FACTSHEET
UNRETURNABLE MIGRANTS IN DETENTION, IN EU LAW AND POLICY

A marginal issue in EU Law

An impressive body of EU law has been produced in the area of asylum and migration since the EU gained competences to harmonise EU Member States' policies in this field. This is obviously most advanced in the area of asylum, where the EU asylum *acquis* now regulates all aspects of Member States' asylum systems, and has resulted in in an – albeit flawed – Common European Asylum System (CEAS). But in the area of irregular migration, too, the EU legislator has adopted an impressively long list of EU legal instruments, ranging from the Schengen Borders Code,[1] establishing the common norms with regard to entry and residence of third-country nationals in the Schengen area, to the Return Directive, laying down common standards relating to the return of those who do not have, or no longer have, a right to stay on the territory of one of the EU Member States.[2] Moreover, EU law increasingly deals with aspects of legal migration, such as entry conditions for high-skilled workers,[3] the right to family reunification[4] and the status of third-country nationals who are long term residents.[5] However, this does not mean that the EU legal framework is comprehensive and coherent, nor is it necessarily promoting the highest human rights standards. The situation of unreturnable migrants is one of those areas that is still mainly within national competence and is only marginally addressed by EU law.

The limited provisions of the Return Directive

The situation of migrants who have no right to stay on the territory of one of the EU Member States but at the same time cannot be removed is mainly, though only marginally, dealt with in the EU Return Directive. Although recital 12 of the Directive explicitly states that the "situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed", the Directive does not extensively deal with their situation. This is because the Directive focuses primarily on the situation of third-country nationals after it has been established that they have no right to remain on the territory, and the underlying principles governing the issuance of return decisions and removal orders: their formal requirements, legal remedies and the use of detention for the purpose of removal. How to deal with those who have not been granted a residence permit but cannot be returned was not seen as the priority at the time the Directive was adopted. The issue was, and still is, politically sensitive and therefore has to be primarily dealt with at the

1 Regulation (EC) NO 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1.

2 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, OJ 2008 L 348/98.

3 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17.

4 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12.

5 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44 and Directive of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ 2011 L 132/1.

national level. This explains why the already mentioned recital 12 at the same time explicitly states that "their basic conditions of subsistence should be defined according to national legislation".[6] In other words, there was little or no political will to address this issue extensively in an EU legislative instrument that, according to a majority of Member States, should primarily be the expression of the EU's determination to pursue a firm return policy as an essential part of its efforts to curb irregular migration.

Nevertheless, some of the standards laid down in the directive are directly or indirectly relevant to the situation of migrants who cannot be returned. Particularly relevant are Article 6, relating to return decisions; Article 9, on postponement of removal; Article 14, on safeguards pending return; and Article 15 on detention.

Obligation to issue a return decision

Article 6(1) establishes an obligation for Member States to issue a return decision to any third-country national staying illegally on their territory, without prejudice to a number of exceptions. The inclusion of this principle in theory has far-reaching consequences, as it in principle prohibits Member States from tolerating the presence of irregular migrants. However, Article 6(4) of the Return Directive maintains the possibility for Member States, at their discretion, to issue residence permits to irregularly staying third-country nationals, with an obligation not to issue (or withdraw) a return decision in such cases, and adds the option of suspending a return decision for the duration of validity of the residence permit or other authorisation conferring a right to stay. This provides further flexibility for Member States, as the return decision may in such cases simply be re-activated upon expiry of the residence permit, without any need for a new return decision to be issued.

No obligation to issue a residence permit in cases where return is not possible

Whereas the Return Directive establishes an obligation to issue a return decision and a possibility for Member States to grant a residence permit at their discretion it does not include any obligation for Member States to issue a (temporary) residence permit where return of an irregularly staying third-country national has proven to be impossible. Even in cases where the Directive requires Member States to postpone the removal, such as when it would violate the principle of non-refoulement, there is no such obligation to issue a temporary residence permit under the Directive. In such cases, Article 14(2) of the Return Directive only requires Member States to provide the persons concerned with written confirmation that the return decision will temporarily not be enforced. Although such confirmation does not provide the unreturnable migrant with a proper status, it at least provides the person concerned with written proof of the impossibility of their return vis-à-vis law enforcement and other authorities, which is a useful aid in avoiding at least unlawful detention.

