

“Against the outrageous Directive!”, full-text of speech given by Yasha Maccanico (Statewatch) at the hearing with NGOs organised by the GUE group, European Parliament, Strasbourg on 12 December 2007

Firstly, I would like to thank Mr. Giusto Catania and the GUE group for inviting Statewatch to participate in this hearing and debate about the Returns Directive.

The Directive represents an attempt to legitimate practices deriving from EU policy that are intrinsically in violation of human rights and discriminatory by couching them in terms that would suggest that they will be implemented humanely and while respecting human rights. However, it has some serious shortcomings that range from the premises on which it is based, the common norms it seeks to introduce and the failure to establish significant limits to the punishment of removal and detention, and to their implications for people suffering them. Its only saving grace, are the awful practices that we are witnessing in several Member States in the fields of the detention and expulsion of so-called “illegal immigrants”. The European Parliament’s amendments would go some way towards mitigating some of the worse abuses and allow some scope for taking specific circumstances into consideration, as in the possibility of extending the period for voluntary departure or granting a special authorisation to stay for compassionate, humanitarian or other reasons.

The EP’s efforts to improve the proposal, as its amendments would do to a limited extent, should be welcomed, although they fail to alter the unacceptable nature of a Directive that confirms the detention of people not convicted of any criminal offence and the return of third-country nationals as a standard practice, raising it to the status of a European norm, effectively setting it in stone. While the Directive, if amended as proposed by the EP, would improve certain conditions under which the return and removal process takes place in several countries, it would be more appropriate to insist on them complying with their national and international human rights obligations that exist with or without the Directive, which would merely reinforce existing obligations that are being routinely contravened.

Its bases are fundamentally flawed. For example, recital 17 of the original proposal suggests that:

“Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation”.

However, this is contradictory, as the provisions that must be applied in this way are discriminatory themselves, introducing special treatment and punishment as a result of nationality.

Even in cases where the EP report has suggested amendments that would improve the situation, such as amendments 3, 4 and 5 (recitals), there is a considerable gap between theory and reality - amendment 4 recognises that “it is legitimate for States to return people”, provided that “fair and efficient asylum systems are in

place, which fully respect the principle of non-refoulement”, which is assumed to be the case in all EU Member States, in spite of the progressive dismantling of asylum that they have been carrying out.

Historically, under the 1951 Geneva Convention, western European countries were letting in people fleeing from poverty and persecution, effectively providing a safe haven. Now poverty has been ruled out as a reason for entering, through the portrayal of these people as “economic migrants”, an expression that was loaded with negative connotations. After the exclusion of people fleeing from poverty, the goal became that of increasingly restricting the grounds for obtaining asylum for victims of persecution or violence, through the notion of “bogus asylum seekers” and the introduction of procedures to establish an ever-expanding category of claims to be deemed “manifestly unfounded”, such as those from safe countries of origin, safe regions in unsafe countries of origin, and so on. A further development in asylum and immigration policy has been that of suggesting that specified skilled workers are to be allowed in (so-called “legal migration”), thus perpetuating a long tradition of colonialism, by stripping poorer countries of their main assets for the benefit of our economies, undermining theirs, and thus reinforcing the reasons for which people seek to emigrate in the first place.

Amendment 3 stresses the need for bilateral and multilateral readmission agreements to facilitate the return process, although there is plentiful evidence surfacing that people are being returned to transit countries (particularly Libya) where they are subjected to widespread abuses and violence that contravene human rights and thus, the principle of non-refoulement is violated (most notably, in this instance, by Italy), as is also true in the case of Eritreans deported to Eritrea from Libya. On these matters, Fortress Europe’s recent report, “Escape from Tripoli”, is very interesting, highlighting the importance of assessing with whom the EU or its Member States conclude readmission agreements, and the dreadful consequences that the externalisation of EU migration policy is having on migrants in transit in this country.

The work of the rapporteurs is to be commended in a number of areas in which improvements are proposed to tackle some of the more blatant abuses that Member States are committing in violation of their international obligations and often of their own domestic laws and constitutions. These include independent supervision of detention and removal processes by national and international NGOs in the process, although, unfortunately, the only body mentioned explicitly is the IOM, and its role in securing “voluntary” returns that were not so voluntary has been denounced. Others, are the application of some degree of safeguards in transit zones, which nonetheless remain a legal construct established for countries to avoid their legal duties by treating these zones as extra-territorial, and at border points, to give voluntary return precedence over forced removal, for decisions to be taken on a case-by-case basis, for the euphemism of “temporary custody” to be replaced by what it is, namely, “detention”, to limit the countries to which someone can be “returned”, not to make re-entry bans obligatory, to limit the cases in which detention may be imposed, expand the categories of people to be considered vulnerable, and increase consideration of the principle of non-refoulement and of circumstances such as family relations, a child’s best interest, health, etc. in the implementation of returns policy.

However, the underlying flaws remain and make this Directive unfit to become a European norm, as well as meaning that any safeguards introduced would be a mere fig leaf with which to hide Europe's shame in this field. Moreover, the Council has already responded to the Parliament's report and its latest position would strip many of the limits proposed of any significance. Some of the Directive's key problems include the sanctioning of a regime imposing generalised detention, including of children with families, limited to six months (original Commission proposal), to three months which may be extended to up to 18 months (European Parliament report), or to six months, extendable in special circumstances without a specified limit (Council response), accompanied by systematic expulsions and re-entry bans for up to five years, extendable in defined cases. Where the European Parliament report proposes the limiting of detention to people at "risk of absconding" involving "serious reasons, defined by individual and objective criteria... not automatically deduced from the mere fact of illegal residence", the Council's latest response features a definition of this situation that could hardly have been cast wider, listing five conditions that include:

"Risk of absconding means the existence of particular reasons to believe that a third country national who is subject to return procedures will abscond, for example:

- if the person has illegally entered the territory of a Member State and has not subsequently obtained an authorisation to stay in the Member State".

