

Common standards and procedures for returning illegally staying third-country nationals. "Return Directive"

2005/0167(COD) - 18/06/2008 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 369 votes to 197, with 106 abstentions, a legislative resolution amending, under 1st reading of the codecision procedure, the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

The report had been tabled for consideration in plenary by Manfred **WEBER** (EPP-ED, DE) on behalf of the Committee on Civil Liberties, Justice and Home Affairs.

The amendments adopted by 367 votes to 206, with 109 abstentions are the result of the outcome of a compromise reached with the Council at 1st reading. This vote opened the way for an agreement with the Council at 1st reading.

The main amendments are as follows:

Purpose: the Directive, as amended by the European Parliament and the Council, aims to encourage the “voluntary return” of illegal immigrants by harmonising the return conditions and by establishing certain safeguards. The Directive sets out a two-stage approach: firstly, a return decision which lays down a period of “voluntary return” which may be followed by a “removal decision” which leads to expulsion. If the removal order is issued by a judicial authority which believes the individual in question might abscond, the person can be placed in custody.

In this context, the Directive lays down a maximum period of detention (6 months in general) and detention conditions which guarantee, notably, the right to medical assistance and the right to education for children.

More favourable provisions: new provisions are laid down so that the Directive does not diminish the level of protection of those covered by the scope of the Directive.

Non-refoulement, best interest of the child, family life and state of health: provisions are introduced with a view to taking due account of the best interest of the child; family life; the state of health of the third-country national concerned, and respect the principle of non-refoulement.

Return decision: clarifications have been made to this section. In principle, Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in the Directive (e.g. if a Member State issues the right to stay for humanitarian reasons). The Parliament adds a new paragraph which states this Directive does not prevent Member States from adopting a decision on the ending of legal stay together with a return decision and/or a decision on removal and/or entry ban within one administrative or judicial decision or act in accordance with the relevant provisions of Community and national law.

Entry ban: return decisions shall be accompanied by an **entry ban**. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. In principle, it may not exceed **5 years**. Member States shall consider withdrawing or

suspending an entry ban where a third-country national who is the subject of an entry ban can demonstrate that he/she has left the territory of a Member State in full compliance with a return decision. Victims of trafficking in human beings who have been granted a residence permit shall not be subject of an entry ban provided that they do not represent a threat to public policy, public security or national security. Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons. Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

Voluntary return: the return decision shall provide for an appropriate period for **voluntary departure** ranging between 7 and 30 days. Member States may provide in their national legislation that such period shall only be granted following an application of the third-country national concerned. The time period foreseen above does not exclude the possibility for the third-country nationals concerned to leave earlier. Member States shall, when this is necessary, extend the period for voluntary departure for an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links. Certain obligations aimed at avoiding the risk of absconding, 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 may be imposed for the duration of that period. If there is a risk of **absconding**, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent or if the person concerned poses a risk to public security, public order or national security Member States may refrain from granting a period for voluntary departure, or grant a period shorter than 7 days.

Removal and coercive measures: where Member States use - as a last resort - coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportional and shall not exceed reasonable force.

Return and removal of unaccompanied minors: new measures are provided for the return and removal of unaccompanied minors. It is provided that before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration given to the best interest of the child. In addition, before removing an unaccompanied minor from its territory, the authorities of the Member State shall be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.

Procedural safeguards: Parliament provides that return decisions and - if issued - entry-ban decisions and decisions on removal, shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. The information on reasons in fact may be limited where national law allows for the right of information to be restricted, in particular in order to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences.

Remedies: the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

Safeguards must be offered to people in temporary custody such as the right of family unity, the right to medical assistance and the right to education for children. Member States shall ensure that necessary **legal assistance and/or representation be granted on request free of charge**.

Detention: a number of amendments have been made to this section. It is now stipulated that Member States may only keep in detention a third-country national, who is subject to return procedures, 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 concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as **short a period as possible** and only maintained as long as removal arrangements are in progress and executed with due diligence. When detention has been ordered by administrative authorities, Member States shall: i) either provide for a speedy judicial review (and not in 48 hours as was proposed by the committee responsible) of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention, or ii) or grant the third-country national concerned the right to take proceedings by which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible from the launch of the relevant proceedings; in this case Member States shall immediately inform the third-country national concerned about the possibility of submitting such an application.

The third-country national concerned shall be released immediately if the detention is not lawful.

In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

When 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**.

Length of detention period: the maximum period of detention shall not exceed 6 months. This period could be extended for an additional limited period of 12 months in cases where, regardless of all their reasonable efforts, the removal operation is likely to last longer due to a lack of co-operation by the third-country national concerned, or due to delays in obtaining necessary documentation from third countries.

Conditions of detention: the Directive states that detention shall be carried out as a rule in **specialised detention facilities**. Where a Member State cannot provide accommodation in a specialised detention facility and has to resort to prison accommodation, the third-country nationals under detention shall be separated from ordinary prisoners. Third-country nationals under detention shall be allowed - upon request - to establish in due time contact with legal representatives, family members and competent consular authorities. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities. Such visits may be subject to authorisation.

Detention of minors and families: new measures are provided for the detention of unaccompanied minors and families with minors. They shall only be detained as a measure of **last resort** and for the **shortest appropriate period of time**. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy. Minors in detention shall have the possibility to engage in leisure-activities, including play- and recreational activities appropriate to their age, and shall have - depending on the length of their stay - access to education. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. The best interest of the child shall be a primary consideration in the context of the detention of minors pending removal.

Emergency situations: a new paragraph was inserted for emergency situations, that is, in cases where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff. In this

case, such a Member State may derogate from the detention conditions set out in the Directive. Member States shall not interpret these situations as a means of derogating from their general obligation to take all appropriate measures to ensure fulfilment of their obligations arising out of this Directive.

Entry into force: the Directive should enter into force within 2 years. It shall be subjected to a report every 3 years and, if appropriate, amendments shall be proposed.

Lastly, it should be noted that the **Greens/EFA and the GUE/NGL** requested that the proposed Directive be rejected, however, the request was voted against by 114 votes to 538 with 11 abstentions.