



(Directive 2008/115/EC
on “common standards and
procedures in Member States
for returning illegally staying
third-country nationals”)

PICUM POSITION PAPER ON EU RETURN DIRECTIVE

APRIL 2015

 **PICUM**

PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of more than 160 organisations and 190 individual advocates working with undocumented migrants in 38 countries, primarily in Europe as well as in other world regions, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With over ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

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COVER PHOTO: Decorated fence of the detention centre 127bis in Steenokkerzeel, Belgium during the annual 'Steenrock' festival in April 2014 which protests against immigration detention conditions. With the slogan 'Make Music, not Immigration Detention Centres', the protest gathers migrant rights' supporters who play music in front of the detention centre to show their solidarity with the detained migrants and provide visitors of the festival with information on migration policies and detention.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
1. THE RETURN DIRECTIVE: A CRITICAL OVERVIEW	4
2. ENSURING PROCEDURAL SAFEGUARDS AND NON-ARBITRARINESS OF DETENTION (Articles 15-16).....	8
3. DETENTION IS NEVER IN THE CHILD’S BEST INTERESTS (Article 17).....	17
4. ENSURING ACCESS TO JUSTICE AND REMEDIES TO CHALLENGE THE RETURN DECISION AND THE DETENTION ORDER (Articles 12-14).....	21
CONCLUSIONS	25
RECOMMENDATIONS.....	28

EXECUTIVE SUMMARY

Procedures to return undocumented migrants to their countries of origin have been of great concern to PICUM and its members in recent years. Conditions of migrants in detention, including the detention of children and their families, violence and violations of the principle of non-refoulement during removal procedures, as well as a lack of access to justice and redress mechanisms are numerous examples of human rights violations migrants face in the process of return.

This position paper stresses the importance of ensuring compliance with fundamental rights in migration control mechanisms and, based on experiences in various member states, highlights a number of shortcomings in several national practices, including systematic and prolonged detention, the detention of children and their families, the lack of effectiveness of return policies and human rights violations in the context of removal procedures.

Standards and procedures applicable to persons subject to a return decision are currently regulated by the EU Return Directive, adopted by the European Union in 2008. The Return directive sets common standards and procedures for returning migrants residing irregularly on the territory of the European Union. The directive also requires EU Member States to issue a return decision to undocumented migrants, unless their status is regularised.

Although the directive formally refers to the need to uphold fundamental rights in the process of returning migrants to their countries of origin, shortcomings and different interpretations in its implementation at national level are negatively impacting migrants' human rights.

The Return Directive envisages detention as a measure of last resort, only applicable when there is a risk of absconding, and when it is not possible to apply alternative measures. The directive also establishes that the maximum limit of detention shall be for six months, which may be exceptionally extended to a maximum time period of 18 months. Detention of migrants has largely become a systematic part of migration management across the European Union: in the process of transposing the Return Directive to their national legislation, eleven Member States applied the maximum time limit of detention of 18 months and ten Member States extended the maximum legal time limits of detention in comparison with legislation in place before the transposition of the Return Directive.

In relation to systematic and prolonged detention, recent legal developments in Greece and in Italy illustrate different approaches adopted by national legislators when considering the use of detention as a tool for migration management.

In Greece, detention is allowed for virtually undetermined periods, beyond the maximum length of 18 months as established within the Return Directive. The national legislator is currently attempting to use detention as a deterrent for irregular migration, although evidence collected by researchers on the ground indicates that detention does not deter irregular migration, nor does it contribute to an increased effectiveness in removal procedures.

Italy shows an opposite development: legal time limits for detention were recently reduced from a maximum of 18 months to a maximum of 90 days. The decision appears to be based on evidence provided at national level which shows the high costs and low effectiveness of lengthy detention as a tool for migration management.

In relation to the detention of children, the Return Directive stipulates that children should only be detained as a measure of last resort and for the shortest appropriate period of time. Nonetheless, 17 EU member states reportedly detain unaccompanied children and 19 member states detain families with children. By allowing detention of children as a measure of last resort, the Return Directive breaches the principles of the UN Convention on the Rights of the Child, by failing to recognise that detention of

a child because of their or their parent's migration status always constitutes a child rights violation. The UN Committee on the Rights of the Child and the Council of Europe have both recently clarified that children should never be detained for immigration purposes and detention can never be justified as in a child's best interests.

The Return Directive also establishes procedural safeguards aimed at ensuring migrants' human rights in the process of return. For example, the directive provides that return decisions and re-entry bans shall be clearly motivated in law and in fact and should be issued in writing. However, research carried out in Italy in 2014 shows that return and detention decisions are often motivated only through standard formulas and that, in some cases, a motivation is completely lacking.