Article 9 of the Return Directive establishes rules on the postponement of removal, and distinguishes between the situations where removal must be postponed and where it may be postponed for an appropriate period of time, taking into account the specific circumstances

6 It should be noted that the 2005 Commission proposal suggested that minimum standards for the conditions of stay of these persons should be adopted with reference to the provisions of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. See COM (2005) 391 final, *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*, Brussels, 1 September 2005, recital 8.

Vottem detention centre, Belgium.

of the individual case. According to Article 9(1), an obligation for Member States to postpone removal only exists where it would violate the principle of non-refoulement and for as long as a remedy against a return or removal decision has suspensory effect, which simply consolidates in the Directive existing obligations that Member States already have under international law and the EU Charter of Fundamental Rights. In all other cases, postponement of removal is at Member States' discretion, but Member States must in particular take into account the third-country national's physical state or mental capacity, and technical reasons for postponing removal. As examples of such technical reasons, the Directive mentions, non-exhaustively, the lack of transport capacity or the failure of the removal owing to lack of identification,.

Where removal is postponed, Member States may impose the same obligations aimed at preventing the third-country nationals concerned from absconding during a period of voluntary departure. As a result, where a Member State has postponed a removal in accordance with Article 9 of the Return Directive (either because it is under an obligation to do so, or making use of its discretion to postpone) it may impose certain measures on the third-country national concerned, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place.

The provisions in the Return Directive on the detention of irregularly staying third-country nationals for the purpose of removal are without doubt among the most controversial in the EU immigration and asylum *acquis*. The power to detain irregular migrants for up to a maximum of 18 months has been criticised as setting an unacceptable standard in immigration detention while the grounds for detention laid down in Article 15(1) of the Return Directive are at the same the time open to wide interpretation.[7] Detention of third-country nationals subject to return procedures is permissible "in order to prepare return and/or carry out the removal process, in particular, when there is a risk of absconding or the third-country national avoids or hampers the preparation of return or the removal process". The definition of risk of absconding in Article 3(7) provides little guidance as to what can be considered to constitute such a risk, as it is up to the Member States to establish in national legislation the "objective criteria … [constituting grounds for belief] that a third-country national who is the subject of return procedures may abscond".

7 See for instance 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, pp. 20–22.

This broad and unclear definition allows Member States to consider every third-country national who is irregularly on the territory as potentially presenting a risk of absconding.

On the other hand, Member States' detention practice. With particular regard to persons who are non removable, is restricted by three other important principles laid down in Article 15 of the Return Directive.

1. Detention is justified only for the purpose of carrying out the removal process, and it is subject to the principle of proportionality.[8] Since return is, by definition, not possible in the case of unreturnable migrants, detention in such cases constitutes an infringement of the Return Directive.

2. Detention can only be maintained as long as removal arrangements are in progress and executed with due diligence.[9]

3. According to Article 15(4), "[W]hen it appears that a reasonable prospect of removal no longer exists for legal or other considerations, or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately". A reasonable prospect of removal has been interpreted by the Court of Justice of the European Union (CJEU) as being when a "real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115" and the same judgement goes on to say that "a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods".[10]

The CJEU furthermore ruled in this case that the detention of third country nationals under the Return Directive cannot in any circumstances be extended beyond the maximum period of 18 months, as laid down in Article 15(6). The Court mentions explicitly that Member States may not invoke the absence of valid documents, the aggressive conduct of the person concerned, nor the fact that the person has no means of supporting himself or herself, nor the fact that no accomodation or means is supplied by the Member State for that purpose. It should be noted in this respect that the Return Directive establishes in principle a maximum period of detention of six months, which may only be extended by another twelve months if the removal operation is likely to last longer owing to a lack of cooperation by the third-country national or delays in obtaining the necessary documentation from third countries. The latter factor is again open to wide interpretation, as the directive does not provide any guidance as to what constitutes lack of cooperation, while the second circumstance allows the detention of third country nationals to be prolonged even where removal takes longer for reasons that are beyond the control of the person in question.

