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van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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To Mr. Manfred WEBER
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Reference CM0717 I

Regarding Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals 2005-0167 (COD), COM(2005) 391

Date 10 December 2007

Dear Mr. WEBER,

The Standing Committee followed the legislative process concerning the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals [2005-0167 (COD), COM(2005) 391] with great interest.

Many important decisions shall still have to be made in the codecision procedure, balancing different approaches of the Council and the European Parliament. For this reason, the Standing Committee sends you a note on a number of core issues which may hopefully be helpful in the negotiations to come.

Yours sincerely,

Prof. dr. C.A. Groenendijk
Chairman

Prof. dr. P. Boeles
Executive secretary

Permanente commissie van deskundigen
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Note on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals 2005-0167 (COD), COM(2005) 391

The Standing Committee notes that the Council and the European Parliament emphasized quite different aspects of the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third country nationals. Judging from a perspective of the rights of the individual, both the Council and the Parliament can be said to have added ameliorations. However, both drafts also show lacunae and in some cases even deteriorations. As the two approaches must now merge into one common text in the process of co-decision, the Standing Committee would like to comment on a number of core issues. The draft proposal of the Commission will be referred to as "the original draft". The Council paper 13195/07 will be referred to as the "Council draft" . The draft resolution of the European Parliament A6-339/2007 FINAL will be referred to as the "EP draft".
In the opinion of the Standing Committee, the proposal for a Directive hinges upon two potentially contradictory goals: (1.) the provision of a set of common, or harmonized, rules on return, while simultaneously (2.) providing for a minimum set of procedural safeguards to illegally staying persons. The Standing Committee observes that in several aspects, the goal of setting common standards jeopardizes the possibility for Member States to introduce or retain more favourable provisions and questions the rationale for giving precedence to the goal of setting common rules.
The Standing Committee urges the Council and the European Parliament to avoid a mandatory character of decisions regarding return, (re)entry ban and detention and to secure the right to effective judicial remedies against decision on return, (re)entry ban and detention under all circumstances. Further, it should be borne in mind that coercive measures like detention and a (re)entry ban for illegal immigrants are highly intrusive measures, comparable with penal measures though they do not fall within the system of criminal law, restricting the liberty and freedom of movement of persons. Such measures should, accordingly, only be applied when strictly necessary and proportionate.

1. Relation to free movement of persons and the Community acquis relating to immigration and asylum

In all versions of the proposal, movement of persons under Title III EC Treaty receives a different treatment compared to movement of persons under Title IV EC Treaty . From a systematic point of view, two critical observations can be made.
Firstly, it is difficult to understand why minimum standards for expulsion should not apply to EU citizens. Article 63(3)(b) EC Treaty is about illegally staying persons" not about "illegally staying third-country nationals". Are EU-citizens not in need of minimum standards concerning detention in case of expulsion? It would be more consistent if the Directive (a) would be applicable to EU citizens as well and (b) would contain a general provision according to which the Directive is without prejudice to more favourable provisions regarding persons enjoying the Community right of free movement or persons to whom the Community acquis relating to immigration and asylum is applicable.
Secondly, when the Title IV acquis is at stake, it is precisely the task of the drafter of an expulsion directive to spell out in detail what the exact meaning is of more favourable minimum standards applying to asylum seekers, applicants for family reunification, blue card applicants. Leaving these vital questions for practice to be sorted out is poor legislation. After all, it would be utterly meager if the "normal" application of the directive would only refer to those exceptional categories of third-country nationals who are not able to invoke the Community acquis relating to immigration and asylum.
It should at least be added to the definition of "illegal stay" in Article 3(b), that this qualification does not extend to persons who are in a procedure concerning withdrawal of, or refusal to extend a residence right obtained under the Community acquis relating to immigration and asylum.
Further, it should be laid down in Article 14, that the mere circumstance that a person applying for protection under the Community acquis relating to immigration and asylum does not possess a travel document, a visa or financial means cannot provide sufficient justification for detention.

2. Mandatory decisions on (a) return, (b) (re)entry ban and (c) custody

a. return
Article 6(1) of the original draft stated in general terms that Member States "shall" issue a return decision to any third-country national staying illegally on their territory. Both the Council and the Parliament have mitigated the obligation to issue a return decision, by formulating a number of exceptions.
The Standing Committee is of the opinion that these exceptions are not sufficient to prevent the obligation under Community law to issue a return decision violating rights granted under the Community acquis relating to immigration and asylum, especially when principles of community law are taken into account. Examples are the case of a mandatory refusal of a residence permit to an asylum seeker under Article 12 or Article 17 of Directive 2004/83 (Qualification Directive) while his expulsion is not allowed under Article 3 ECHR and thus a violation of the Community law principle of non-refoulement , or, when the expulsion of a child would be an infringement of the Community law principle of respect for family life . Whereas it is difficult to foresee in what circumstances such a conflict may arise, it would be preferable to skip the obligatory character of a return decision, and to replace the word "shall" by "may"
Article 6(4) of the original draft would have been beneficial for avoiding situations as described above. In the opinion of the Standing Committee it would be a confusing instruction to oblige the authorities of the Member States, on one hand, to issue a return decision under circumstances described in concrete terms, and to oblige them, on the other hand, not to do so if other obligations, described in abstract terms, would stand in the way. Article 6(4) has been deleted in he Council

