Please cite as: EUAA, '7.13 Return of former applicants' in *Asylum Report 2020*, Ιανουάριος 2022.

7.13 Return of former applicants

EU law on the return of former applicants falls within the remit of general immigration law. Effective return of rejected asylum seekers is an integral part of a credible asylum system, as is the possibility to return to a country of origin voluntarily if an application for international protection is withdrawn. For the practical functioning of CEAS, returning a rejected asylum applicant effectively to his/her country of origin is essential, since an inability to return such a person in an efficient and sustainable way may corrode confidence in the system and stigmatise migration.[679]

Return options include:

Voluntary return: when a person opts to withdraw a claim and voluntarily returns to the country of origin or a person complies with a return decision and can receive support from the Member State, for example covering travel costs; and

Forced return: when a person is returned by the public authorities of the Member State to the country of origin or another country where the person can stay legally.

A person who has formally been refused international protection may still be granted the right to remain in the Member State (outside of the scope of the asylum law and under national migration and residence laws) if the return is not feasible, for example for technical reasons or because of the situation in the country of origin. Otherwise, a person who exhausted all legal avenues to remain in the EU and received a return decision from a court or competent authority of a Member State should in principle leave the EU territory.

The legislative framework at the EU level is prescribed in the Return Directive,[680] for which the Commission proposed a recast in 2018[681] to secure a better link between asylum and return procedures. In July 2019, the Council of the EU adopted its partial common position[682] on the recast, focusing on clearer and faster procedures for issuing return decisions and lodging appeals, development of a common, non-exhaustive list of objective criteria to determine the risk of absconding, and more efficient rules on voluntary return.

Effective return of irregular migrants is one of key areas under the European Agenda on Migration. In October 2019,[683] the Commission stated that cooperation with partner countries on return has improved, with return and readmission agreements and practical arrangements in place with 23 partner countries – both countries of origin and transit countries, as well as capacity-building projects for third countries and exchange of liaison officers.

When necessary, the EU can adopt restrictive visa measures for third countries which do not cooperate sufficiently on readmission, leveraging for example on the EU Visa Code. The

Commission also noted that several areas needed continued improvement, in particular strengthening the assistance available to third country nationals who are returning voluntarily and monitoring that an applicant who received a return decision does not abscond or make secondary movements.

Return is also one of the principal areas of work for Frontex, whose mandate was expanded with a new regulation in December 2019. The agency's mandate on returns and cooperation with non-EU countries, including those beyond the EU's immediate neighbourhood, was strengthened. The *Risk Analysis for 2020*[684] indicated that the number of return decisions issued in 2019 increased by 5 %. This continued to be higher than the number of effective returns, which dropped by 6 % compared to 2018. This is in part linked to a relatively lower migratory pressure on EU+ countries in 2019 compared to previous years, while known challenges remained in several practical areas affecting the efficiency of returns. Challenges include the identification of migrants, obtaining the necessary documentation from authorities in third countries and frequent absconding by migrants who were to be returned. In regard to specific nationalities, effective returns of Afghans and Syrians dropped, linked to typically high recognition rates for those nationalities, while the number of returned South American citizens rose, reflecting high arrivals of this group and typically low recognition rates.

Under its mandate, UNHCR continued advocating for the establishment of a rights-based return system in several of its recommendations to the EU Presidency[685] and the European Parliament.[686] The organisation urged that those who do not qualify for protection need to be rapidly identified and returned with dignity and respect. For those who have sought international protection, returns should only take place following a final negative asylum decision reached through a fair procedure, with due consideration given to the principle of non-refoulement, as well as humanitarian and statelessness-related aspects. Updates were also released concerning UNHCR positions on returns to Mali[687] and South Sudan.[688]

7.13.1 Institutional changes

The main institutional change concerning returned applicants took place in Austria where a new Department for Return and Reintegration (V/10) was established in the Federal Ministry of the Interior in January 2019. The Federal Agency for Care and Support Services was established in June 2019 to assume responsibility for the accommodation and care of asylum applicants as of July 2020 and to provide legal counselling, return counselling and assistance as of January 2021 (AT LEG 02). The aim is to achieve more cost efficiency and an increased number of voluntary returns through independent counselling and quality assurance.

