



Statewatch Supplementary Analysis: The EU's Returns Directive

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Introduction

A previous Statewatch analysis of this proposed Directive was released in January 2008. That analysis pointed out that the Commission's proposal on this issue had been dramatically watered down by the Council. However, this proposal is subject to the 'co-decision' procedure, and so therefore must be jointly agreed between the EP and the Council. While the European Parliament's (EP's) proposed amendments to the Directive, which had been approved by an EP committee in 2007, maintained and in many respects improved the Commission's original proposal, on one particular point the EP's position was highly objectionable - the proposed possibility to detain irregular migrants for up to 18 months. In any case, the Council had not, at the time of the January 2008 Statewatch analysis, made any substantive concessions toward the EP's position.

Since the January 2008 analysis, discussions have continued between the EP and the Council, and within the Council, on the text of this Directive. In a February 2008 version of the Directive, the Council text contained number of substantive changes to the Directive as compared to the text (dating from December 2007) which was the subject of the January Statewatch analysis. Most of these changes amount to concessions to the EP. However, the Council and EP positions remain some distance apart. A later version of the Council text, dating from March 2008, makes only one further significant concession to the EP. Otherwise the Council's position is apparently hardening, with many reservations by Member States now removed (except on the difficult issues of re-entry bans and detention) and some more restrictive amendments to the text in the March version.

The following analysis supplements the January 2008 analysis (to which it refers) in order to assess whether and to what extent, at present, the Council's version of the Directive now satisfies the minimum standards of proportionality, fairness and humanity that should apply to EU immigration and asylum law.

Summary of changes

As compared to the December 2007 Council version of the Directive, which was discussed at length in the January 2008 analysis, the February 2008 version of the

Directive makes the following substantive changes (the most important changes are marked with an asterisk):

- a) *Article 2(2)(a): the scope as regards persons who have entered irregularly has been altered, apparently to widen the (optional) exclusion of such persons from the Directive; this is a departure from the EP position;
- b) Article 3(h): the definition of ‘risk of absconding’ has been changed, and expressly takes on board aspects of the EP’s position;
- c) Article 3(j): the definition of ‘vulnerable persons’ drops the requirement to examine the individual situation; this reflects the EP’s position;
- d) *Article 4(4): this new clause requires Member States to apply certain provisions of the Directive to persons who have entered irregularly, and who would otherwise be excluded from the Directive; this is a move toward the EP’s position;
- e) *Article 5: this clause is reinserted; it is an underlying human rights safeguard which provides for Member States to take account of issues such as the best interests of the child and family life when applying the Directive; this is an important point for the EP but the EP version of Article 5 goes much further to restrict expulsions on such grounds;
- f) Article 6(2): the rules on readmission to other Member States have been altered;
- g) Article 6(3): there is an option to suspend the return decision rather than withdraw it if a Member State allows the person concerned to stay; and either suspension or withdrawal will only take effect for the duration of the right of stay;
- h) Article 6(4): where an application to renew a residence permit is pending, Member States ‘shall consider’ (rather than ‘may’) refrain from issuing a return decision;
- i) Article 6(5): it is provided that if a Member State issues a return decision and removal order at the same time, then the safeguards in the Directive will nonetheless apply;
- j) *Article 6a(1): a minimum period for voluntary departure is added; this is referred to as a concession to the EP, although the report approved by the EP committee does not contain such a provision;
- k) Article 6a(2): a non-exhaustive list of examples as to why the deadline to leave might be extended has been added;
- l) *Article 6a(4): the possible exceptions to the obligation to allow a period for voluntary departure have been extended, but then again the exceptions are now optional, rather than mandatory;
- m) *Article 8(1): there are new grounds for mandatory postponement of removal;
- n) *Article 8(2): there is a shorter list of (optional) grounds for postponement of removal, although stronger wording here (Member States ‘shall in particular take into account’);
- o) *Article 8a: this new clause contains new substantive criteria regarding the removal of unaccompanied minors;
- p) *Article 9(1): the re-entry ban is made mandatory in fewer cases; this is described as a compromise between the EP’s position (an optional ban) and a wider mandatory ban;
- q) *Article 9(3): a mandatory exception to the re-entry ban, subject to certain conditions, is added for victims of human trafficking who cooperate with the judicial authorities; the option of ‘refraining’ from issuing an entry ban in other cases is at this point dropped, although Member States may still withdraw or suspend bans which have been issued; the express reference to