Based on the impacts on undocumented migrants of the provisions established within the Return Directive as identified by PICUM members, this position paper aims at informing the debate on possible further development of the EU return policy by providing concrete policy recommendations concerning the situation faced by undocumented migrants within the return process.

1. THE RETURN DIRECTIVE: A CRITICAL OVERVIEW

Directive 2008/115/EC on “*common standards and procedures in Member States for returning illegally staying third-country nationals*” was adopted by the European Union in December 2008.¹ The Directive sets out common standards and procedures for returning migrants residing irregularly on the territory of the European Union, in accordance with “*fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations*” (Art. 1).

Despite formally referring in Article 1 to the need of upholding fundamental rights in the process of returning migrants, the directive fails to establish a principled policy on return which fully respects migrants’ dignity and human rights. In addition, the references to human rights in the text are vague and mostly limited to the introduction.

In the European Union, migration management remains mostly a competence of the member states, as it is still considered an issue of national sovereignty and often approached from a security perspective. Although harmonization of rules at EU level has been progressing over the past years, progress towards a common policy towards regular channels for migration and migration management is still needed. In the absence of a comprehensive policy governing the admission of migrants and migration management at European level, the European Union, with the adoption of the Return Directive, has nonetheless tried to agree on “*common standards and procedures*” for returning those residing irregularly in the territory of Member States. Although their efficiency has not been proven in the context of ensuring effective removal, coercive and punitive measures established within the Return Directive, such as prolonged pre-removal detention and re-entry bans, have now become common tools systematically used by Member States for management of migration and return.

- 1 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on “*common standards and procedures in Member States for returning illegally staying third-country nationals*”, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:pdf>. Ireland and the United Kingdom are not taking part in the adoption of the Return Directive and are therefore not bound by it in its entirety or subject to its application. See: Recital 26, Directive 2008/115/EC.
- 2 The obligation for member states not to exceed the maximum duration of 18 months was clearly underlined by the Court of Justice in the Kadzoev judgment of 30 November 2009, Case C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov) v. Bulgaria, available at: http://ec.europa.eu/dgs/legal_service/arrets/09c357_en.pdf. In the decision, the Court intervened concerning the conditions of detention under article 15 of the Return Directive. The Court first specified that to calculate whether the maximum duration of detention laid down in Directive 2008/115/EC has been exceeded, it is necessary to calculate any period of detention carried out before the Return Directive was applied. Furthermore, the decision underlines that being a threat to public order or public safety cannot be invoked as a ground to detain a person under the Return Directive if the 18-month period has expired.

The following issues are some critical aspects of the Return Directive:

1.1 Systematic administrative detention for the purpose of removal

One of the most debated aspects of the Return Directive concerns the detention of third-country nationals under repatriation order. It is to be noted that, with the provisions introduced by the Return Directive, in particular the measure imposing a time limit to detention of 6 months, which may be extended exceptionally to maximum 18 months², the detention of migrants has largely become a systematic part of migration management across EU Member States.

As part of the implementation of the legal measures provided within the Directive, 11 Member States³ have applied the maximum time limit of detention of 18 months and ten Member States⁴ have extended the maximum legal time limits of detention. As a case in point, in France, the maximum length of detention of 32 days as of Law No. 2003-1119 of 26 November 2003, was increased to a maximum of 45 days as a consequence of the transposition of the Return

Directive on 16 June 2011.⁵ Migration detention in France is now “[...] limited to the time strictly necessary to organise the removal and, except in some cases, cannot exceed 45 days”.⁶ The Italian Government also initially extended the maximum time limit for detention by twelve months but the new law approved in October 2014 now provides a maximum limit of detention of 90 days.⁷

The Directive establishes that detention for the purpose of removal shall only be used if other sufficient but less coercive measures cannot be applied effectively in a specific case, particularly when there is a risk of absconding, or the person concerned avoids or hampers the preparation of return or the removal process.

According to the Directive, detention shall only be ordered by administrative or judicial authorities, in writing, with reasons being given in fact and in law, and must be subject to speedy judicial review upon request. In case of unlawful detention or when no reasonable prospect of removal exists, the third-country national concerned shall be released immediately (**Art. 15**). The EU Court of Justice has clarified that the administrative detention period must be limited solely to instances where migrants are awaiting repatriation.⁸

3 Cyprus, Czech Republic, Denmark, Estonia, Germany, Italy, Lithuania, Malta, Netherlands, Romania and Slovakia. See: European Commission Communication on EU Return Policy, 28 March 2014, COM(2014) 199, p. 17, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

4 France, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal, Slovakia and Spain. See: European Commission Communication on EU Return Policy, 28 March 2014, COM(2014) 199, p. 17, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

5 Law 2011-672 of June 16, 2011, on Immigration, Integration and Nationality, published in the country's official gazette on June 17, 2011 (Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité).

