



# **EU Return Policy – vulnerable returnees**

**European Commission  
DG HOME C1  
Mr Fabian Lutz**



## Intro – Return Policy in a nutshell:

EU return policy is an **integral and necessary part** of a comprehensive EU Migration Policy. An effectively implemented and credible return policy is no contradiction to a generous asylum policy or a more open legal migration policy. It is rather meant to enhance these policies by making sure that admission channels and admission capacities are not unduly blocked by those who clearly don't qualify for a stay in the EU.

Since 2008, the **key instruments** of the EU's return policy are in place:

- The Return Directive 2008/115/EC
- The European Return Fund (2008-2013) (Decision 575/2007/EC) succeeded by the Asylum, Migration and Integration Fund (AMIF) (Regulation No 516/2014)
- EU Readmission agreements (17) – co-existing with numerous bilateral readmission agreements between MS and third countries

## *Return Directive 2008/115/EC and its key features:*

1. Horizontal scope: Covers any third-country nationals staying illegally on MS territories.
2. Common discipline on MSs – avoiding "grey areas": A return decision must be issued.
3. Promoting voluntary departure: Period of voluntary departure to be granted, unless risk of absconding.
4. Coercive measures only as last resort: If less coercive measures don't work, removal shall be enforced, taking into account proportionality.
5. EU entry ban as preventative tool in the fight against illegal immigration.
6. Due process / effective legal remedies
7. Limitations on the use of detention
8. Special provisions regarding minors and families / general safeguards
9. Issues which are not covered by the Directive:
  - Harmonisation of reasons for ending legal stay.
  - Regularisation.

## Gap between theory and practice

In 2014 **less than 40%** of the irregular migrants that were ordered to leave the EU departed effectively. Experience confirms that the procedures foreseen in the Return Directive allow for determined action. The main reasons for non-return relate to practical problems in the identification of returnees and in obtaining the necessary documentation from non-EU authorities.

CITIZEN*	Return decisions	Effective return	Return ratio (%)
All TCN	470.080	192.445	40,9
Albania	29.665	25.780	86,9
Morocco	32.825	11.065	33,7
Afghanistan	23.445	3.350	14,3
Pakistan	21.210	11.230	52,9
Algeria	16.820	4.150	24,7
Tunisia	13.500	4.245	31,4
India	15.930	9.530	59,8
Iraq	6.330	2.085	32,9
China	11.770	5.100	43,3
Nigeria	13.830	4.430	32,0
Brazil	5.150	3.375	65,5
Ukraine	12.475	10.125	81,2
Turkey	9.910	2.850	28,8
Bangladesh	11.110	3.770	33,9
Serbia	11.540	9.100	78,9
Syria	44.470	3.470	7,8
Russia	10.055	7.435	73,9
Somalia	6.890	485	7,0
Bolivia	1.950	1.075	55,1
Senegal	5.510	1.250	22,7



## *Latest developments*

**The Commission's Action Plan on return** (COM(2015)453 of 9.9.2015) sets out almost 40 measures that should be taken to increase the effectiveness of return.

- The Action Plan envisages a significant boosting of the role of Frontex in return, through the creation of a Frontex Return Office.
- It announces an enhanced use of relevant information systems – in particular the Schengen Information System and Eurodac – for return purposes.
- It also sets out a strategy for scaling up cooperation with countries of origin and transit for irregular migrants – through practical cooperation, political dialogues, the completion of negotiations and the launch of new negotiations with key countries.

The Focus of the Action Plan is on enhancing efficiency. No direct mentioning of specificities of return of vulnerable persons.

### *The Commissions Return Handbook (C(2015)6250 of 1.10.2015)*

Contains detailed common guidelines, best practices and recommendations in the field of return. Its aim is to provide concrete guidance for national authorities in charge of return. It should be used by national authorities as a tool when carrying out return related tasks, for the purpose of training and as a point of reference for Schengen Evaluations on return.

The Handbook bases itself to a large extent on the work conducted by Member States and the Commission within the "Contact Committee Return Directive". The Handbook does not create any legally binding obligations upon Member States. Only the legal acts on which it is based can be invoked before the courts. The Return Handbook contains numerous references to specific rules applicable to vulnerable returnees.

⇒ Recommendation to use it as key reference document.