- possible suspension of a ban in reward for cooperation with other investigations is dropped, although at this point Member States still have an option to suspend or withdraw ban in such cases as they are covered by the general authority to suspend or withdraw bans in ‘other’ cases;
- r) Article 9(5): a reference to the refugee qualification Directive has been added as regards the definition of ‘international protection’; this clause also takes precedence over Article 9(4);
 - s) *Article 11(2): the right to information has been broadened, expressly by reference to the EP’s position;
 - t) *Article 11(3): the exception to the obligation to give information to individual persons in certain cases (because a standard form is to be issued instead) is no longer also an exception to the right to a remedy (see Article 13a in the December draft; but note that the standard form has not been amended on this point); however, this exception is no longer optional; also the provision is broader in scope because a condition previously attached to it has been removed;
 - u) Article 12(1): the provision regarding appeal or review of decisions is clarified, by reference to the EP position;
 - v) Article 12(2): this paragraph is amended simply to reflect the fact that automatic suspensive effect of an appeal might already exist in some Member States;
 - w) *Article 12(4): the right to legal aid has been strengthened, by reference to the EP’s position;
 - x) *Article 13: the minimum standards for persons subject to expulsion proceedings are now ‘without prejudice’ to the rules on detention; this lowers the standard of protection;
 - y) *Article 13(1): the guarantee of emergency health care is narrower than in the previous version, which referred to ‘necessary’ health care ‘including’ emergency care;
 - z) *Article 14(1): the basic rules on the grounds for detention are amended significantly, in some part by reference to the EP’s position; the requirement of ‘necessity’ is dropped; three conditions have been added; and detention is limited to two grounds;
 - aa) *Article 14(2): detailed rules on the review of detention have been added, by reference to the EP’s position;
 - bb) *Article 14(3): a review of prolonged periods of detention ‘shall’ (previously ‘should’) be carried out;
 - cc) *Article 14(5): the maximum period of detention is 18 months (the EP’s position), rather than an indefinite period;
 - dd) Article 14(6): it is expressly stated, by reference to the EP’s position, that a person must be released if detention is no longer justified;
 - ee) *Article 15(1): migrants ‘shall’ (previously ‘should’) be detained separately from other prisoners;
 - ff) Article 15(2): there is a shorter list of persons or groups which a detainee has a right to contact;
 - gg) *Article 15(3): a right to emergency health care for detainees has been added, by reference to the EP’s position;
 - hh) Article 15(4): specific organisations are no longer mentioned as regards the right to inspect detention;
 - ii) *Article 15(5): a right to information for prisoners is added, by reference to the EP’s position; and
 - jj) *Article 15a: detailed rules on imprisoning children have been added; this new clause is virtually identical to the EP amendment on this point.

As for the March 2008 version, the following changes are made compared to the February 2008 version (again, the most important changes are marked with an asterisk):

- a) *preamble: a new recital 10a states that it is up to Member States as to whether the right to an appeal or review will entail an examination of the merits of the decision;
- b) Article 6(2a): this new Article provides that Member States may refrain from issuing a return decision if another Member State takes back the person concerned; but the latter Member State must then issue a return decision;
- c) Article 6a(1): a new sub-paragraph states (rather self-evidently) that persons can always leave earlier than the deadline set for their voluntary departure;
- d) *Article 6a(4): the exceptions to the obligation to permit a period for voluntary departure are revised to specify that an exception may apply if an application for a right to stay is *unfounded* (previously this read, '*manifestly unfounded*');
- e) *Article 9(3): the optional possibility to withdraw or suspend a re-entry ban for 'other' reasons than the specific reasons listed in this paragraph has been dropped; it is specified again that Member States may refrain from issuing (as well as withdraw or suspend, as in February text) a re-entry ban in humanitarian cases; and Member States 'shall consider withdrawing or suspending' (this had read 'may withdraw or suspend') a re-entry ban in the event of compliance with a return decision;
- f) *Article 13(1): it is made expressly clear that the minimum standards do not apply to detainees;
- g) *Article 14(1): detention of irregular migrants is now *optional*, not mandatory; but the two listed grounds for detention are made non-exhaustive;
- h) *Article 14(2): review of detention need only be done 'speedily', rather than within five days; and
- i) Article 15(4): it is specified that the bodies which might visit detention facilities must be 'competent'.

Analysis

It is useful to compare the February and March versions of the text with the long list of issues where the EP and the Council had different views, as listed in the January Statewatch analysis.