6 See: Service Public, « *Rétention administrative d'un étranger en instance d'éloignement* », available at: <http://vosdroits.service-public.fr/particuliers/F2780.xhtml>. In France, the average length of detention has been 11.2 days since this law was enacted, and 9.7 days over the whole year 2011. However, this lengthening of the waiting period has not ensured efficacy, nor has it helped improve the conditions of recognition of his nationality by consular authorities. Individuals who could not be identified within 32 days have not been better identified since the law of 2011; consulates have simply extended the deadline for submitting their replies to let the French administration know if the migrant is of their nationality. See: Point of No Return, “*The Futile Detention of Unreturnable Migrants, Factsheet The Detention of Migrants in France*”, January 2014, available at: http://pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_FR_HR.pdf.

7 Law 30 ottobre 2014, n. 161, “*Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013-bis*”, (14G00174) (GU Serie Generale n.261 del 10-11-2014 - Suppl. Ordinario n. 83), available at: <http://www.gazzettaufficiale.it/eli/id/2014/11/10/14G00174/sg>. For more information see Chapter II.

8 See above: Case C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov) v. Bulgaria.

However, the extension of the detention period in a number of member states leads to increasing difficulties for migrants in the detention facilities waiting to be deported. The Court of Justice also clarified that criminal sanctions for non-compliance of a repatriation order following a period for voluntary departure may not be applied by Member States, as the sanction –including detention- may jeopardise the achievement of the objectives pursued by the directive, depriving it of its effectiveness.⁹

In principle, the safeguards set out in Article 15 aim at limiting systematic detention as a tool for migration management. However, the vague formulation of the specific grounds under which detention could be justified, such as the “risk of absconding”, leaves wide margins for interpretation, making the requirement “*unless other sufficient but less coercive measures can be applied effectively in a specific case*” redundant.

1.2 Safeguards against arbitrary detention: legal justification

Issues to be highlighted in relation to detention concern the lack of mandatory legal assistance and the duration and conditions of detention. The Directive provides that detention shall take place as a rule in specialised detention facilities. Third-country nationals in detention shall be allowed timely contact with their legal representatives, family members and competent consular authorities, and particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided (**Art. 16**).

Although the directive stipulates that detention shall be ordered by legal or administrative authorities with appropriate motivation in fact and in law, detention orders and judicial validations of the arrest often lack a specific motivation and fail to take into account the individual circumstances and potential protection needs or vulnerability factors of the migrant involved.

1.3 Detention of children and their families

The directive further provides that a particular limit has to be established in relation to the detention of children and families, who should only be detained as a measure of last resort and for the shortest appropriate period of time. The directive establishes that the best interests of the child shall be a primary consideration in the context of the detention of children pending removal (**Art. 17**).

However, by allowing detention of children as a measure of last resort, the Return Directive breaches the principles of the UN Convention on the Rights of the Child, by failing to recognise that detention of a child because of their or their parent’s migration status always constitutes a child rights violation and contravenes the principle of the best interests of the child.

9 See: Court of Justice of the European Union, Case C-61/11, *Hassen El Dridi, alias Karim Soufi*, 28 April 2011, available at: <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=82038&occ=first&dir=&cid=81346>. See also: Court of Justice of the European Union, Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, 6 December 2011, available at: <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=115941&occ=first&dir=&cid=81422>.

1.4 Re-entry bans and criminalisation of migration

Another highly criticised element of the Return Directive is the EU-wide re-entry ban imposed on all undocumented migrants who have undergone a forced return procedure. According to the directive, the length of the re-entry ban should be determined with due regard to all the relevant circumstances of each individual case and should not, in principle, exceed five years - unless the third-country national represents a serious threat to public or national security. Moreover, member states should consider withdrawing or suspending the ban in cases where a third-country national can demonstrate that he or she has left the territory of a member state in full compliance with a return decision (**Art. 11**).

However, imposing lengthy re-entry bans on migrants who have been subject to forced removals in the past consists of an undeniably punitive measure and contributes to a logic of criminalisation of migration. Bans on return accomplish deterrence and retributive goals and cannot be justified in remedial terms. The imposition of re-entry bans should therefore always be subject to proportionality reviews on an individual basis. The right to appeal against the imposition of a re-entry ban should always be granted. Bans on lawful return may violate case-by-case proportionality, as they raise an issue of gross disproportionality with the rights to private and family life and function as an administrative sentence that in many cases could bear radically greater effects than a criminal sentence that was or could have been imposed.

