AMNESTY INTERNATIONAL European Institutions Office

31 October 2018

POSITION PAPER

THE EUROPEAN COMMISSION PROPOSAL RECASTING THE RETURN DIRECTIVE

On 12 September, the European Commission released new legislative proposals in the field of asylum and migration. They include a proposal for a recast of the Return Directive, a proposal for a Regulation on the European Border and Coast Guard and amendments to the proposed Regulation on the European Asylum Agency. These measures follow up on the June European Council Conclusions, which underlined the necessity to significantly step up the effective return of irregular migrants. The European Commission issued also a Communication on enhancing legal pathways to Europe. However, this does not propose significant measures or changes, and only reiterates a call to Council and Member States to put more efforts into the reform of the Blue Card Directive (concerning labour mobility for high-skilled workers), on implementing the 50,000 resettlement pledges under the current EU resettlement scheme, and on cooperating with the Commission in developing new pilot projects on labour mobility with selected African countries.

This briefing provides an overview of the main changes proposed to the return policy and outlines Amnesty International's key concerns.

RECAST RETURN DIRECTIVE

The Commission describes the recast of the Return Directive as a targeted review intended to speed up return procedures, secure a better link between the asylum and return procedures, and reduce the risk of absconding. The recast includes various elements that were already contained in the 2017 Recommendation to Member States on increasing effectiveness of returns, about which Amnesty International was very critical (see newsflash) as it called for broader use of detention powers and longer pre-removal detention. The Commission cites the decreased return rate from 45.8% in 2016 to 36.6% in 2017 as evidence of the urgent need for tabling this new proposal and has not deemed it necessary to carry out an Impact Assessment on this proposal, as per internal rules under the better regulation agenda.[1]

Amnesty International is concerned that the proposal seeks to base a more effective EU's return policy on increased powers to detain migrants in order to effect removals. Immigration detention is, and should remain, an exceptional measure. Effective return policies hinge on cooperation from countries outside the EU and comprehensive migration policies which balance the aim of reducing irregular migration with establishing meaningful and effective legal migration pathways. Expanding the use of detention will not by itself increase the rate of returns, but merely increase the cost of migration detention to national budgets and the misery of the people detained.

Key changes and concerns

Article 6 - Risk of absconding: The Commission proposal set out a list of "objective", non-exhaustive, criteria to determine the existence of a risk of absconding. Member States must include in national law "at least" these 16 criteria to assess whether a third country national may abscond:

1. lack of documentation proving the identity;
2. lack of residence, fixed abode or reliable address;
3. lack of financial resources;
4. illegal entry into the territory of the Member States;
5. unauthorised movement to the territory of another Member State;
6. explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;

[1] Impact Assessments form a key part of the Commission's better regulation agenda, which seeks to design and evaluate EU policies and laws so that they achieve their objectives in the most efficient and effective way. They are meant to improve the evidence base which underpins all legislative proposals.

7. being subject of a return decision issued by another Member State;
8. non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;
9. non-compliance with the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;
10. not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;
11. existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;
12. ongoing criminal investigations and proceedings;
13. using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;
14. opposing violently or fraudulently the return procedures;
15. not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);
16. not complying with an existing entry ban.

A risk of absconding will have to be determined by Member State authorities, taking into account any of these criteria on the basis of a case-by-case assessment, but the last four grounds create a rebuttable presumption: using false documents; opposing expulsion violently or fraudulently; not complying with a measure like a reporting requirement; or violating an entry ban. Amnesty International is opposed to inscribing in the national law a presumption of risk of absconding, which is likely to lead to de facto deprivation of liberty. The burden of proof must in all circumstances rest on the authorities to demonstrate that the presumption in favour of liberty should be displaced, based on a case-by-case assessment of the specific circumstances of each individual case.

