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4.15.1 Regulating returns at the European level



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). This can be the case if a return is not possible due to technical reasons, personal circumstances (for example, if protection is granted under the ECHR, Article 8 on the right to respect for family life), the situation in the country of origin or preventing non-refoulement. Otherwise, a person who has exhausted all legal avenues to remain in the EU and received a return decision from a court or a 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. In 2018, the European Commission proposed to amend the directive to establish a better link between asylum and return procedures.[1200] The proposal was submitted to the ordinary legislative procedure in the European Parliament and the Council,[lxii] and on 21 February 2020, the LIBE Committee rapporteur published a report on the proposed amendments which proposed nearly 800 amendments on:

- the definition of the risk of absconding;
- information provision to returnees on the return process and their rights;
- obligations imposed on returnees;
- time limits for voluntary departure;
- best interest assessments of minors before issuing a return decision;
- the appointment of guardians to assist unaccompanied or separated minors;
- reception conditions in the country of return;
- entry bans;
- grounds for detention of returnees and maximum time limits of detention;
- detention of children and families; and
- the border procedure for returns.

The LIBE Committee considered the amendments in its session of 15 October 2020.[1201] As part of the New Pact on Migration and Asylum presented in 2020, the European Commission called on the

European Parliament and Council to swiftly conclude these negotiations *(see Section 2).*

For several years, the effective return of persons not authorised to stay in the EU has been at the top of the EU's political agenda. According to estimations by the European Commission, around 370,000 applications for international protection are rejected every year, but only about one-third of these persons are returned to their country of origin.[1202] This can be explained by challenges in several practical areas which impact the efficiency of returns, for example the identification of migrants, obtaining the necessary documentation from authorities in third countries and frequent absconding by migrants who are to be returned.

Against this background, the European Commission tabled several initiatives under the new Pact on Migration and Asylum to further improve return procedures and the common EU return system. The proposals include:



The introduction of an end-to-end border procedure covering asylum and, where relevant, return, following a pre-entry screening. The new rules specify that a return order must be issued simultaneously with a negative asylum decision, speeding up existing practices. The rapid decision-making ensures that return decisions can be adopted quickly and fully enforced at the border by channelling applicants into a simplified and accelerated return procedure during a border procedure.



A new 'return sponsorship' scheme, by which Member States can contribute to a new form of solidarity. Under return sponsorship, a Member State commits to returning irregular migrants on behalf of another Member State directly from the territory of the beneficiary Member State. The sponsoring Member State would provide, for instance, counselling on voluntary return to irregular migrants, offer financial and practical support for the voluntary return and reintegration, or lead policy dialogue with non-EU countries on behalf of another Member State to facilitate identification and readmission. This would be done while the irregular migrant is still on the territory of the beneficiary Member State. If these persons have not been returned within 8 months, they will be transferred to the territory of the sponsoring Member State to finalise the return procedure.



Changes to the Eurodac database to ensure better monitoring of returnees by counting individual applicants rather than applications and storing data on non-EU nationals who are found to be staying irregularly in the EU. The amendments would monitor the support provided for voluntary departures and reintegration, and make it easier to identify and re-document individuals who are apprehended at external borders for the purpose of a return and readmission (by extending data retention of those persons).



The adoption of a new strategy on voluntary returns and reintegration to ensure that EU and national schemes are well-designed and coordinated. The strategy would also promote returns from third countries to other countries of origin.



The appointment of an EU Return Coordinator, supported by a network of national representatives, to coordinate national approaches to returns and ensure consistency across the EU.



Mobilising other policies, tools and funding instruments (aside from restrictive or favourable visa measures for partner countries depending on their level of cooperation on readmission) in order to incentivise cooperation on return and readmission. This would include better linkages with other development initiatives and national strategies which aim to build capacity and ownership in partner countries. This will also include prioritising the effective implementation of the 24 existing EU agreements and arrangements on readmission, completing ongoing readmission negotiations and exploring options for new agreements. The focus will be on practical solutions through cooperation to increase the number of effective returns.[1203]

The proposals in the new Pact on Migration and Asylum, including the concept of EU return sponsorships and its likely implications, were also discussed by the European Policy Centre in the discussion paper, "EU return sponsorships: High stakes, low gains?".

Along with the new measures proposed by the European Commission, the role and work programme of Frontex were strengthened to support EU+ countries in managing the external borders. Under its reinforced mandate, Frontex can now provide significant support during a return, linking operational cooperation with Member States and effective readmission cooperation with third countries.