Taking these points in turn:

- a) the Council has an even wider scope of exclusion from the scope of the Directive (move away from EP), although some safeguards would apply to the main group of excluded persons (move toward EP);
- b) there is no real move toward the EP position on the definition of the country of 'return';
- c) there is no move toward the EP's desired safeguard that persons should not be detained just because they are irregular migrants;
- d) the general human rights safeguard has been reinserted, a concession toward the EP position, but the substantive protection which the EP seeks for the groups covered by the safeguard has not been conceded;
- e) there is a slight move toward more mandatory protection against return decisions;

- f) there is a compromise offered as regards the EP's position on mandatory grounds for postponement of removal, going some way toward the EP position;
- g) there is another compromise offered as regards the EP's position against mandatory re-entry bans, cutting down the scope of mandatory bans; this offer has however been undercut by the March version of the text, which limits the scope of the obligation to permit a voluntary departure (which means that there is a wider obligation to impose a mandatory re-entry ban) and also limits Member States' optional ability to withdraw or suspend bans (these changes are more important than the concessions toward the EP position which are simultaneously made in the March text);
- h) there is no movement toward the EP position as regards standards when persons are returned by force;
- i) the rules on information for individuals have been improved in light of the EP's position;
- j) there is some movement toward the EP position on remedies, particularly as regards legal aid and guaranteeing the basic rights to remedy in all cases; however, there is still no right to a judicial remedy in all cases;
- k) there is movement away from the EP position as regards the treatment of persons pending their expulsion, as regards the removal of detainees from the rules;
- l) the Council has made considerable movement toward the EP position as regards detention, in particular as regards grounds for detention, time limits, judicial review and the right to information, and (in the March text) the non-mandatory nature of detention (although the grounds for detention are now non-exhaustive and the provisions on speedy judicial review have been weakened); and
- m) as regards detention conditions, there is a move towards the EP position as regards health care and an adoption of the EP position as regards the treatment of children.

Conclusions

On the whole, the EP has secured improvements to text, as regards the protection of excluded groups, a minimum period for voluntary departure, the postponement of removal, the removal of unaccompanied minors, limiting the scope of the mandatory re-entry ban, exceptions to the re-entry ban, the scope of the right to a remedy, information on return decisions, the right to legal aid, the grounds for detention, the non-mandatory nature of detention, the review of detention, detention conditions and the detention of children. However, the gains regarding exceptions to the re-entry ban, the grounds for detention and the review of detention were all undercut by the March version of the Council text.

Despite these improvements, the text is still too weak as regards (obviously) the maximum time limit for detention (where the EP and the Council are jointly responsible for the unjustifiable 18-month limit). It is also still too weak as regards substantive safeguards against expulsion, the scope of the Directive, the rules on mandatory postponement of expulsions, the rules on mandatory re-entry bans (including the threshold for bans lasting over five years, where there has been no change in the Council position), the non-exhaustive grounds for limiting information to be given to persons to be expelled, the lack of automatic suspensive effect of appeals, and the grounds for and review of detention. Many of the provisions of the Council text, for the reasons pointed out in the January Statewatch analysis, would potentially violate human rights standards.

It is striking that while the February version of the Council text makes a significant number of concessions to the EP, the March version makes only one further concession (as regards non-mandatory detention), and on the whole the March version is more restrictive than the February text. Put bluntly, the discussions are heading in the wrong direction at the moment.

It remains to be seen whether MEPs will accept this, or can muster the political will to demand further changes to ensure that minimum standards of proportionality, fairness and humanity are satisfied - which must include a reversal of the EP's position approving an 18-month time limit for detention. Even more problematically, it remains to be seen whether the Council, in light of the thrust of the amendments in the March text, would in any case accept any further significant amendments at the EP's behest. The EP and the Council have to decide whether their endlessly-repeated support for the principles of fairness, human rights and human dignity is a genuine commitment, or simply empty rhetoric.

Sources

January 2008 Statewatch analysis of returns Directive:

<http://www.statewatch.org/analyses/eu-ret-dir-sp.pdf>

Council doc. 6541/08 Add 1 (Feb. 2008 version):

<http://www.statewatch.org/news/2008/mar/eu-returns-dir-6541-add1-08.pdf>

Council doc. 7774/08 (March 2008 version)

<http://www.statewatch.org/news/2008/mar/eu-returns-dir-7774-08.pdf>

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