1.5 Procedural safeguards and possibility to challenge the removal and detention orders

The Return Directive provides a number of procedural safeguards which are defined in paragraph 11 of the preamble: "We need to establish common minimum legal safeguards on decisions related to return, for the effective protection of the interests of the persons concerned". However, in the case of a return decision, procedural safeguards are limited in practice. The directive establishes that return decisions, decisions banning re-entry and decisions to repatriate must be issued in writing, have to be motivated in fact and law and must provide information about the availability of legal assistance (**Art. 12**).

In line with the Return Directive, migrants should be granted language assistance and legal aid to appeal against removal orders before a competent and impartial judicial or administrative authority (**Art. 13**). However, despite formal recognition of migrants' right to access justice through the courts in national law, procedures before national courts often do not have a suspensive effect against the removal order and migrants may therefore be deported before they are able to realise their right to access justice.

2. ENSURING PROCEDURAL SAFEGUARDS AND NON-ARBITRARINESS OF DETENTION (ARTICLES 15-16)

Directive 2008/115/EC on “*common standards and procedures in Member States for returning illegally staying third-country nationals*” contains specific provisions relating to the use of coercive force by member states, outside the criminal justice system and the control of the judiciary power, to carry out the removal of third-country nationals.¹⁰ In relation to the issue of detention for migration purposes, the Return Directive establishes that undocumented migrants may lawfully be detained for the purposes of return or removal where other less coercive measures cannot be applied.¹¹

In line with international human rights law, detention must be prescribed by law and necessary, reasonable and proportional to the objectives to be achieved. Although the Return Directive stipulates that detention should be a measure of last resort, in practice, very few viable alternatives to detention have been explored by the European Union and

its Member States and administrative detention for migration purposes is currently applied systematically across the European Union.¹²

A report published in 2014 by Pueblos Unidos highlights that immigration detention is overused by the national authorities. Pueblos Unidos also found that, in many cases, detention is used even when there are no reasonable prospects for deportation. For example, in Barcelona in 2013, 54% of detainees were reportedly released while 46% were deported. The report also points out that the Spanish legal framework has many guarantees, but lacks implementation in practice. Judicial review is often ineffective and the quality of legal representation for migrants in detention is reportedly often very low.¹³

10 For example, Article 8(4) of Directive 2008/115/EC provides that: “*Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force*”.

11 See Article 15(1).

12 See: European Commission Communication on EU Return Policy, 28 March 2014, COM(2014) 199, available at: [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com_com%282014%290199_/com_com%282014%290199_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf). See also: European Union Agency for Fundamental Rights, “*Detention of third-country nationals in return procedures*”, November 2010, available at: <http://www.refworld.org/pdfid/4ecf77402.pdf>.

13 See: Pueblos Unidos, “*CIE Informe 2013, Criminalizados, Internados, Expulsados*”, March 2014, available at: http://www.entreculturas.org/files/documentos/estudios_e_informes/InformeCIE2013.pdf?download. In the report, Pueblos Unidos has found that the particularities of each case are not analysed and evaluated and that the police reportedly automatically request admission to the detention centres (CIEs) when an individual has a removal order, ignoring the particularities of the case, such as if the person has a pending application for a residence permit. Courts tend to rubber stamp detention applications, although detention is supposed to be a measure of last resort.

For example in Spain, immigration detention is more commonly used by the national authorities than alternatives to detention. Civil society organisations monitoring the use of administrative detention in Spain have found that, although the Spanish legal framework provides for various guarantees, including alternatives to detention, in the context of migration management, an individual assessment of each case is often not carried out by the competent judicial authorities and, as a result, alternatives to detention are not applied in practice.¹⁴

PICUM is particularly concerned that the practice of administrative detention for migration purposes is not systematically accompanied by legal guarantees and human rights protection for detained migrants. While the Return Directive does contain fundamental rights guarantees for migrants in the process of return (articles 14-18), these principles are often not applied in most EU countries.¹⁵

Several EU Member States may currently detain irregular migrants for irregular entry or stay, beyond what is allowed by the Return Directive, as such acts are considered to be subject to criminal law sanctions under national law.¹⁶ Although, in principle, criminal law does not fall within EU competence, recent jurisprudence of the Court of Justice of the European Union (CJEU) clarified that “a Member State may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by Directive 2008/115 and thus to deprive it of its effectiveness”.¹⁷ The CJEU further clarified that detention for the offence of irregular stay, before carrying out the removal, unnecessarily delays the removal process¹⁸ and it is therefore not allowed, under EU law, to prosecute a migrant in an irregular situation under criminal law, before a return decision is adopted and implemented.¹⁹

In particular, PICUM members identified the following shortcomings within the practical implementation of the benchmarks set out by the Return Directive at national levels:

14 Ibid.

15 This for example has been witnessed by the UN Special Rapporteur on the Human Rights of Migrants who, as part of his country visits to Italy, Greece, Tunisia and Turkey in 2012 and 2013, repeatedly witnessed inadequate procedures for detention, including the failure to guarantee proper legal representation, lack of access for detainees to consular services, and interpretation or translation services, lack of appropriate detection procedures for vulnerable individuals and lack of recourse to effective remedies. See: Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 24 April 2013, A/HRC/23/46, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf.