UNHCR continued to advocate for a rights-based return system in its recommendations to the EU Presidencies. The organisation urged that the integrity of the EU's asylum system is dependent on a functioning return system. It also stated that throughout the asylum procedure, and in particular in the case of a negative decision, asylum seekers should have the opportunity of voluntary return assistance to support sustainable and dignified returns. Nonetheless, after a final negative asylum decision has been granted through a fair procedure, a return should be implemented with due consideration to the principle of non-refoulement and humanitarian and statelessness-related aspects.[1204]

The State Parties to the ECHR are obliged to refrain from removing a non-national when there is a risk that human rights which are guaranteed by the ECHR will be violated. As in previous years, in 2020, the situation of applicants who have been returned to a country of origin remained a recurring theme in the ECtHR's judgments, adding to the case law on the prohibition of torture, inhuman or degrading treatment or punishment in Article 3 in cases.

In this respect, the ECtHR concluded that, in the absence of a new assessment of risks by Switzerland, the return of a homosexual applicant to Gambia would constitute a violation of the ECHR, Article 3. The court found the same violation when an applicant withdrew his application for international protection, but the Belgian authorities did not adequately assess the risk of ill treatment prior to the removal. In addition, the court found that authorities did not provide adequate safeguards during an identification meeting between the applicant and the Sudanese embassy.

With regard to removals to Afghanistan in particular, the ECtHR concluded that, based on the most recent country of origin information (including EASO material), there are no substantial grounds for

believing that an applicant upon his return would be exposed to a real risk of being subjected to treatment contrary to ECHR, Articles 2 and 3.

The ECtHR also ruled on the issue of a removal order based on a threat to national security to a recognised refugee from Syria and stated that Bulgaria violated the right to family life and did not provide an effective remedy when it issued the decision.

In contrast, the ECtHR found no risk of death or ill treatment in the event of a return of a politically-active rejected asylum applicant to Iran and no risk of forced recruitment and persecution of an ethnic group Tunjur (a non-Arab ethnic group associated with Darfuri rebel groups) when returning a rejected asylum applicant to Sudan. In addition, no violation of Article 3 was found in the removal of Afghan Sikhs to Afghanistan.

On several occasions, the ECtHR ruled on collective expulsions (Article 4 of Protocol No 4). In the case *Asady and Others* v *Slovakia*, the court held that Afghani nationals who crossed the border hidden in a truck were not subject to a collective expulsion when they were returned to the Ukraine (the removal had been carried out following an examination of their individual situations). Similarly, the ECtHR concluded that Spain did not breach Article 4 of Protocol No 4 when returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave *(see Section 4.1).*

In the context of EU law, the CJEU ruled that moving illegally-staying third-country nationals to a border area, without observing the substantive and procedural guarantees surrounding a return procedure, constituted an infringement of the Return Directive by Hungarian authorities. At the same time, civil society organisations remained concerned about the absence of implementing returns of rejected applicants from Hungary to Serbia,[lxiii] resulting in prolonged stays of rejected applicants in transit zones.

In two CJEU judgments on a request for a preliminary ruling by Belgium (C-233/19 and C-402/19), the court ruled on the consequences of the automatic suspensive effect of a return decision on social assistance benefits.

[lxii] The Council of the EU adopted its partial common position in July 2019. See: Council of the European Union. (2019, June 7). *Migration policy: Council agrees partial negotiating position on return directive* . https://www.consilium.europa.eu/en/press/press-releases/2019/06/07/migration-policy-council-agrees-partial-negotiating-position-on-return-directive/

[lxiii] Serbia refused to readmit third-country nationals from Hungary with the exception of citizens of the successor states of former Yugoslavia and Turkey. This is partly because it does not have readmission agreements with the relevant countries of origin. Voluntary returns are conducted through the IOM. See: Hungarian Helsinki Committee | Magyar Helsinki Bizottság. (2021). *Input to the EASO Asylum Report 2021*. /sites/default/files/Hungarian-Helsinki-Committee_0.pdf; Asylum Protection Centre | Centar za zaštitu i pomo ? tražiocima azila. (2021). *Input to the EASO Asylum Report 2021*. /sites/default/files/Asylum-Protection-Center.pdf

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[1200] 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 (recast); A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/634 final, September 12, 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634 ; European Parliamentary Research Service. (February 2019). *The proposed Return Directive (recast): Substitute Impact Assessment* . https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf

[1201] European Parliament. (2021, April 21). *Legislative train schedule: Proposal for a recast of the Directive on common standards and procedures in Member States for returnning illegally staying third-country nationals* . https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-proposal-for-a-recast-of-the-return-directive
[1202] European Commission. (2020, September 23). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final* . https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM:2020:609:FIN
[1203] European Commission. (2020, September 23). *New Pact on Migration and Asylum: Questions and Answers* . https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707
[1204] United Nations High Commissioner for Refugees. (January 2020). *UNHCR's Recommendations for the Croatian and German Presidencies of the Council of the European Union (EU): January - December 2020* . https://www.unhcr.org/be/wp-content/uploads/sites/46/2020/01/200107-FINAL-UNHCR-Recommendations-for-the-Croatian-and-German-Presidencies-of-the-Council-of-the-EU-2020.pdf

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