Ending limbo situations resulting from non-removability: a purely national matter?

Policy documents relating to the EU's common immigration policy hardly address the situation of third-country nationals who have no legal right to stay in the territory of one of the EU Member States but cannot return. Whereas EU law increasingly covers the legal status of specific

8 See recital 16 and Article 15(1) EU Return Directive.

9 See Article 15(1) EU Return Directive.

10 CJEU, Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, Judgment of 30 November 2009, par. 65-66.

A detention centre at Lyon, France.

categories of third-country nationals, such as asylum seekers, refugees and victims of trafficking under certain conditions,[11] competence for taking individual decisions on the entry and residence of third-country nationals remains with Member States. Therefore, the residence of third-country nationals who cannot be removed remains largely outside the scope of EU immigration and asylum legislation. This is also clearly reflected in the Commission's views on the issue of regularisation of irregular residence – the ultimate solution to any situation of unreturnability in the long run. In two communications of 2007 and 2008 relating to the development of a common immigration policy, the Commission emphasises the fact that this remains an issue for the Member States to deal with on a case-by-case basis, while discouraging the use of mass regularisations.

In the 2007 communication, the Commission points to the importance of at least exchanging information with regard to Member States' policies regarding the regularisation of third country nationals residing irregularly on the territory of the Member States, while remaining neutral on the use of regularisation programmes. It calls for a renewed commitment to develop a common immigration policy which would "ensure genuine and efficient coordination and information between Member States as regards major decisions in the immigration field, particularly regularisation measures and measures to tackle illegal immigration".[12]

However, in the 2008 Communication on a Common Immigration Policy for Europe, it is explicitly stated that "indiscriminate large-scale regularisations of illegally staying persons should be

11 According to Article 13 and 18 of the Qualification Direction, Member States are under an obligation to grant refugee status or subsidiary protection status to any third-country national who meets the criteria for such status laid down in the Directive. The Directive on residence permits for trafficking victims (2004/81/EC) defines the conditions for granting residence permits of limited duration to third country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration. However, it does not impose an obligation on Member States to grant such residence permit but only requires Member States not to expel such a person during the reflection period granted for the purpose of taking an informed decision as to whether they wish to cooperate with the authorities. Article 6(3) states explicitly that the "reflection period shall not create any entitlement to residence under this Directive", but Member States must nevertheless ensure that "third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment", and must also "attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, [any need for] psychological assistance." See Article 6 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ* 2004 L 261/19.

12 COM(2007) 780 final, Communication from the Commission to the European Parliament, the Council; the European Economic and Social Committee and the Committee of het Regions. Towards a Common Immigration Policy, Brussels, 5 December 2007, p. 11.

Inside a Hungarian detention centre

avoided, while leaving open the possibility for individual regularisations based on fair and transparent criteria."[13] While the communication refers to the necessity of developing a common approach on regularisation, this is not to be understood as a call for establishing common criteria for regularisation but simply as an invitation to establish minimum requirements for "early information sharing", with a view to allowing Member States to prepare or anticipate in a timely manner the possible consequences of regularisation measures adopted in other Member States. This approach is endorsed in the European Pact on Immigration and Asylum adopted by the European Council under the French Presidency in 2008 by the agreement to use only-case-by-case regularisation, rather than generalised regularisation under national law for economic or humanitarian reasons.[14] As much as these (non-binding) policy documents express a vision whereby mass regularisations are seen as potentially counterproductive from the perspective of ensuring effective return policies, they at the same time clearly acknowledge case-by-case regularisation at the national level as a valid and indispensable aspect of any immigration policy. This is particularly relevant to the situation of third-country nationals who cannot be removed, for whom temporary or permanent regularisation of their residence on the territory is the most efficient way to ensure that their fundamental rights, including their human dignity, are respected in practice.

