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4.12 Return

This section looks into main developments in EU+ countries in the area of return, focusing on developments concerning return of former applicants for international protection (whose claims have been rejected or who opt for withdrawal of their claim and voluntary return to the country of origin).

In its Annual Risk Analysis for 2018[772] Frontex identified that Member States continued to struggle to effectively return those whose asylum application was rejected and who were not granted subsidiary protection status and the overall relatively low ratio of effective returns in particular to African and Asian countries. In the Risk Analysis for 2019[773], based on developments in 2018, Frontex further underlined that the number of effective returns in 2018 once again fell short of the decisions issued by Member States to return migrants: Around 148 000 migrants who were not granted asylum or subsidiary protection were returned to their countries of origin, little more than half the total number of return decisions issued. In particular, no measurable progress was made as regards returns to West Africa – while the number of return decisions issued increased by roughly 80 % compared with 2017, effective returns remained unchanged, reflecting deficits in cooperation and administrative capacity in countries of origin.



Legislative changes

With two new laws published at the end of the year, **Belgium** modified the Immigration Act in order to ease the return of applicants for international protection having introduced subsequent application under very strict circumstances. Following the change in Act LXXX of 2007 in **Hungary**, aliens policing procedure starts immediately after a negative decision on asylum application and an application for judicial review does not have a suspensive effect automatically, while immediate judicial protection can be requested in the application. In **France**, the implementation of expulsion decisions against rejected asylum seekers was amended. The law of 10 September 2018 that entered on 1 January 2019 put an end to the automatically suspensive nature of the appeal before the National Asylum Court (CNDA) against the OFPRA's rejection decision for certain categories of asylum seekers placed under fast-track and special procedure for those from safe countries of origin. A return decision (obligation to leave the French territory: OQTF) can be taken at this stage. This decision can be contested before the administrative judge which can suspend the execution of the measure until the decision of the CNDA. The appeal, in these very limited cases, is therefore not automatically suspensive anymore.

Pending legislative proposals concern aspects of return of former asylum applicants. In **Finland**, a proposed amendment to Aliens Act [774] foresees that travel document of an applicant for international protection could be taken to the possession of the authorities until the applicant is granted a residence permit or leaves the country. The goal is to ensure the smoothness of the asylum procedure so that a missing travel document would not prevent the identification of an applicant or the removal of a person who has received a negative decision concerning international protection. Another change was proposed to the processing of asylum seekers' subsequent applications aiming to prevent the filing of subsequent applications that are intended for delaying the person's removal from the country (see Section on special procedures).

In **Luxembourg** a legislative amendment was proposed [775] sstipulating that in the context of taking a decision regarding the return of a unaccompanied minor (both applying for international protection and other categories) the best interest of the child is individually evaluated by a multidisciplinary team.[776] Also in the **Netherlands** a legislative proposal for the detention and return of foreign nationals is under discussion to provide a legal basis for stopping and questioning, transfer and detention pending forced return. In order to assess whether a person should be placed in immigration detention, it may be necessary first to stop and question the foreign national and take him or her along for interrogation. The existing powers for stopping and questioning, transfer and detention, however, they pertain to situations in which it is suspected that the third-country national is staying illegally in the Netherlands. A third-country national who has submitted an asylum application or is anticipating his/her transfer, is often staying legally in the Netherlands and the legislative proposal fills the gap. [777]

More generally, in **Bulgaria** the national legislation was amended in 2018 with additional measures to ensure the return of the citizens of third countries in accordance with Directive 2008/115/ EU, among others two new alternatives to detention were introduced. In **Finland** the removal from the country of those who have committed criminal offences and those who pose a danger to public security was accelerated with a legislative amendment that entered into force on 1 January 2019. In **Estonia** the Identity Documents Act amendment entered into force, allowing the Police and Border Guard Board to issue the European travel document for return in accordance with the Regulation (EU) 2016/1953. In **Hungary** Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals was modified [778] so that procedural rules regarding return and readmission – for example, usage of language, communication of decisions etc. – are now included in Act II of 2007 instead of the new law on administrative proceedings which rules other administrative procedures outside of aliens policing. In **Italy** Law No 132 of 1 December 2018 doubled the duration (from 90 to 180 days) of the maximum period of detention of third-country nationals in the centre of permanence for returns. This applies in the cases in which the expulsion is not possible due to temporary obstacle in preparation of the return or the execution of the removal.

On 20 December 2018, the Law Amending the Law of the Republic of **Lithuania** on the Legal Status of Aliens was passed and, as of 1 July 2019, will stipulate that wider possibilities will be provided to oblige an alien to voluntarily leave the territory of Lithuania, the obligation will be introduced for the Migration Department and the State Border Guard Service to inform an alien about the possibility to apply for a voluntary return to a foreign state a decision on expulsion of

an alien from Lithuania will be issued not only by the Migration Department but also by the State Border Guard Service, i.e. the decision will be issued by the authority which has established the ground for the alien's expulsion; whereas the police will no longer decide on an alien's obligation to leave Lithuania or on their return to a third country.