16 Currently, irregular border crossing or irregular stay is formally considered an offence under criminal law in 17 EU Member States. In other EU Member States, irregular entry or stay is often considered to be an administrative offence rather than a crime (as for example in the Czech Republic, according to the Act on Residence of Foreign Nationals in the territory of the Czech Republic; and in Slovakia, see Article 76 of the Act on. 48/2002 Coll. on the residence of Foreigners). In 12 member states, irregular entry or irregular stay can be punished by imprisonment, which, in Bulgaria can be up to 5 years. For more information see: EU Fundamental Rights Agency, “Fundamental rights of migrants in an irregular situation in the European Union”, 2001, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf. For more detailed information see also: European Migration Network, “Practical Measures to Reduce Irregular Migration”, EU Synthesis Report, October 2012, available at: http://www.emnbelgium.be/sites/default/files/publications/0a_emn_synthesis_report_irregular_migration_publication_april_20131.pdf, see in particular Annex V for more information on criminalisation of irregular migration in Europe.

17 CJEU, C-61/11, *El Dridi*, 28 April 2011, paragraphs 55-59; CJEU, C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, paragraphs 39 and 43; CJEU, C-430/11, *Sagor*, 6 December 2012 (concerning the imposition of a fine), paragraph 32.

18 CJEU, C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, paragraph 40.

19 Ibid., paragraph 45.

2.1 Legal time limits for detention: contrasting legal developments in Greece and in Italy

Although it could be argued that the Return Directive has contributed to a convergence – and overall to a reduction - of maximum detention periods across the European Union,²⁰ the implementation of the legal measures provided within the Directive has had a considerable impact on the extension of detention periods beyond six months, and has brought about the extension of the maximum time limits of detention in ten Member States in comparison with legislation in place before the transposition of the Return Directive.²¹

Legal developments in Italy and in Greece illustrate the different approaches adopted by national legislators when considering the use of detention as a tool for migration management. On the one hand, in Greece, by allowing detention for virtually undetermined periods beyond the maximum length of 18 months established within the Return Directive, the national legislator is currently attempting to use detention as a deterrent for irregular migration, although evidence collected by researchers on the ground indicates that detention does not deter irregular migration, nor does it contribute to an increased effectiveness in removal procedures.²²

On the other hand, in Italy, the national legislator has recently decided to decrease the legal time limits for detention from a maximum of 18 months to a new maximum of 90 days. The decision appears to be based on evidence provided at national level, showing the high costs and low effectiveness of lengthy detention as a tool for migration management.²³

20 See: European Commission Communication on EU Return Policy, 28 March 2014, COM(2014) 199, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

21 Ibid., p. 17. In particular, the following Member States have increased the maximum length of detention as a result of the implementation of the Return Directive: France, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal, Slovakia and Spain.

22 See for example: Midas Report, “Assessing the Cost-effectiveness of Irregular Migration Control Policies in Greece”, October 2014, available at: <http://www.eliamep.gr/wp-content/uploads/2014/11/MIDAS-REPORT.pdf>. See also: Midas Report, “Is the indiscriminate detention of irregular migrants a cost-effective policy tool? A case-study of the Amygdaleza Pre-Removal Center”, May 2014, available at: http://www.eliamep.gr/wp-content/uploads/2014/05/Policy-brief_the-case-study-of-Amygdaleza-1.pdf.

23 See for example: Lunaria, “Costi disumani. La spesa pubblica per il ‘contrasto dell’immigrazione irregolare””, 30 May 2013, available at: <http://www.lunaria.org/2013/05/30/rifiutare-costa/>. See also: A. Di Martino, F. Biondi Dal Monte, I. Boiano, R. Raffaelli, “The Criminalization of irregular immigration: law and practice in Italy”, Pisa University Press, May 2013, available at: <http://www.wiss-lab.dirpolis.sssup.it/files/2013/05/Libro-dirpolis-1.pdf>.