Growing recognition of the need for convergence

Notwithstanding the lack of clear political vision and legal framework at EU level to address the situation of third-country nationals who cannot be removed from the territory of the Member States, there is growing acknowledgment at EU level that this is an increasingly important issue in all EU Member States. This is also reflected in recent research carried out at EU level on the situation of irregular migrants. A recent study on the situation of third-country nationals pending return in the EU Member States and Schengen Associated States documents the enormous divergences that exist at the national level with regard to the rights granted to the persons concerned, the issuance of a residence permit and their accommodation pending removal.[15] While the researchers acknowledge that the legal status of the third-country nationals concerned, as well as the legal frameworks of the States concerned, are so divergent that there are essentially 31 different approaches, they distinguish three main categories:

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13 COM(2008) 359 final, Communication from the Commission to the European Parliament, the Council; the European Economic and Social Committee and the Committee of het Regions. A Common Immigration Policy for Europe: Principles, Actions and Tools, Brussels, 17 Juni 2008, p. 14.

14 See Council of the European Union, *European Pact on Immigration and Asylum*, Doc. N° 13440, Brussels, 24 September 2008.

15 European Commission, *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries*, March 2013.

1. Third-country nationals who have received an official postponement of the return or removal order, which gives them the permission to stay pending their return or removal, and grants them additional rights compared to other third-country nationals pending return.[16] The rights attached to such "tolerated stay" again vary considerably between the various countries.

2. Third-country nationals who have received either an official or *de facto* postponement of the return decision but have not been granted additional rights. This includes third-country nationals who are allowed to maintain the rights they had when the return order was issued to them, whether or not these are time-limited. This category exists (again with enormous differences between the countries) in all the 31 European states covered by the research. An example is the situation of rejected asylum seekers who in some countries are allowed to continue staying in the accommodation they were provided with during the asylum procedure after their asylum application has been finally rejected.

3. Third-country nationals who have been granted neither any postponement of the return order nor any additional rights, which according to the study is reported in 23 countries covered by the research.[17]

Another important finding of the report is that in many countries the lack of cooperation of third-country nationals with the return process is an important consideration that determines whether or not the persons concerned will be granted access to certain rights pending return, and in some cases whether or not the person will be detained. Yet nowhere is the lack of cooperation with return sufficiently defined in law or administrative practice, which increases the risk of arbitrary detention, as lack of cooperation is a notion that is open to wide interpretation. The key problem remains that lack of cooperation of a third country national will largely have to be determined on a case-by-case basis by the competent authorities, taking into account the specific circumstances of the individual.

The notion of "reasons that are beyond the control of the third-country national" is also open to wide interpretation, as this covers the variety of reasons discussed in this report, as well as purely technical or administrative reasons, such as the fact that the country of origin does not have an embassy in the EU, or is a failed state, or that the country of origin simply refuses to recognize the third-country national as a national of that country. Such non-cooperation by countries of origin may have a variety of possible explanations, ranging from a genuine belief that the third-country national concerned is not one of their own nationals to a lack of administrative capacity, or even the wish to sustain the remittances of expatriate workers.[18]

With regard to the non-cooperation of countries of origin, the practice in France described in this report shows how excessive measures may be employed in order to prove that "removal arrangements are in progress", as required under Article 15(1) EU Return Directive. The practice of "embassy shopping", whereby the detained third-country national is systematically presented to one embassy after another in the hope of finding any embassy willing to deliver a travel document, is a clear example of bad practice that unnecessarily prolongs detention periods and therefore detention costs while mostly not being effective at all.

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16 According to the study, this is possible in the following countries: Austria, Switzerland, Czech Republic, Germany, Greece, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovenia and Slovakia). See Study, page 27.

