



Briefing

Coercive measures or expulsion: Fingerprinting migrants

*“If the data-subject still refuses to cooperate it is suggested that **officials trained in the proportionate use of coercion may apply the minimum level of coercion required**, while ensuring respect of the dignity and physical integrity of the data-subject..”*

Statewatch Director, Tony Bunyan comments: *“Where is the EU going? Migrants, including pregnant women and minors, who have fled from war, persecution and poverty are to be forcibly finger-printed or held in detention until they acquiesce or are expelled and banned from re-entry.”*

New guidelines [1] released by the European Commission allow Member States to use physical and mental coercive measures to take fingerprints of migrants and asylum seekers entering Europe, including minors and pregnant women. If they refuse, they face detention, expulsion and a potential five year EU-wide ban.

Asylum seekers and irregular migrants arriving in the EU are supposed to be fingerprinted in their country of arrival, and to have their details placed in the EU's Eurodac database. If the individual later comes into contact with the authorities elsewhere, the country responsible for them - their "country of arrival" - can then be identified. In the face of a growing number of people entering the EU, some countries are either unwilling or unable to meet the legal requirement for fingerprinting.

The document, outlining possible best practices for taking fingerprints deals with two situations in which people entering the EU are either irregular migrants, or asylum seekers.

In both cases throughout the document these groups are referred to as the 'data-subject', emphasising that whilst full respect of fundamental rights are mentioned, the focus is “more specifically of the right to data protection”. However, this is the only mention of data protection in the document itself.

Member States are reminded to:

- 1) Take fingerprints on land, immediately upon apprehension in connection with irregular crossing of the borders, in full compliance with the EURODAC Regulation
- 2) Take restrictive measures to prevent absconding in case migrants refuse fingerprinting, ensuring respect of fundamental rights
- 3) Inform migrants in a timely manner of their rights and obligations and consequences of noncompliance with rules on identification.

With these in mind, the document outlines a possible common approach to take to coercively take fingerprints.

The guidelines

For asylum seekers, the document routinely proposes the use of detention, as well making it clear that applying for asylum is only possible through obtaining fingerprints, and that it is considered beneficial for their applicant to do so:

*“The Member State should inform the data-subject of the obligation to be fingerprinted under EU law, and can explain to him/her that it is in his/her interests to **fully and immediately** cooperate and provide his/her fingerprints”*

(...)

“it can be explained to the data-subject that, if he/she applies for asylum in another Member State, according to the Dublin Regulation it is possible to use either fingerprints or other circumstantial evidence as a basis for effecting is/her transfer to the Member State that is responsible for his/her asylum application.”
(emphasis added throughout)

Asylum seekers will be told, according to this, that in order to facilitate their movement to the country they wish to travel to, that fingerprinting will not only be necessary, but an obligation if they wish to apply for asylum.

In addition to this, Member States are being advised to threaten asylum seekers who do not adhere to being fingerprinted that “their request for international protection may be subject to an accelerated and/or border procedure” if they do not.

A number of organisations such as the as UNHCR, the UN Refugee Agency, advises that “the use of accelerated and border procedures with reduced procedural safeguards should be limited” [2]

Indeed, the European Council of Refugees and Exiles states that extremely short time frames for decision-making in the context of accelerated asylum procedures, “are likely to effectively jeopardise a key objective of the recast Asylum Procedures Directive which is to ensure an adequate and complete examination being carried out and the applicant’s effective access to basic principles and guarantee” [3].

The guidelines themselves explain why accelerated procedures are less than desirable:

“the consequence of their asylum application being dealt with via such an accelerated and/or border procedure could be that the application, following an adequate and complete examination of its merits, may be considered as manifestly unfounded. Such a finding could, if provided for in the national law of the Member State and in line with EU and international law, result in a significant limitation of the rejected applicant’s right to remain on the territory pending an appeal against the rejection, and may result in him/her being returned before the appeal has been decided”

In addition to this, if the asylum seeker is returned, they could face a five year EU-wide entry ban. This is based on the assumption that Member States assess applications on similar grounds, and there is no variation between Member States in the decision to accept an application of asylum.