7.13.2 Legislative changes

Several legislative changes were implemented by EU+ countries concerning specifically the return of former asylum applicants. Many amendments aimed to facilitate efficient return through additional obligations to cooperate, removing the suspensive effect of appeals against return decisions, increasing possibilities for detention and accelerating return procedures.

In Germany, the Act on Orderly Returns entered into force on 21 August 2019. The law primarily refers to rejected applicants and focuses on limiting the risk of absconding and on better identification. The requirements for persons to cooperate in acquiring identity documents from a country of origin were strengthened and those who do not cooperate will be issued a specific note, “persons with unverified identity”. For the duration of the note, the person cannot be employed and the respective length of time does not count towards future consolidation of residence status and the possibility to remain lawfully in Germany (since January 2020, persons with certain types of residence titles or in vocational training or employment can have their deportation suspended). It will also be easier for authorities to detain unsuccessful applicants in order to enforce their obligation to leave the country and to return applicants found guilty of criminal offences more swiftly.

In France, the Law of 10 September 2018, in force since January 2019, terminated the suspensive effect of appeals before the CDNA against OFPRA’s decision to reject certain categories of asylum seekers placed under the accelerated procedure and, in particular, those from safe countries of origin. Following a rejection decision by the determining authority and a return decision by the administrative authority, the asylum applicant can request the administrative court to rule whether the applicant may remain on the territory during the asylum appeal procedure. If the administrative court accepts this request, the administrative authority puts an end to house arrest or detention.

Similarly, amendments to the Aliens Act of 1 June 2019 in Finland stipulate that a subsequent application will not prevent the enforcement of an earlier decision on denial of admittance or stay if the subsequent application does not fulfil the criteria for admissibility and has been submitted only for the purpose of preventing or delaying the return (*see Section 7.5*). In such cases return shall be enforced.

In Italy on 4 October 2019, a decree of the Ministry of Foreign Affairs and International Cooperation was adopted in agreement with the Ministry of the Interior and the Ministry of Justice formalising a list of countries of safe origin (IT LEG 03).

As of September 2019, the Estonian Police and Border Guard Board started to issue “three in one” decisions combining a negative decision on an asylum application, a return decision and a decision to impose a prohibition to entry. The return decision and the decision to impose an entry ban are suspended until the final asylum decision has been made.

In Austria, an amendment to the Aliens Police Act 2005 of 27 December 2019 granted a postponement of the period for voluntary departure to rejected applicants who are in an apprenticeship (AT LEG 03). This ensures that apprenticeships already underway can in principle be completed.

In Ireland, the Immigration Act 1999 was amended to confirm that a minister’s deportation order is subject to the prohibition of refoulement. This means that a person is not expelled or returned to the frontier of a territory where, in the opinion of the Minister, the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular

social group or political opinion or there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. This already-existing practice was formalised through the legal amendment.

The Netherlands issued on 29 November 2019 amended Aliens Act Implementation Guidelines (NL LEG 02). While in principle after the rejection of the first asylum application a departure period is granted, exceptions to the rule were extended concerning unfounded applications and applications predominantly based on socio-economic grounds.[lxii] This aimed to impede the increase in unfounded applications placing a burden on the reception and asylum systems.

7.13.3 Practical measures

In addition to legislative changes, some EU+ countries undertook practical measures to enhance returns of former asylum applicants and address specific challenges. The changes included new guidelines and technical arrangements.

Addressing a spike in unfounded applications from Moldovans in 2019, the Netherlands excluded Moldovan applicants falling under the Dublin III Regulation from financial support to return to their country of origin, funds which are usually provided by the DT&V or the IOM's REAN programme. This was later reversed and Moldovan applicants were granted limited support (EUR 40).