Detention pending return and alternatives to detention

In March 2018, two new laws modifying the Immigration Act have been introduced in **Belgium**. The new laws introduce the concept of alternative to detention for applicants for international protection. This means that detention is only possible if no less coercive measures can be used. The new laws also define the duration of detention and the risk of absconding according to 11 criteria. Since summer 2018 in Belgium families with underage children can be detained in dedicated detention centres pending their removal.[779]

In **Norway** more specified provisions for the detention of minors as part of the return procedure, ensuring that minors are only arrested or detained as a last resort and for the shortest possible period of time.[780]

Some EU+ countries increased their detention capacity in 2018.

In accordance with an assignment from the **Swedish** government, the Migration Agency increased its detention capacity, which reached 417 beds at the end of 2018. A new building C in the Foreign National Detention Facility Bělá-Jezová (taking into account the needs of vulnerable groups) was built in 2018 in the **Czechia**. In the end of 2018 a new detention centre was opened in Rae municipality in **Estonia**, which replaced the previous detention centre in Harku, accommodating up to 123 returnees and asylum seekers and offering improved living conditions.

In the **United Kingdom**, developments were noted in the field of alternatives to detention where legislative changes were introduced setting out a new power of immigration bail (setting out who can be bailed; the conditions that can be imposed on individuals; the consequences if an individual breaches bail conditions, and when bail ends) which repealed and replaced the previous complex legal framework contained in Schedules 2 and 3 to the Immigration Act 1971.

Instruments and tools related to return

´Database of foreigners staying or having stayed in **Estonia** illegally´ (UUSIS ILLEGAAL) was fully developed in 2018 and should be launched by June 2019. This data system supports Police and Border Guard Board in return procedure and will improve interoperability with other databases and ability to collect statistical data.

In a joint effort with **Denmark**, **France**, **Germany**, **Sweden** and the **United Kingdom**, in 2018 **Austria** prepared an internal guideline for harmonising forms and procedures used in voluntary return and reintegration, while implementing a corresponding pilot project in the Russian

Federation and Morocco. Regarding return of former asylum applicants, PBGB compiled in collaboration with specialists in this field, the *Guidelines of Child Treatment*, in 2018. The document is not for public use and also contains a chapter on the procedure how to deal with unaccompanied minors.

Jurisprudence

The ECtHR ruled on several occasions on the application of *non-refoulement* principle throughout 2018.[781]

Following the case of the return of Sudanese nationals in 2017, several rulings in **Belgium** recalled the necessity to assess the risk of torture and inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights (ECHR) in any case of removal even if no application for international protection has been made previously or if no coercive measures are foreseen.

As regards the relation between Dublin transfers and return transfers, in its decisions of 8 March 2018[782] and 9 March 2018[783], the CALL underlined that a return decision implies the removal to a third country outside the European Union, while in case of a take-back by a Member State responsible for examining the application for international protection, only a transfer decision can be taken. Both procedures do not offer the same guarantees and do not have the same consequences. If the Dublin III Regulation applies, a return decision cannot be taken, but a decision to transfer the applicant to the responsible Member State should be taken. Only in case that the application for international protection was rejected by final decision by the Member State responsible for examining the application, the Immigration Office has the choice to either take a return decision to the country of origin or another third country outside the European Union, or ask for a transfer to the Member State responsible for examining the application for international protection. If it is opted for a transfer, the Dublin III Regulation applies.

As regards relation between expulsion and end of protection the French CNDA found in its judgment of 31 December 2018[784] that the expulsion of a person previously granted international protection shall not prevent the termination of the refugee status according the national legislation due to the person from being considered a serious threat to the security of the State.

International projects

IIn 2018 Austria (leading the working group on harmonisation) and Sweden became partners in the European Return and Reintegration Network (ERRIN).[785]

Other developments and practical measures

In the **Czechia,** since 2019 asylum seekers who withdraw their asylum application and those whose asylum application will be rejected (under particular conditions) are included in the target groups of the relevant AMIF project regarding assisted voluntary return and reintegration assistance. It means that also this category of returnees may (under certain conditions) apply

for reintegration assistance. (As a general rule, citizens of countries with visa liberalisation are not considered to be eligible. Exemptions might be considered under certain conditions.) Emphasis is put on the cooperation with particular embassies of third countries.

In **Finland**, active measures were taken in order to increase returns, for example enhancing the use of the voluntary return system and motivating those who have received a return decision to return voluntarily, also the amounts voluntary return assistance were increased. For example, the project called AUDA aims to diversify and further develop voluntary return in Finland.[786] One of its components is to define how the foreign policy measures could better support voluntary return and, for example, how and where the reintegration measures provided by the Finnish government could be bridged with the other (development) aid allocated to the country of return. The other component is to establish a dialogue with diaspora communities and NGOs on how they could support the positive development of the return country by, for instance, implementing projects in the country. AUDA has also undertook a large information campaign on voluntary return mainly in social media (Facebook, Twitter, Instagram and sponsored displays) showcasing video interviews with Iraqi and Somali returnees.[787] A follow up research will be published at the end of 2019, based on interviews with approximately 200 Iraqi, Afghan and Somalian returnees, focusing on their economic, social and socio-psychological reintegration. **France** focused on the effectiveness of assigned place of residence and the surveillance of foreigners subject to a return decision, as well as the implementation of expulsion decisions.