draft, and in the EP draft Article 6(4) has been rephrased in such a way that the original meaning disappeared. The Standing Committee strongly advises to return to the original draft of Article 6(4).

b. (re)entry ban
Similar objections can be made with regard to the mandatory character of a (re)entry ban under Article 9. In the Council draft, the mandatory character of the original Article 9 has been subjected to the condition of an individual assessment of the case. In the EP draft, the word “shall” has simply be replaced by “may”. By obliging the Member States to make an individual assessment, the Council has introduced a discretionary element. Nevertheless, the Committee is of the opinion that the need to make an individual assessment is best clarified by just using the word “may”.

c. detention
The Original draft and the Council draft prescribe in Article 14(1) that the Member States shall keep in detention a third-country national under a number of conditions. The EP draft changed “shall” into “may”.
The Standing Committee supports the EP draft, and is of the opinion that a legal obligation to deprive a person of his liberty if a number of conditions is fulfilled is irreconcilable with Article 5 ECHR, presuming the right to liberty for everyone and allowing deprivation of liberty only “in accordance with a procedure prescribed by law”. Essential is that all personal circumstances are taken into account in an individual assessment. Any legislation preventing the competent authorities from such an individual assessment creates the risk of arbitrary detention.
In the *Mubilanzila Mayeka* case , the European Court of Human Rights prescribed that there must be a sufficient “quality” of the legal rules applicable to the persons deprived of their liberty. “Quality in this sense implies that a national law authorising deprivation of liberty must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness”. The law must sufficiently protect the right to liberty, and there must be adequate rules in case of vulnerability of the person detained.

3. Duration of (re)entry ban

The Standing Committee strongly supports the EP amendments according to which a (re)entry ban is only allowed after the threat to public order (etcetera) has been proven (EP draft, amendment 39), and according to which a (re)entry ban may be withdrawn at any time (EP draft, amendment 40, see also amendment 43).
A lacuna in Article 9(2) in the original draft and the EP draft, referring to the circumstances that must be taken into account with regard to the length of the (re)entry ban, is that only reasons of public policy or public security are mentioned. The Standing Committee considers it important that an explicit referral to Article 5 (family relations and best interest of the child) be made . The Committee supports the amendment of Article 5 in the Council draft, and amendment 23 of the EP draft, adding non-refoulement to the principles to be taken into account.
The explicit provision restricting the maximum duration to - normally - five years, which is laid down in all drafts as yet, should not be replaced, like one Member State suggested, into a lifelong ban as a principle which could be shortened. Such an approach would be in conflict with the right to free movement referred to in Article 61(a) EC Treaty and it would infringe on the right to free movement secured by the ECHR. In the cases of *Riener v. Bulgaria* (ECtHR 23 May 2006, 46343/99) and *Iletmiş v Turkey* ECtHR 6 December 2005, 29871/96 the European Court of Human Rights acknowledged a “right to free movement” under the ECHR . The principle of proportionality, recognised in preambles 9 and 11 of the original draft, would be violated if the right to free movement could be restricted, as a rule, by a (re)entry ban for the rest of someone’s life.

4. Duration of detention

Under the original draft, temporary custody may be extended by judicial authorities to a maximum of 6 months. According to the Council draft, Member States may extend the duration of detention for an unspecified period “in cases where regardless of all their reasonable efforts the removal operation is likely to last longer due to a lack of cooperation by the third country national concerned or due to delays in obtaining necessary documentation from third countries”. The EP draft (amendment 60) shortens the “normal” maximum duration to 3 months, but provides for extension up to 18 months in similar cases as described in the Council draft, and, in addition, “if the person concerned represents a proven threat to public order, public security or national security”. Further, the EP draft (amendment 61) states that “temporary custody shall cease in the event of removal becoming impossible. This paragraph shall not apply to convicted criminals”.
The Standing Committee underlines that detention is one of the most far-reaching measures of law enforcement conceivable. Detention not as a penal measure, but just for facilitating removal, can therefore only be justified for a strictly limited period. This period should not be extended because of factors which are normal to many removals and are beyond the control of the individual person concerned: lack of cooperation of a third country. Extended detention may not be used as a quasi-criminal punishment for non-cooperation. This is the more so if extended detention might last for one year (EP-draft) or even for an indefinite period (Council draft). Such prolonged administrative detention for reasons beyond the control of the individual concerned may be in violation not only of Article 5 but also of Article 3 ECHR.
Extended detention, just for reasons of public order, public security or national security (EP draft, amendment 60) or for “convicted criminals” (EP draft, amendment 61) confuses the distinction between penal sanctions and measures of law

enforcement. If a convicted criminal has served his punishment, he or she should not be liable for further imprisonment on a quasi-criminal law basis.