The Federal Office for Immigration and Asylum in Austria, in coordination with police administrations in the provinces, organised targeted activities in public places to locate applicants who have absconded after a rejected application in order to take the appropriate security measures.[689]

In November 2019, Fedasil in Belgium issued a new instruction on the implementation of the return process for failed applicants with serious medical issues. This profile of applicants can request that the return process takes place directly from the reception accommodation without being assigned to an open return place.

In France, new measures were implemented for assisted returns (DPAR, *dispositifs de préparation de l'aide au retour*) of third country nationals in an irregular situation, providing an alternative to detention and streamlining the pathway for former asylum applicants whose applications have been refused and would otherwise occupy a place in the reception system. Four new centres for DRAPs were opened in 2019 (in Aisne, Gironde, Île et Vilaine and Doubs), bringing the total as of December 2019 to 16 centres for DPARs (4 in the Paris region and 12 in the provinces).

7.13.4 Projects

In 2019, EU+ countries launched and implemented projects aimed at enhancing the quality of the return process and safeguarding respect for fundamental rights. The projects focused on specific situations faced by applicants for international protection.

In Belgium, Fedasil launched the project, “Your Global Future”, which aimed to provide applicants with training towards their professional future, regardless of the outcome of their application for international protection.

An international “Reach Out” project, led by Fedasil and *Office Français de l’Immigration et Intégration (OFII)* in France, engaged ‘outreachers’ who informed stranded migrants in the street of Brussels and Calais about options available to them (including return, the Dublin procedure and application for international protection). The other pillar of the project included exchange on good practices between cities (namely, Antwerp, Amsterdam, Gent, Milan, Newcastle and Utrecht) in reaching out to irregularly-staying migrants.

Croatia launched a series of informative workshops on the Croatian National Programme for Assisted Voluntary Return and Reintegration, for example, in the Ježevo Reception Centre for Aliens.

The monitoring of returns and post-return processes also play important roles in improving transparency and preventing breaches of migrants’ rights. In Belgium in February 2019, the interim report of the commission for the evaluation of the voluntary and forced return policy was presented. This commission was set up in March 2018, following investigations of Sudanese returnees allegedly subjected to bad treatment upon return. The report acknowledged progress in achieving shorter return procedures and highlighted the issue of subsequent applications and preventing misuse of the system.

Several other EU+ countries implemented monitoring activities focused on return through various mechanisms. The Croatian Law Centre conducted monitoring of forced returns within the framework of the national programme of the Asylum, Migration and Integration Fund. Also in Cyprus, an AMIF project established the national forced return monitoring system, conducted by the Commissioner for Administration and Protection of Human Rights Ombudsman. In Czechia, monitoring by the Ombudsman continued, however under the Ombudsman’s budget and no longer under AMIF. A national legal basis for a forced return monitoring system, in accordance with the relevant provisions of the Return Directive, was drafted in Norway and published for public consultation.

On a related note, FRA published the 2019 on forced return monitoring systems in EU Member States.[690] Relevant guidance includes a FRA focus paper on fundamental rights in the context of returning unaccompanied children, including guidance on assessment of best interests of the child and specific scenarios in the border context.[691] Comprehensive guidance to respect children’s rights in return policies and practices, focusing on EU legal framework was also published by UNICEF, OHCHR, the IOM and other partners.[692]

7.13.4 Jurisprudential developments[lxiii]

At the European level

The possibility and the conditions of return to a country of origin accounted for a high share of

cases brought before European and national courts in 2019. At the European level, the ECtHR remained active on the basis of the EU Charter, Article 3 (prohibition of torture and inhuman or degrading treatment). In this regard, the Court reaffirmed the decision of the French courts to deport an Algerian asylum seeker who was convicted of terrorist action and there were no serious, proven grounds to believe that he would be subjected to treatment in breach of Article 3 when returned to Algeria.

In contrast, the Court ruled against a decision by Bulgaria to expel an applicant to Syria, given the overall security situation and the risk for the individual. The Court also ruled that Switzerland had not carried out a sufficient assessment of the risks that could be faced by an Afghan national of Hazara ethnicity if he were returned to Afghanistan.