Likewise, with regards to bans on re-entry (article 9), the original proposal provided that "Removal decisions *shall* be accompanied by an entry ban of a maximum of five years" [emphasis added], unless there are grounds for a lengthier ban (serious threat to public policy or public security), while return decisions "may" be accompanied by such a measure. The Parliament's report proposed a degree of discretion by changing "shall" to "may", in the case of removal orders, confirming the five-year limit (although the Committee on Development had proposed a six-month maximum, adding that re-entry bans should be ruled out as "out of proportion" for people who comply with a return decision) and considering that a longer ban should be applicable when the person in question "constitutes a **proven** serious threat to public order -as opposed to public policy-, public security or national security" [emphasis in original]. However, the Council responded through a harsher proposal than that in the original Commission document, expanding the requirement to impose re-entry bans indiscriminately to all return decisions. Moreover, it expanded the possibility of issuing bans for longer than five years by removing the word "serious" (and the Parliament's proposal to require some proof of this) that preceded "threat to public policy or public security", two categories that are in constant expansion in political debate at a national level. In Italy, following a murder committed by a Romanian, leading politicians as well as some *Lega Nord* (Northern League) mayors, have been arguing that lack of legal employment, means of subsistence or of a formal residence address intrinsically turn people into threats to public security, as well as calling for their immediate expulsion, even if they are EU nationals (and not just for Romanians, "even if they are French", as Fini told a political chat show audience in the wake of the murder).

Some further areas of apparent disagreement include the nature of a return (art.3c), originally proposed by the Commission as “the process of going back to one’s country of origin, transit or another third country, whether voluntary or enforced”, and thus including the linguistic aberration of a “return” to somewhere someone had not previously been. The Parliament’s report sought to restrict the scope somewhat by proposing “one’s country of origin or to a country of transit in which the third-country national has solid established ties”, and the Council’s response was to reiterate the Commission’s proposal with the proviso “in which the third-country national will be accepted”. The Parliament’s efforts to introduce some limited guarantees against human rights abuses are clashing with the Council’s (the governments of EU Member States) insistence on guaranteeing the effective expulsion of “illegal” immigrants, by lowering the inadequate guarantees in the Commission’s initial proposal, and deleting provisions that may clash with or obstruct current removal procedures at a national level. Thus, in article 6.7, where the Commission suggested that Member States “shall refrain from issuing a return decision” against someone residing illegally who is the subject of a pending procedure for renewing their residence permit, the Council proposes to switch that “shall” to “may”, opening the way for people awaiting renewal of their legal residence documents to be removed in the meantime. Likewise, where the Commission argues that a return decision (article 6.2) “shall provide for an appropriate period of voluntary departure of up to four weeks” (unless there is a risk of the person absconding), and Parliament defines this requirement “as a matter of principle”, unless the risk of the person absconding or of them posing “a threat to public order, public security or national security” is certified by “a competent administrative or judicial body”, the Council extends the period to “up to 30 days”, while cunningly allowing Member States to pass legislation that only allows this period for voluntary departure following the submission of an application which, inevitably, will mean that it could either be granted or denied.

In spite of the non-exhaustive points examined above, the problems with the Directive lie deeper, in that it would establish procedures for removing foreigners that are causing a substantial lowering of human rights standards within EU countries and beyond (through externalisation) as cornerstone of EU policy, elevating them to the rank of an EU norm. The very nature of EU immigration policy and returns is that of violating freedom of movement for third-country nationals established in article 13.2 of the Universal Declaration on Human Rights, “Every person has a right to leave their country”. What is happening, is that freedom of movements by EU country nationals is being implemented at the expense of freedom of movement beyond its borders. Translating “co-operation with third countries in the field of combating illegal immigration”, what is meant is that third states are being pressurised and funded to discriminate, punish and return people from neighbouring countries. In doing so, the EU is fostering racism and financing the expansion of the repressive apparatuses of not very democratic states. Moreover, it is turning poor countries from which people emigrate into “cages” that people cannot leave if they choose to, much as was the case in eastern European countries when the Berlin Wall was functioning, and the shootings of migrants climbing border fences in the Spanish north African enclaves of Ceuta and Melilla was reminiscent of precisely those times. Remittances from migrants working abroad are a major (sometimes the major) source of income in many communities. By denying them this, we are reinforcing the reasons for which

they emigrate, as well as implementing policies that mean that they are further impoverished by having to pay enormous amounts to another child of EU migration policy - the migrant smuggling networks that are offering a much sought after service that is otherwise unattainable and are so heatedly denounced as those responsible for the thousands of deaths that would not occur if people could pay their ticket and travel as Europeans do when visiting their countries.

Returning to the nature of returns policy, it is the product of situation in which many EU countries realise that they are unable to sustain themselves and would suffer greatly without the migrants working there (both legally and illegally in the underground economy). The threat of return is a way of keeping them under permanent probation, effectively a guillotine that could strike them at any time, as soon as they stray from what is expected of them, altering their lives dramatically. We need them, but do not want them to live with any security or long-term prospects. Thus, employees, those contracting their labour legally, can abuse and cheat them, in the knowledge that it is unlikely that they will be confronted, as the increasing link between employment contracts and residence permits means that they may end up having to return, or be removed, to their home countries if fired. Moreover, it is increasingly being used an appendage of criminal law sanctions, functioning as a threat discriminating nationals from non-nationals.

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