, “Forced removals”).

¹⁸ See also UNHCR's Provisional Comments on the Proposal for a European Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), comment on Article 38 (which has been renumbered as Article 39 in the published version of the final Asylum Procedures Directive, OJ L 326/13, 13.12.05)

¹⁹ OJ L 326/13, 13.12.05

first instance. The Asylum Procedures Directive permits States to limit that assistance under some conditions, but does not impose the same mandatory constraints expressed in Article 12(3).

Article 13: Safeguards Pending Return

UNHCR welcomes the fact that some of the guarantees provided for in the Reception Conditions Directive²⁰ apply, but notes the absence of other key entitlements – including those contained in Articles 5, 11, 13 and 21 of that Directive. In particular, UNHCR would welcome an explicit reference to the right to acceptable material conditions pending return.

The obligation contained in Article 13(2) to notify the individual in writing of postponement of enforcement of a decision is welcome. However, it should be specified that this notification will be in a language the individual understands.

Article 14: Temporary Custody

The term “temporary custody” may give rise to confusion, since the term commonly used is “detention” (or “pre-removal detention”).

Pre-removal detention under the draft Directive may concern two groups of persons who are of concern to UNHCR: asylum-seekers whose applications have not yet been considered on their merits, and persons who apply for asylum while in pre-removal detention. This needs to be taken into account. UNHCR therefore suggests that provision should be made in Article 14 to oblige the authorities, when examining or reviewing the necessity of detention, to consider the situation of a person who may be in need of international protection but whose asylum application has not been examined on the merits because another State has been deemed responsible for considering the claim.

Article 14 should also clearly provide for the release of persons who apply for asylum while in detention, to enable their claims to be pursued fairly. UNHCR’s position on the detention of asylum-seekers is set out in the “Guidelines on Detention of Asylum-Seekers”²². UNHCR’s Executive Committee has also adopted relevant Conclusions, including Conclusion No. 7 (XXVIII), para. e), No. 44 (XXXVI) 1986; as well as No. 96 (LIV) 2003.

In line with Article 5(2) ECHR and the “Guidelines on Forced Return”²³, a requirement should be included in Article 14 to inform the detained person promptly, in a language

²⁰ Council Directive 2003/9/EC of 27 January 2003 on minimum standards on the reception of applicants for asylum in Member States, OJ L 31/18, 6.2.03.

²² UNHCR Revised Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers, February 1999.

²³ Supra, note 5, Guideline 6(2), “Conditions under which detention may be ordered”.

which s/he understands, of the legal and factual reasons for the detention and the possible remedies available to him or her.

UNHCR further suggests explicit reference be made to the obligation to release, where the removal arrangements are halted. Detention pending removal is only justified for as long as removal arrangements are in progress. If such arrangements are not executed with due expedition and diligence, the detention will cease to be permissible. Due diligence is particularly required if return of an asylum-seeker is contemplated to another State for the assessment of the asylum request.

In line with Article 5(4) ECHR and the “Guidelines on Forced Return”²⁴, Article 14 should provide for the possibility of judicial review of the detention decision.

The provision in Article 14(4), which provides for a maximum 6-month period of detention, is a welcome acknowledgement that pre-removal detention should not be unlimited. However, UNHCR is concerned that 6 months could become the new norm in countries which currently limit pre-removal detention to shorter periods. Moreover, the current practice in some Member States of releasing and immediately re-incarcerating people should be expressly prohibited, where it is used as a means of circumventing time limits.

Article 15: Conditions of Temporary Custody

UNHCR welcomes the guarantees contained in Article 15(1) but notes that for these to have effect, States must ensure access in practice to qualified advice, including to lawyers, NGOs and international organizations. This may require providing access to communications facilities, as well as directories of relevant organizations.

UNHCR recommends inclusion in Article 15 of a specific provision guaranteeing appropriate facilities in detention for vulnerable persons and those with special needs. UNHCR remains concerned about the inappropriate conditions of detention, in particular for families and children, which it has observed in many Member States.

With reference to Article 15(3) concerning detention of minors, UNHCR considers that children who have not been accused or convicted of a criminal offence should not be held in custody. The Convention on the Rights of the Child provides that the detention of a child shall be used only as a measure of last resort and for the shortest time possible.²⁵ Unaccompanied children should be represented by a guardian.²⁶

UNHCR welcomes the assurance contained in Article 15(4) of access to detention facilities for international and non-governmental organizations. For this to have effect, specific wording is needed to ensure that access is reasonably and practically available at

²⁴ Supra, note 5, Guideline 9, “Judicial remedy against detention”.

²⁵ CRC Article 37(2).

²⁶ In the case of asylum-seeking children, this would be consistent with the guardianship requirement in Article 17 of the Asylum Procedures Directive, OJ L 326/13, 13.12.05.

short notice, and not deniable, for example on “security” grounds, without a demonstrable threat to safety. UNHCR remains concerned that it continues to be denied access to some immigration detention facilities in EU Member States.

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