GREECE

Extension of the legal time limits for detention beyond 18 months

The Greek State Legal Council issued its Legal Opinion 44/2014 on 20 March 2014, which concerns persons who are held in detention on the basis of a return order, and whose removal cannot be carried out because of lack of cooperation.

The Legal Opinion allows for undocumented migrants who fail to cooperate in the process of return to be issued with a detention order beyond the initial 18 months limit provided for within the Return Directive and for an undetermined period of time. In blatant contrast with the safeguards provided within Article 15 of the Return Directive, the Legal Opinion allows for prolonged and undetermined deprivation of liberty. Such practice is in clear violation of Article 15(6) of the EU Return Directive as interpreted by the Court of Justice of the European Union.²⁴ It is to be noted that, in its ruling, the Court did not allow for exceptions to the maximum duration of detention for the purpose of removal to be established under any circumstances.

Over a hundred individual decisions allowing for a detention period beyond the initial period of 18 months have already been adopted at national level.²⁵ For example, in a decision issued on 13 April 2014 to a person who had been detained since 13 October 2012 (for a total period of 18 months), the national authorities established, in line with Opinion 44/2014, that, in case of continued lack of cooperation, the person concerned could be issued with measures providing “*mandatory stay in the detention facility where he is being already held*”.

A first claim against Opinion 44/2014 was brought by the Athens Administrative Court of First Instance on 23 May 2014. The Court ruled against the indefinite detention of migrants and found that the measures established within Opinion 44/2014 were not founded on any formal legislative provisions and effectively constituted a prolongation of detention beyond the 18 month time limit set by the Return Directive. The Afghan migrant concerned in the case had already been detained for the 18-month limit, and should therefore have been released.

Following this case, the European Court of Human Rights (ECtHR) ruled on 26 June 2014 that conditions in detention centres in Thessaloniki and in Athens constituted inhuman or degrading treatment and were in violation of the European Convention on Human Rights.²⁶

It is to be noted that a systematic implementation of a policy allowing unlimited and lengthy detention could affect hundreds of people currently being held for migration purposes in Greece. According to the 44/2014 Opinion, around 7,500 migrants are detained in pre-removal centres and in other detention facilities, of which approximately 300 detainees have already reached the 18-month period. This development clearly shows that Greece is currently acting in violation of the safeguards established within the Return Directive, and subjecting migrants to periods of extremely long and systematic detention.²⁷ On 9 February 2015, the Greek Deputy Minister for Public Order addressed the Greek Parliament as part of his first policy speech and made a commitment to ensure the end of indefinite detention of migrants under return procedures.²⁸

24 CJEU, C-357/09, PPU Said Shamilovich Kadzoev (Huchbarov). In particular see: para. 69: “[I]t must be pointed out that, as is apparent in particular from paragraphs 37, 54 and 61 above, Article 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded”, even where “the person concerned ... is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose”.

25 In a document addressed on 5 November 2014 to the Group of Lawyers for the Rights of Migrants and Refugees in Greece, the Athens Administrative Court confirmed that, as of the beginning of November 2014, the court had analysed 150 cases of prolonged detention: in 127 cases, the court found a violation and established that the migrants should be released, whereas 23 cases were rejected. For more information refer to: Group of Lawyers for the Rights of Migrants and Refugees, at <http://omadadikigorwnenglish.blogspot.be/>. Throughout 2014, the Greek Council for Refugees provided

- legal assistance to ten migrants to challenge the lawfulness of their detention beyond 18 months before the Athens First Instance Administrative Court. In all ten cases the Greek authorities had imposed de facto orders of indefinite detention after the third country nationals concerned had been held for the maximum period of 18 months envisaged in the Greek and EU legislation. The cases concerned nationals of Iran, Bangladesh, Pakistan, Cote d' Ivoire, Nigeria, Tunisia and Egypt, who were held between 19 and 23 months in total. In all these cases, the competent judges found that the extended detention was not in accordance with existing legislation. For more information see: Amnesty International and Greek Council for Refugees, Joint Public Statement, 11 February 2015, available at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/445-deltio-typou-11-2-2015>.
- 26 European Court of Human Rights, *De los Santos and de la Cruz v. Greece*, Applications 2134/12 and 2161/12, 26 June 2014, available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/AFFAIRE%20DE%20LOS%20SANTOS%20ET%20DE%20LA%20CRUZ%20c.%20GRECE.pdf>.
- 27 Moreover, the measure comes in addition to the appalling conditions in detention centres in Greece that are already well-documented. In April 2014, Médecins Sans Frontières (MSF) published a report on the invisible suffering of migrants detained in Greece, concluding that detention has devastating consequences on the health and human dignity of these people. See: Médecins Sans Frontières, "*Invisible Suffering*", April 2014, available at: http://www.doctorswithoutborders.org/sites/usa/files/attachments/invisible_suffering.pdf. The report details that migrants and asylum seekers suffer from a wide range of illnesses, anxiety, depression and undertake extreme acts such as hunger strikes, self-harm and suicide attempts as a result of substandard conditions and the lack of adequate medical assistance.
- 28 See: Amnesty International and Greek Council for Refugees, Joint Public Statement, 11 February 2015, available at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/445-deltio-typou-11-2-2015>.