Amnesty International is also concerned that several of the elements proposed to determine the existence of a risk of absconding are very broad (e.g. illegal entry, lack of identity documents, residence or financial resources) or vague (e.g. failure to cooperate with authorities). Defining the risk of absconding in very broad or vague terms significantly increases the risk of arbitrary detention. Many of the criteria listed are invalid indicators of an actual risk of absconding, such as unauthorised movement to another Member State, being subject of a return decision issued in another Member State, expression of an intent of non-compliance with a return decision or non-compliance with a requirement to return to the state which issued a valid residence permit. They have no link to a risk of absconding and would just make detention punitive. Administrative detention is not criminal detention and should not be used as a punitive measure.

Moreover, there is no requirement in the proposed legislation that the risk of absconding must be assessed in relation to a return procedure that has been initiated, is in progress and has a reasonable prospect of being executed within a reasonable period of time. This standard is central to assessing the proportionality and legitimacy of detention.

Amnesty International is concerned about the wide list of elements which would establish a presumption of risk of absconding, which are difficult to rebut and would de facto introduce an automatic detention regime which may or may not lead to removal.

Amnesty International is particularly opposed to the use of broad, vague or inappropriate criteria which expose migrants and asylum seekers to arbitrary detention, such as the following:

- **lack of documentation proving their identity;**
- **lack of residence, fixed abode or reliable address;**
- **lack of financial resources;**
- **illegal entry into the territory of the Member States;**
- **unauthorised movement to the territory of another Member State;**
- **destroying or otherwise disposing of existing documents;**
- **explicit expression of intent of non-compliance with return-related measures;**
- **being subject to a return decision issued by another Member State;**
- **non-compliance with the requirement to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;**
- **not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures.**

Amnesty International is also opposed to criteria related to criminal investigations or existence of criminal conviction, as these cases should be dealt with in the context of criminal justice proceedings.

The legislation should clarify that the risk of absconding must be assessed in relation to a return procedure that has been initiated, is in progress and has a reasonable prospect of being executed within a reasonable period of time.

Article 7 – Obligation to cooperate: The Commission proposal introduces an explicit obligation for third country nationals to cooperate with national authorities in the return process, particularly in providing elements necessary to establish their identity and information on the countries transited. Moreover, they need to remain available throughout the procedures and are required to lodge a request for obtaining valid travel documents at the relevant consular/diplomatic services. But for this last duty, this provision mirrors what is required from asylum seekers in the asylum procedure.[2] Lack of cooperation puts individuals at risk of detention, since this is to be considered a risk of absconding criteria (see above).

Amnesty International has concerns about cooperation being imposed by threat of sanctions, including detention. The obligation to lodge a request for travel documents appears unnecessary, since these documents can be obtained by the national authorities themselves, and it would therefore be disproportionate to sanction with detention the lack of cooperation in obtaining such documents. This provision seems to reflect recent administrative practice in some Member States.

Amnesty International is concerned that lack of cooperation with national authorities in the return process will lead to detention, under provisions which make this 'lack of cooperation' both a criterion for assessing the risk of absconding, and a ground for detention in itself, if it is considered that the individual's conduct hampers the preparation of the removal process.

Amnesty International opposes the use of immigration detention powers as a punitive measure. To sanction an individual's lack of cooperation in obtaining travel documents is disproportionate and unnecessary, as authorities can themselves obtain the travel documents for executing the return process.

Article 9 - Voluntary departure: The Commission proposes that Member States no longer give a seven-day minimum of time for an irregular migrant to depart voluntarily, so that shorter periods can be granted. The maximum time limit of 30 days stays. However, the three cases where Member States can currently *opt* to refuse to give the irregular migrant a chance to leave voluntarily – risk of absconding, manifestly unfounded or fraudulent application for legal stay, and risk to public policy, public security and public health – are replaced by an *obligation* to refuse the chance of a voluntary departure in such cases. The effect of this change is bolstered by including a wide definition of what might be considered as a risk of absconding.