## *Return Handbook - Vulnerable Returnees*

### **1. Definition of vulnerable persons - Article 3(9) Return**

**Directive:** *"Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence"*

Contrary to the definition of vulnerable persons used in the asylum acquis (see for instance: Article 21 RCD or Article 20(3) QD), the definition in the Return Directive is drafted as an exhaustive list. The need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the categories of vulnerable persons expressly enumerated in Article 3(9). The Commission recommends that Member States should also pay attention to other situations of special vulnerability, such as those mentioned in the asylum acquis: being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders. (p.13)

**2. Taking into account vulnerability is a horizontal – cross-cutting principle:** The need to pay specific attention to the situation of vulnerable persons should not be limited to the situations expressly referred to by the Return Directive (during the period of voluntary departure, during postponed return and during detention). The Commission therefore recommends that Member States should pay attention to the needs of vulnerable persons in all stages of the return procedure.(p.13)

**3. *Applicable also in border procedures:*** If Member States opt not to apply the Directive to border cases, they must nevertheless ensure – in accordance with Article 4(4) of the Return Directive - that the level of protection for affected persons is not less favourable than that set out in the Articles of the Directive dealing with: Limitations on use of coercive measures; Postponement of removal; Emergency health care and taking into account needs of vulnerable persons; Detention conditions and respect the principle of non-refoulement. (p.17)



**4. As well as pending postponed return:** Article 14(2): *Member States shall, .... ensure that*

- (a) family unity with family members present in their territory is maintained;*
- (b) emergency health care and essential treatment of illness are provided;*
- (c) minors are granted access to the basic education system;*
- (d) special needs of vulnerable persons are taken into account.*

In its judgement in case *Abdida* (C-562/13), the ECJ found that Member States are obliged to also cover other basic needs, in order to ensure that emergency health care is in fact made available during the period in which that Member State is required to postpone removal. The logic upon which the ECJ relied to establish this obligation was that the requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) may be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. Based on this logic developed by the ECJ, it can be derived that enjoyment of the other rights enumerated in Article 14(1) (such as in particular: access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third country national concerned. (p.74)

**5. And pending detention:** Member States are obliged to pay attention to the situation of vulnerable persons, which also implies ensuring, more generally, due consideration of elements such as the age, the disability, the health and mental health conditions of the person concerned.(p.92)

**6. Return of minors is possible, but subject to a number of specific safeguards:**

- The obligation on Member States to issue a return decision to any third-country national staying illegally on their territory is subject to the respect of fundamental rights, including the principle of proportionality (recital 24). The legitimate aim of fighting illegal migration may be balanced against other legitimate State interests, such as... respect for the best interests of the child. (p.22):

*Migrants in an irregular situation should not be apprehended at or next to the school which their children are attending.*

*Schools should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.(p.23)*

- Member States shall, where necessary, extend the period for voluntary departure 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 (p.35)
- The Return Directive expressly allows Member States which do not wish to return/remove third-country minors staying illegally on their territory or are restrained from removing the unaccompanied minor due to the best interests of the child to grant at any moment a permit or authorisation in accordance with national law (e.g. a temporary permit for a minor to stay until the age of 18). The Return Directive obliges, however, Member State to say either "A" (grant a permit or a legal right to stay) or "B" (carry out return procedures). (p.51)
- Before returning an unaccompanied minor, an assessment should be carried out on an individual basis taking into consideration the best interests of the child and his or her particular needs, the current situation in the family and the situation and reception conditions in the country of return. (p.51)

- 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.(p.52)
  - 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.(p.53)
- Pending postponed return, minors are granted access to the basic education system subject to the length of their stay;(p.74)

## **7. Detention of minors only as measure of last resort:**

- 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. (p.100)

## ***Conclusions***

Return Policy has two faces: the protection of the rights of individuals needs to go hand in hand with efficient returns/removals. Currently the need to address gaps in the efficiency of return policy is in the focus of political attention.

This does not mean, that the other side is forgotten. The findings of the 2014 application report on the Return Directive still remain valid: *The Return Directive has positively influenced national rules regarding primacy of voluntary departure, forced return monitoring, detention, alternatives to detention, respect for fundamental rights, fair and efficient procedures and reduction of cases in which migrants are left without clear legal status.*

Finding the right balance is a challenge. The existing return acquis and the Return Handbook are a good basis to face this challenge.



**Thank you for your attention!**

**European Commission  
DG HOME C1  
Fabian Lutz**