ITALY

Lengthy detention does not increase effectiveness of removal

In Italy, mandatory detention for migrants irregularly residing on the territory of the state was first introduced in 1998 by the Turco-Napolitano Law.²⁹

In May 2008, the newly elected Berlusconi government, claiming the need to urgently address the “*persistent and extraordinary influx of non-EU citizens*”, declared a “state of emergency”, which led to the adoption of a new “Security Package” (Pacchetto Sicurezza)³⁰ aimed at facilitating expulsions and addressing irregular migration.

As part of the “Security Package,” in July 2009, the national legislator adopted new “*Provisions relating to Public Safety*” (Disposizioni in materia di sicurezza pubblica), which amended the 1998 Consolidated Immigration Act.³¹ Article 6 of the Immigration Act was then amended to introduce for the first time in Italian law the crime of irregular stay in Italy, punishable with imprisonment of up to one year and a fine of up to 2,000 Euros. The amended legislation also extended the maximum length of detention of undocumented migrants from 60 days to 180 days.³²

The Security Package also included provisions that allowed for the imprisonment for up to four years of migrants found to have remained in the country in violation of a voluntary departure period. In its *El Dridi* judgment,³³ the Court of Justice of the European Union, when asked to assess whether such custodial sentence was compatible with the EU Return Directive, ruled that, although criminal law falls under national competence, national legislation may not deprive EU law – and in this case the Return Directive – of its effectiveness. The Court highlighted that a criminal sanction of imprisonment would risk jeopardising the achievement of a key objective of the Return Directive, namely the establishment of effective removal procedures.³⁴

When transposing the Return Directive into national legislation in August 2011, the Italian legislator decided to increase the time limit for detention, by arguing that an increase in the maximum allowed time of detention of up to 18 months would allow a better management of forced returns across the country. In August 2011, the Consolidated Immigration Act was amended by the Law 129/2011³⁵, which, transposing the Return Directive into Italian legislation, further extended the maximum legal limit for detention from 180 days to 18 months.

Although the rationale behind the extension of the maximum period of detention in Italy was to grant more time to the administration for the identification of the third-country nationals concerned, this did not lead in practice to the expected result, as very often the identification was proven to be very difficult to achieve or often impossible even after six months of detention, limit after which the migrants concerned were usually released. In its 2004 annual audit, the Italian Court of Auditors examined the general spending on migration management and found that the extension of the maximum period of detention is of limited use as a means to increase expulsions.³⁶

In order to adopt a more evidence-based and realistic approach to migration management, Italy has modified its immigration legislation with Law 161/2014³⁷ adopted on 30 October 2014 and effective as of 25 November 2014. As part of the new legislation, the maximum time limit of detention was reduced from 18 months to 90 days.³⁸

29 Legge 6 marzo 1998, n. 40, “*Disciplina dell’immigrazione e norme sulla condizione dello straniero*”, Gazzetta Ufficiale n. 59 del 12 marzo 1998 - Supplemento Ordinario n. 40, available at: <http://www.camera.it/parlam/leggi/98040l.htm>. As a consequence of the adoption of the new law, a new Consolidated Immigration Act 286/1998 was adopted in August 1998. See: Decreto Legislativo 25 luglio 1998, n. 286, “*Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*”, Gazzetta Ufficiale n. 191 del 18 agosto 1998 - Supplemento Ordinario n. 139, available at: <http://www.camera.it/parlam/leggi/deleghe/98286dl.htm>.