17 Austria,Belgium, Bulgaria, Switzerland, Czech Republic, Denmark, Estonia, Greece, Spain, France, Ireland, Italy, Lithuania, Luxembourg, Latvia, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, United Kingdom.

18 On the issue of non-cooperation of countries of origin and other obstacles to return see ECRE, *The Way Forward. The Return of Asylum Seekers whose Applications have been Rejected in Europe*, June 2005, p. 19–27.

Harmondsworth Immigration Removal Centre, UK.

Nothing to expect at European level?

Clearly the lack of a common understanding or definition between EU Member States as to who is considered to be returnable and who is not, as well as the lack of a clear legal basis in the Treaty on the Functioning of the European Union (TFEU) further complicates the debate and possible measures at EU level to address situations of unreturnability.[19] However, this does not mean that no action can be taken at EU level.

Using existing EU safeguards against arbitrary detention

First, the case studies included in this report illustrate the hardship detention creates for unreturnable migrants in particular, as well as the challenges they face once released from detention in accessing basic fundamental rights. As it concerns the detention of persons for whom no realistic prospect of removal exists, detention of unreturnable migrants cannot serve a lawful purpose. Here a strict application of the safeguards laid down in EU law and international human rights law to avoid arbitrary detention at the national level would contribute to reducing the detention of unreturnable migrants. In this regard, the European Commission should continue to closely monitor Member States' policies vis-à-vis unreturnable migrants through the EU Return Directive Contact Committee, and promote and encourage the development of a rights-based approach. It should in particular focus on Member States' practices with regard to detention as well as the effective implementation of the requirement under Article 14(2) of the EU Return Directive to provide persons whose removal has been postponed with written confirmation that return will temporarily not be enforced. The latter is in practice a useful aid at least in preventing unreturnable migrants from being detained or re-detained.

19 The divergences between EU Member States in dealing with the situation of non-removable persons is also partly addressed in two studies conducted by the European Migration Network. See European Migration Network, *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010 and European Migration Network, *Practical Measures to Reduce Irregular Migration*, October 2012.

Long-term strengthening of safeguards

Second, amending the Return Directive with a view to reinforcing the safeguards in Articles 9, 14 and 15, in order to avoid the detention of persons who are non-removable as well as the legal limbo situations they often find themselves in, does not appear to be a feasible option in the short to medium term but could be considered on the longer term. However, further guidance could be provided by the Commission, in the form of interpretive guidelines, with regard to the interpretation of key concepts in the Return Directive that are directly relevant in assessing situations of unreturnability, such as the risk of absconding, lack of cooperation by the third-country national and the country of origin, and due diligence with regard to removal arrangements.

Opportunities for new commitments

Third, the upcoming elections for the European Parliament in 2014, the establishment of the new Commission and the discussions on the strategic guidelines for legislative and operational planning within the area of freedom, security and justice that are to be adopted by the European Council in June 2014 all provide opportunities for EU institutions to reflect on concrete actions to address the situation of unreturnable migrants. There is a need for a clear commitment by EU institutions and Member States to developing a rights-based approach to situations of unreturnability in EU Member States that aims at preventing legal limbo situations and excludes the use of detention with regard to unreturnable migrants.

Tasks for human rights agencies

Finally, human rights monitoring bodies set up in the framework of the Council of Europe, such as the Commissioner for Human Rights and the Committee for the Prevention of Torture, should pay particular attention to the situation of unreturnable migrants in and outside detention, and the human rights violations they may face. The Fundamental Rights Agency should also continue its work in documenting and mapping the fundamental rights challenges faced by unreturnable migrants, building on its preliminary findings on the situation of non-removable persons in the EU.

This factsheet is published as a supplement to the report Point of no Return: the futile detention of unreturnable migrants and can be downloaded at www.pointofnoreturn.eu It is a result of a collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE).

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Design: Louis Mackay/ www.louismackaydesign.co.uk

Published: January 2014

Supported by the European Programme for integration and and Migration (EPIM), a collaborative initiative of the Network of European Foundations (NEF).

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