In regard to voluntary returns, in the case *N.A. vs Finland* the Court found that the Finnish authorities had not carried out a sufficient assessment of the risks faced by the applicant's father in Iraq. According to the Court, the decision of the Finnish authorities to expel the father had ultimately forced him to agree to return voluntarily to Iraq, where he was allegedly shot and killed soon after arrival. In April 2020 Finland's National Bureau of Investigation revealed it had reason to suspect that the applicant's father is alive and that the documents that influenced the Court's ruling were forged. The case is being investigated as aggravated forgery. The investigation is ongoing.

The ECtHR also reviewed prolonged detention practices despite the suspension of deportation after lodging an asylum application. In addition, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) requested Denmark to refrain from deporting a Palestinian refugee, with a Jordanian passport, and her children from Syria to Jordan pending the assessment of her case. The Refugee Appeals Board suspended the time limit for departure until further notice, in accordance with the Committee's request.

At the national level

Similar issues were addressed at a national level. Some national courts assessed the possibility of ECHR violations when enforcing returns. In Austria, the Supreme Court examined whether deficiencies in the health system or in available health care resources in the country of origin could lead to an infringement of the ECHR. In Belgium, CALL noted that the exclusion clause only serves to preclude an international protection status without releasing the authorities of their responsibility to assess the compatibility of removal measures with ECHR.

Following the CJEU judgement on the request for a preliminary ruling (C-180/17), the Council of State in the Netherlands noted that Dutch law does not provide for an automatic suspensive effect in asylum cases. Suspensive effect only applies to proceedings at the district court. However, if a claim under ECHR, Article 3 is brought before the court, interim measures are granted in principle since December 2016, preventing the removal of a third country national while the appeal is pending. Based on ECHR, Article 8, the Court of Appeal in the United Kingdom found that the Secretary of State should reconsider the applicant's human rights claim since her removal from the country would be a breach of the Convention.

Procedural aspects were also clarified by the relevant jurisprudence. In Italy and the Netherlands, the superior courts ruled on the enforcement of a removal order and detention pending the examination of an application for international protection. Similarly, the Migration Court of Appeal in Sweden elaborated on the calculation of the maximum time that a person may spend in detention for the purpose of removal. The Federal Administrative Court in Germany confirmed family unity as a rule in the context of return procedures. In Poland, the Supreme Administrative Court ruled on the consequences of waiving the right to appeal against a return decision, interpreting the provisions strictly.

The consequences of a practical impediment to enforce an expulsion decision were considered by the Swedish Migration Court of Appeal, which ruled on the possibility and conditions of granting a residence permit. The issue of collective expulsion was also reviewed by the Italian Civil Court which followed the *Hirsi Jamaa v. Italy* ruling. The court found a breach of the non-refoulement principle.

Existing challenges reported by civil society organisations



ECRE published a policy note, Return Policy: *Desperately Seeking Evidence and Balance*,[993] analysing developments in EU policy and law for returns and contesting the excessive focus on returns and restrictive policies since the migration crisis. Civil society organisations raised several concerns with the implementation of returns in EU+ countries. They highlighted the absence of implementing returns from Hungary to Serbia, resulting in prolonged stays of rejected applicants in transit zones,[lxiv] no suspensive effect of appeal on return,[994] limited application of interim measures that would prevent return and the risk of chain refoulement where a country to which a rejected applicant is readmitted may then expel the person to a country where they are at risk.[995]

[lxii] Those new categories include: asylum applications which are rejected for being manifestly unfounded, in which an evident rejection of the application is concerned; asylum applications that are not handled within the Dublin procedure, but on a substantive basis for economic reasons pertaining to the process; asylum applications that are predominantly inspired by socioeconomic reasons; and asylum applications in which the third-country national has stated that he shall not comply with is obligation to return upon rejection. These applications are generally also manifestly unfounded.

[lxiii] To avoid issues on arbitrary presentation/interpretation of cases, wording is similar to official press releases

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