

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

2005/0167(COD) - 16/12/2008 - Final act

PURPOSE: to lay down a common set of rules applicable to third-country nationals staying illegally within the territory of any Member State.

LEGISLATIVE ACT: Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

CONTENT: the Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

To respond to this request, the European Parliament and the Council have adopted, following an agreement reached at first reading, a Directive setting out clear, transparent and fair rules to provide for an effective return policy as a necessary element of a well managed migration policy. A horizontal set of rules are established which are applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State. This Directive promotes and encourages the **voluntary return** of illegal immigrants. The rules can be summarised as follows:

I. Scope and objective: this Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III of this Directive and under other relevant provisions of Community and national law.

II. Termination of illegal stay: the principle of this Directive is to provide a **2-step procedure**: firstly a “return decision” which opens up a “voluntary return” period, which may be followed by a “removal decision” ending in “expulsion”.

1) Return decision: 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. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished.

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**. It may however exceed five years if the third-country national represents a serious 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 departure: a return decision shall provide for an appropriate period for **voluntary departure** of between seven and thirty days. The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier. The period for voluntary departure may be extended by 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. 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 policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

2) Removal: 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 proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to [Decision 2004/573/EC](#). Member States shall provide for an effective forced-return monitoring system. Moreover, Member States may **postpone** removal for an appropriate period taking into account the specific circumstances of the individual case.

Return and removal of unaccompanied minors: 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 being given to the best interests of the child. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

More favourable provisions: this Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum. It shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

Non-refoulement, best interests of the child, family life and state of health: provisions are introduced so that the Directive shall take due account of the best interests of the child; family life; the state of health of the third-country national concerned, and respect the principle of non-refoulement.

III. Procedural safeguards: the Directive sets out a number of procedural safeguards such as:

- the right to have a written or oral translation of the main elements of decisions related to return including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand;
- the right to be afforded an effective remedy to appeal against or seek review of decisions related to return. Member States shall ensure that the necessary legal assistance and/or representation is

granted on request free of charge (Member States have until 24 December 2011 to comply with this provision);

- the right to family unity, emergency medical care, basic education to minors,pending their voluntary return or their removal.

IV. Detention for the purpose of removal: unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the 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. Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered, Member States shall either provide for a speedy judicial review of the lawfulness of detention. 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. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

Duration of the detention period: the maximum duration of detention shall **not exceed a limited period of six months**. This period may be extended for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned, or delays in obtaining the necessary documentation from third countries.

Conditions of detention: detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners. 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 nongovernmental organisations and bodies shall have the possibility to visit detention facilities. Such visits shall be subject to authorisation. Third-country nationals in detention shall be allowed - on request - to establish in due time contact with legal representatives, family members and competent consular authorities.

Detention of minors and families: unaccompanied minors and families with minors 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 interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Emergency situation: in situations 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, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for in this Directive. These specific situations shall not be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures to ensure fulfilment of their obligations under this Directive.

Reporting: the Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments. The Commission shall report for the first time by 24 December 2013 focusing in particular on the additional financial and administrative impact in Member States.

Territorial application: Norway, Iceland, Switzerland and Liechtenstein are associated with the implementation of this Directive in accordance with the bilateral agreements concluded with the EU on the Schengen Acquis. The United Kingdom and Ireland shall not participate in the adoption or the implementation of the text, in accordance with the Protocol annexed to the Treaty on the European Union. Denmark will not participate either in the adoption of this text but may decide within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

ENTRY INTO FORCE: 13.01.2009. This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.

TRANSPOSITION: 24.12.2010.