Entry bans, may be revoked in humanitarian circumstances which includes the right to claim asylum, however Border Guards at the point of entry must be foretold. Entry bans are also difficult to appeal and questions can be raised in relation to their proportionality. [4]

The document also explicitly addresses irregular migrants, defining as any 'data-subject' not applying for asylum who "continues to refuse to cooperate in being fingerprinted":

"Member States may consider, where other less coercive alternatives to detention cannot be applied effectively, detaining him/her according to the provisions of Article 15 of the Return Directive (2008/115)" [5]

Without getting cooperation for the initial identification process, the Commission understands that there may be not be a "realistic prospect" of return however, the document on best practice guides Member States to "consider, where other less coercive alternatives to detention cannot be applied effectively, resorting to detention under the terms of the Return Directive"

There are a number of guidelines which can be applied in either case for asylum seekers or irregular migrants. These focus on coercive measures for fingerprinting, as well as providing information on the rights of the migrant:

"Irrespective of whether or not it is decided to detain the data-subject, Member States should provide information and counselling to explain to the data-subject his/her rights and obligations (including the right to an effective remedy)" (...)

*"It is suggested that if the initial counselling does not succeed, the Member State may consider resorting, in full respect of the principle of proportionality and the EU Charter of Fundamental Rights, **to coercion as a last resort.**"*

Regardless of the situation of the migrant, and whether their rights have been received, the document continues to reiterate that the most important outcome is that fingerprints are taken:

*"If the data-subject still refuses to cooperate it is suggested that **officials trained in the proportionate use of coercion may apply the minimum level of coercion required**, while ensuring respect of the dignity and physical integrity of the data-subject, as specified in an approved procedure for taking fingerprints"*

In this instance, 'minimum level of coercion' is not detailed or explained. Nor is there any reference to 'an approved procedure for taking fingerprints'.

This applies also to pregnant women and children. The Commission does say that Member States 'may consider that it is never appropriate to use coercion to compel the fingerprinting of... minors or pregnant women' but then goes on to suggest that if this is the case then the most important course of action is to have a record of such coercion:

*"It is suggested that the use of coercion should always be recorded and that a record of the procedure be retained for as long as necessary in **order to enable the person concerned to legally challenge the actions of the authority**"*

This is on the basis that a legal aid is accessible to the migrant, and that there is time to process an appeal. If the 'data-subject' is going through accelerated procedures, this may not be a possibility.

Background

The document follows a series of secret discussions among the European Commission and Member States, after the October 2014 Justice and Home Affairs Council called for the "systematic identification" of asylum seekers and irregular migrants, to ensure that they can be dealt with by the authorities of their country of arrival, as required under the EU's 'Dublin' system [6]

European Commission requested a survey of Member States to find out "what law and practices exist in Member States in order to take fingerprints for transmission to the Eurodac database, both of asylum applicants and of irregular migrants." [7]

The results were summarised in September 2014, based on responses from 25 EU Member States and Norway, a Schengen Associated Country. As previously reported by Statewatch:

"A majority of Member States (18...) do not permit or require use of coercive measures to take fingerprinting of applicants for international protection (Eurodac category 1)...

...with regards to categories 2 and 3 of Eurodac data subjects: half of reporting Member States allow responsible authorities to use coercive measures, whilst the other half do not provide for this possibility." [8]

The Commission's European Agenda on Migration adopted 13 May 2015, highlighted the need to ensure that Member States comply with their legal obligation to take fingerprints under Article 4(1) and 8(1) of the Eurodac Regulation [9] to which the guidelines are intended to enforce.

In a response to the guidelines, Statewatch Director, Tony Bunyan has critiqued the document asking:

"Where is the EU going? Migrants, including pregnant women and minors, who have fled from war, persecution and poverty are to be forcibly finger-printed or held in detention until they acquiesce or are expelled and banned from re-entry. To add insult to injury the Commission deliberately withheld publication of the Guidelines yesterday to control news reporting when announcing its new migration plans." [10]

Footnotes

[1] <http://statewatch.org/news/2015/may/eu-com-guidelines-on-obligation-to-take-fingerprints-swd-150-15.pdf>

[2] <http://www.unhcr.org/4a9d12ef9.pdf><http://ecre.org/component/downloads/downloads/971.html>

[3] <http://ecre.org/component/downloads/downloads/971.html>

[4] http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_reentry_bans_and_readmission_agreements_final_december_2014.pdf

[5] Statewatch analysis of EU Returns Directive: <http://www.statewatch.org/analyses/eu-returns-analysis-mar-08.pdf>

[6] <http://statewatch.org/news/2014/oct/eu-council-migration-flows-13747-14.pdf>

[7] <http://www.statewatch.org/news/2015/feb/forced-fingerprinting.htm>

[8] <http://statewatch.org/news/2015/mar/eu-com-compulsory-fingerprinting-asylum-applicants-ms-responses-summary.pdf>

[9] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0603&from=EN>

[10] <http://www.statewatch.org/news/2015/may/eu-com-public-relations.pdf>

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