In their submissions to the Annual report, civil society raised several concerns with regard to implementation of returns in EU+ countries. Challenges were raised with regard to returns concerning family members of different nationalities[788], stateless applicants[789], experience of child returnees to Afghanistan[790], instances of forcible disappearance upon return.[791]

ECRE published an analysis about the European practices on return, including voluntary departures and assisted voluntary return.[792]

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772 Frontex, Risk Analysis for 2018.
773 Frontex, Risk Analysis for 2019.
774 FI LEG 02: Proposal amending the Aliens Act, HE 273/2018 vp.
775 LU LEG 02: Bill n° 7238, amending article 103.
776 LU LEG 02: Bill n° 7238: (introducing a number of changes to the Immigration Law that are related to return as a consequence to the evaluation of the application of the Schengen acquis in Luxembourg in 2016) proposes that the best interest of the child will be individually evaluated by a multidisciplinary team, in the context of taking a decision regarding the return of an unaccompanied minor. It also aims to introduce systematic verification by the jurisdictions in the case the minister decides to extend detention because the removal operation will take longer, due to a lack of foreign cooperation or a delay in the provision of documents. The bill furthermore adds that the minister or the minister's delegate takes all the measures necessary for the execution of the decision of removal by the Grand ducal Police. In addition, it foresees that the Grand ducal Police can have access to a foreigner's residence, after being duly authorised by the President of the Luxembourg District Court, if the foreigner is refusing access to this place in order to prevent his or her removal.

[777] Tweede Kamer der Staten-Generaal, Parliamentary Papers (Kamerstukken) II, 2018-2019, 35056, nr. 1 (in Dutch); Tweede Kamer der Staten-Generaal , Parliamentary Papers (Kamerstukken) II, 2018-2019, 35056, nr. 2 (in Dutch); Tweede Kamer der Staten-Generaal, Parliamentary Papers (Kamerstukken) II, 2018-2019, 35056, nr. 3 (in Dutch).

[778] Mostly due to the fact that the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services – containing the general rules on procedural law regarding administrative proceeding, including aliens policing – lost its effect. The main elements and rules from the Act CXL of 2004 were incorporated in the Act II of 2007.

[779] The opening of such units has aroused a number of criticisms from more than 325 organisations. The campaign "On n'enferme pas un enfant. Point" has been launched to protest against the detention of children.

[780] NO LEG 02: Act of 20 April 2018, amending the Immigration Act. The legislation provides new, clearer statutory provisions on the arrest and detention of minors. These are designed to ensure that minors are only arrested or detained as a last resort and for the shortest possible period of time. The Immigration Act sets out maximum detention times, and the legality of a detention must be examined regularly by a court. Court rulings must specify how the best interests of the child and the possibility of alternative measures have been assessed.

[781] See for example: ECtHR, X. vs Sweden, ECLI:CE:ECHR:2018:0109JUD003641716; ECtHR, M.A. vs France, ECLI:CE:ECHR:2018:0201JUD000937315; ECtHR, Saidani vs Germany, ECLI:CE:ECHR:2018:0904DEC001767518; ECtHR, X. vs the Netherlands, ECLI:CE:ECHR:2018:0710JUD001431917; ECtHR, A.S. vs France, ECLI:CE:ECHR:2018:0419JUD004624015.

[782] BE CALL, Decision no. 200 933.

[783] BE CALL, Decision no. 200 977.

[784] FR CNDA, N° 17013391.

[785] The Program aims to strengthen, facilitate and streamline the return process in the EU through common initiatives, and to promote a durable and efficient reintegration in countries outside the EU.

[786] For more information: Finnish Immigration Service, Voluntary return supports the future of asylum seekers in their home country.

[787] See the campaign elements at www.voluntaryreturn.fi .

[788] Fundación Cepaim, Input to the EASO Annual Report 2018.

[789] European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention and the significance of the two judgements from Russia, here: European Network on Statelessness, European Court of Human Rights again finds extended detention of stateless individuals illegal: two successful cases by ADC Memorial; European Network on Statelessness, Input to the EASO Annual Report 2018.

[790] Save the Children, From Europe to Afghanistan: Experiences of child returnees.

[791] Amnesty International Russia: Chechen refugee forcibly disappeared after being unlawfully deported from Poland; Helsinki Foundation for Human Rights, Input to the EASO Annual Report 2018 .

[792] ECRE, Voluntary departure and return: Between a rock and a hard place.

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