The proposal appears to further discourage voluntary departures by giving Member State authorities discretion to impose entry bans to people whose illegal stay is detected during border checks carried out at exit "where justified on the basis of specific circumstances of the individual case and taking into account the principle of proportionality" (Article 13.2). This would be done in the absence of a return decision having been issued to those concerned and it is difficult to see when it would be justified or proportionate.

Whilst restricting the scope for voluntary departures, the proposal sets an obligation for Member States to establish voluntary return programmes that may also include reintegration support (Article 14.3). National return management systems – where all return related information is processed - are also envisaged. These are to be linked up with a central system managed by the European Border and Coast Guard Agency.

Amnesty International believes that EU law should increase opportunities for people subject to return procedures to depart voluntarily, thereby avoiding the risk of arbitrary and costly detention, instead of limiting them. Facilitating voluntary departures would provide for a more dignified and sustainable, and altogether less costly, return policy.

Article 16 - Remedies: The Commission proposes several changes to the rules on remedies:

- First, any remedy must be before a judicial authority, not an administrative authority.[3] Amnesty International welcomes this provision.

[2] Directive 2013/32/EU on Asylum Procedures Article 13.

[3] This implicitly takes account of recent CJEU case law on appeals against refusals to issue a visa, where the Court said that the EU Charter of Fundamental Rights requires judicial control of immigration decisions. See C-403/16, *El-Hassani*, judgment of 13 December 2017.

- Next, a new clause states that asylum seekers whose cases have been finally rejected have only one opportunity to appeal against a return decision if they have already had effective judicial review within the asylum process.[4]
- A further new clause states that where the individual has concerns about *refoulement*, at least the first level of appeal must have suspensive effect, i.e. stopping removal from the country. The irregular migrant can ask for suspensive effect in the event of a further appeal, but the national court must rule on that request within 48 hours. Furthermore, these possibilities don't exist where there have already been proceedings concerning asylum or legal migration status, unless there are new issues in the case.
- Finally, asylum seekers whose cases have been finally rejected will have only five days to appeal a return decision.

Amnesty International is concerned that a five-day deadline does not provide enough time to appeal a return decision. Preoccupation with not delaying return procedures should not come at the expense of ensuring access to an effective remedy.

Amnesty International is also concerned that the new provisions restricting suspensive effect of appeals presume access to an effective remedy as part of the asylum procedure, which may not always or consistently be the case.

Article 18 - Detention: the proposal adds one ground for detaining irregular migrants and makes the list non-exhaustive. The first ground – risk of absconding – will be broadly defined, as mentioned above. The second ground, "avoids or hampers the preparation of return or the removal process", which was already broadly defined, remains. The new ground is where the irregular migrant "poses a risk to public policy, public security or national security." This new ground matches one of the grounds to detain asylum seekers in EU asylum legislation, which the Court of Justice of the European Union (CJEU) has interpreted narrowly.[5]

The recast EU rules would continue to provide for last resort and shortest possible detention of minors and families, with some considerations for their privacy and age-based needs, and primary consideration of the child best interests (Article 20).

Depending on their individual circumstances, the detention of migrants on the grounds of a risk of absconding may only be justified in relation to a return procedure that has been *initiated*, is in *progress*, and has a reasonable prospect of being executed within a reasonable timeframe.

Amnesty International opposes vague and punitive detention grounds such as uncooperative behaviour of the migrant.

Amnesty International also opposes administrative detention on security grounds as it is used by states to circumvent the fair trial safeguards in criminal proceedings.

The new proposal should strengthen rules requiring States to conduct individualised assessments of the situation of each migrant or asylum seeker, taking account of their personal circumstances, including personal history, age, health condition, family situation etc, and that such needs assessment be performed by professionals trained to work with victims of trauma or trafficking, and specialised in working with children, women, or the elderly. Trained professionals should also assess whether a person has the psychological resilience to endure detention, given its extremely detrimental impact on mental health.