5. (In)compatibility of a residence right in one Member State and a return decision / (re)entry ban issued by another Member State

None of the drafts is very clear in solving the problems caused when a return decision or (re)entry ban issued by one Member State coincides with a residence right issued by another Member State. In essence, a principle of mutual recognition of expulsion measures is confronted with a principle of mutual recognition of residence rights.
In Article 16 (d) of the Original draft and in Article 9(5) of the Council draft, an arrangement is proposed analogous to Article 25 of the Schengen Implementing Convention (SIC). Where a Member State considers issuing a residence permit or another authorization offering a right to stay to a third-country national who is subject of an entry ban issued by another Member State, it shall first consult the Member State issuing the entry ban and shall take account of its interests in accordance with Article 25 SIC. On the other hand, both the Council draft (article 6(2)) and the EP draft (article 61a) consider that a return decision should not be made in relation to third-country nationals who have a valid residence permit or other authorization offering a right to stay in another Member State. According to the Standing Committee, the proposed provisions fail to lay down a clear system.
The principle should be unequivocally laid down in the Directive that an entry ban (which bars entry to the whole Schengen territory) is irreconcilable with a right to legal residence in one of the Schengen States (which gives a circulation right within the Schengen territories). Either the residence right or the entry ban must be terminated, or limited to the Member State issuing the entry ban.
Further, national courts of one of the concerned Member States must be competent to eventually decide whether the return decision / (re)entry ban issued by one Member State or the residence right issued by another Member State should prevail. Though it is certainly useful that Member States consult each other, no right for the person concerned is foreseen in the present versions of the Directive. This person must have a right to initiate a legal process of balancing his interests against the interests of one or more of the Member States concerned.

6. Refusal of entry, transit zone, detention of asylum seekers

According to the Original draft, Article 2(2), Member States may decide not to apply the Directive who have been refused entry in a transit zone. In the Council draft, this option is reformulated: Member States may decide not to apply the Directive to third country nationals who are subject to a refusal of entry, in accordance with Article 13 of the Schengen Borders Code. From a systematic point of view, the Council amendment is preferable as it clearly and simply refers to the applicable regulation. However, the EP draft is right in adding that the refusal must also be in accordance with Article 35 of the Procedures Directive.
According to the system of the present proposal, Member States may choose to apply the Return Directive to the situation of asylum seekers who are denied entry, or they may use their option not to do so, provided that the treatment and the level of protection of such third country nationals is not less favourable than set out in Articles 8, 10, 13 and 15. The Standing Committee is of the opinion that a reference to Article 12 (legal remedy) should be added in Article 2(2).

7. Risk of absconding

In an individual assessment of the necessity of detention, a full appreciation of all relevant facts is necessary. Therefore, the Standing Committee subscribes the EP amendment 19, adding a new Article 3 point g a, according to which the risk of absconding shall not be automatically deduced from the mere fact that a third country national is illegally resident on the territory of a Member State.
In contrast, the Council amendment, introducing an article 3 point h, giving concrete examples of situations in which a risk of absconding may be assumed, should be rejected, because the assessment of a risk of absconding cannot be based on legal assumptions but must take into account all circumstances of each individual case.

8. Remedies

Legal remedies should be available against all measures restricting a person's liberty. The Standing Committee strongly supports the EP amendment 51, extending the right to a legal remedy to temporary custody and (re)entry ban.
Further, it is vital that remedies are available before a judicial authority. As yet, this is secured in all drafts, but some Member States have entered reservations on that issue, because their legislation provides for administrative appeals too. According to Article 5(4) ECHR judicial control is required. The Community principle of effective judicial remedies also assumes judicial control.

Final remarks

In sum, the Standing Committee urges the Council and the European Parliament to avoid a mandatory character of decisions regarding return, (re)entry ban and detention and to secure the right to effective judicial remedies against

decision on return, (re)entry ban and detention under all circumstances. In all cases a thorough individual assessment is necessary.
Third country nationals invoking or having a residence right under the Community acquis relating to immigration and asylum must have a specific protection against removal and detention.
The duration of a (re)entry ban and the duration of detention must be limited to a clear maximum. A (re)entry ban and detention, both extremely intrusive and coercive measures, must be lifted as soon as the justification for their application ceases to exist.