The proposal should rule out detention of specific groups, in particular families with children, pregnant women, persons with disabilities or suffering from mental health conditions and victims of trafficking.

Another change relates to **time limits (Article 8.5):** The proposal introduces a period of at least three months' detention which must be provided for in Member States' national legislation.[6] The Commission believes this to reflect the time-frame needed to organise a person's return. This means people will be initially detained for at least three months, unless they choose to leave voluntarily and will in practice increase the detention period in Member States which currently apply shorter periods of detention. The other current rules on detention time limits – six months as the maximum time limit, extendable for a further twelve months

[4] This reflects the recent decision in the case C-181/16, *Gnandi v Belgium*, judgment of 19 June 2018.

[5] Case C-601/15 *J.N. v Staatsecretariat van Veiligheid en Justitie*, judgment of 15 February 2016.

[6] The wording "maximum period of detention of not less than three months and not more than six months" is rather ambiguous but would appear to imply an initial detention of three months as a rule and rule out national provisions which foresee a shorter period.

in special circumstances – are retained.

Amnesty International is concerned that the new time limits for detention will lead to longer detention periods for migrants, and that Member States with the most generous approach to detention time limits will become more stringent.

Amnesty International calls on the Commission to closely monitor State detention practices to ensure that the provisions on the length of detention do not result in a general worsening of practice with maximum periods of detention becoming the norm rather than the exception. Detention must remain exceptional, based on individualised assessments, and for the shortest possible time.

Article 22 - Border procedure: a new provision sets out special rules for asylum seekers whose cases have been rejected at border posts or in transit zone, effectively derogating from some key standards in the Directive.[7] They must be given a simplified return decision, rather than a reasoned explanation. As a rule, there will be no chance for voluntary departure, except where the migrant holds a valid travel document (handed over to the authorities) and cooperates fully. Migrants will have only 48 hours to appeal a return decision based on an asylum rejection at the border, and suspensive effect only applies where there are significant new findings or there was no effective judicial review already. Detention appears to be always justified, with a four-month time limit; if a return decision cannot be enforced within this period, the proposal allows further detention under the general rules (six plus twelve months).

Whilst a regime that would amount to automatic detention would be at odds with international human rights law, Amnesty International is also concerned that simplified and expedited return procedures, such as those at border posts or in transit zones, will not be able to ensure an individualised assessment of the risk of a breach of the principle of *non-refoulement,* which is a key guarantee of the return process. Amnesty International has documented violations of the principle of *non-refoulement* in deportations from EU countries in various instances and recommended that any appeal against a negative asylum decision automatically suspends the effects of related removal decisions in all circumstances.[8] Given that returns increasingly take place to countries of origin in the absence of agreements offering appropriate data protection safeguards, it is also important that the assessment of a risk of a breach of the principle of *non-refoulement* for each person whom authorities seek to return, whether the person is seeking asylum or not, takes place before a decision is taken and before any information is shared with consular or other authorities of the country of origin.

Amnesty International opposes any procedure, whether at border posts or elsewhere, that involves automatic detention. The provision requiring detention at border posts for up to four months, with possibility of re-detention under the general rules, violates international human rights law and should be firmly rejected. It is also alarming that the proposal introduces significant limitations to the right to an effective remedy by provision of a very tight timeline and general non-application of the suspensive effect of appeals against return decisions, thus involving heightened risk of *refoulement*.

[7] The proposal cross-references to the asylum border procedure proposed in the Asylum Procedures Regulation, Article 41: at borders or in transit zones, asylum claim can be subject to inadmissibility or accelerated procedures and asylum seekers can be detained pending the procedure for a maximum of four weeks.

[8] See Amnesty International, *Hotspot Italy: How the EU's flagship approach leads to violations of refugee and migrants' rights*, 3 November 2016, Index: EUR 30/5004/2016; Amnesty International Public Statement, *Belgium: Return to Sudan violated principle of non-refoulement*, 30 January 2018, Index: EUR 14/7811/2018