- 30 Legge 24 luglio 2008, n.125 (G.U. n. 173 del 25/07/2008), “*Conversione in legge, con modificazioni, del decreto-legge 23 maggio 2008, n. 92, recante misure urgenti in materia di sicurezza pubblica*”, available at: http://www.difesa.it/LegislaZIONE/Norme_in_rete/Pagine/urn_nir_parlamento_legge_2008-07-24_125_05_08_200801_06_2011_15_08_39.aspx.
- 31 Legge 15 luglio 2009, n. 94, “*Disposizioni in materia di sicurezza pubblica*”, Gazzetta Ufficiale n. 170 del 24 luglio 2009 - Supplemento ordinario n. 128, available at: <http://www.parlamento.it/parlam/leggi/09094l.htm>.
- 32 See Art. 14(5) of the Immigration Act 286/1998.
- 33 Court of Justice of the European Union, Case C-61/11, Hassen El Dridi, alias Karim Soufi, 28 April 2011, available at: <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=82038&occ=first&dir=&cid=81346>.
- 34 A similar question, concerning the compatibility of a custodial sentence for migrants found to have re-entered the country in violation of a re-entry ban, is currently under the scrutiny of the Court of Justice of the European Union. The Court of Florence (Tribunale di Firenze) asked the Court of Justice of the European Union to clarify whether imposing a sanction of imprisonment in case of breach of a re-entry ban would be contrary to the main objective of the Return Directive to achieve effective removal procedures. The Court of Florence lodged a request for a preliminary ruling to the Court of Justice of the European Union on 12 June 2014. The question referred was the following: “*Do the provisions of Directive 2008/115 1 preclude a Member State’s legislation which provides for the imposition of a sentence of imprisonment of up to four years on an illegally staying third-country national [Or.10] who, having been returned to his country of origin neither as a criminal law sanction nor as a consequence of a criminal law sanction, has re-entered the territory of the State in breach of a lawful re-entry ban but has not been the subject of the coercive measures provided for by Article 8 of Directive 2008/115 with a view to his swift and effective removal?*” See: Court of Justice of the European Union, Criminal proceedings against Skerdjan Celaj, Case C-290/14, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=156225&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=35968>.
For more information see: L. Masera, “*Approda alla Corte di giustizia UE la controversa questione della compatibilità con la cd. direttiva rimpatri del delitto di illecito reingresso nel territorio dello Stato (art. 13 co. 13 T.U. imm.)*”, *Diritto Penale Contemporaneo*, 2 July 2014, available at: http://www.penalecontemporaneo.it/area/3-/26-/-/2614-il_delitto_di_illecito_reingresso_dello_straniero_nel_territorio_dello_stato_e_la_direttiva_rimpatri/.
- 35 Legge 2 agosto 2011, n. 129, “*Conversione in legge, con modificazioni, del decreto-legge 23 giugno 2011, n. 89, recante disposizioni urgenti per il completamento dell’attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari*”, available at: <http://www.altalex.com/index.php?idnot=53430>.
- 36 Data analysed by the Court of Auditors for 2003-2004 shows that the vast majority of expulsions (70-80%) took place during the first 30 days of detention. See: Italian Court of Auditors, *Deliberazione n. 10/2004/G*, 24 March 2004, pp. 59-60 and 72-74, available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_stato/2004/Delibera_n_10_2004_G_e_relazione.pdf.
- 37 Law 30 ottobre 2014, n. 161, “*Disposizioni per l’adempimento degli obblighi derivanti dall’appartenenza dell’Italia all’Unione europea - Legge europea 2013-bis*”, (14G00174) (*GU Serie Generale* n.261 del 10-11-2014 - Suppl. Ordinario n. 83), available at: <http://www.gazzettaufficiale.it/eli/id/2014/11/10/14G00174/sg>.
- 38 According to the new legislation, detention can be ordered for an initial maximum period of 60 days, which can be further prolonged by a judge for 30 additional days, for a total of 90 days. For a more detailed analysis of the new legislation see: ASGI, “*Le modifiche al D.Lgs 286/98 in materia di espulsioni e trattenimenti degli stranieri apportate dalla legge 30.10.2014, n. 161 (Legge Europea 2013 bis)*”, available at: <http://www.asgi.it/wp-content/uploads/2014/11/ASGI-Commento-modifiche-legge-n.-161-2014-22.11.2014.pdf>.

2.2 Grounds for imposing detention and the importance of better defining the “risk of absconding”

In line with the principles of necessity and proportionality and with the preventive nature of administrative detention established within the Return Directive, pre-removal administrative detention could only be justified by a well-established risk of absconding or threat to public order.

However, in order to prevent systematic detention, clear safeguards against presumption of risk for public order or of absconding on the sole basis of irregular status should be established in the national systems. The Return Directive’s preamble enshrines vaguely such presumption, as it reminds that “*decisions taken under [the] Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of irregular stay*”. However, it is important to recall that the preamble has a non-binding nature and therefore suggests a recommendation, rather than imposing a clear requirement on the national authorities. In this context, immigration authorities may and often do rely on the broad terms used in the Directive to systematically detain migrants on account of alleged risk of absconding.

Although the risk of absconding is one of the two explicitly listed grounds in the Return Directive providing states the ability to impose detention for up to six months (Article 15(1)(a)), the directive lacks clear safeguards to prevent authorities from relying on the alleged risk of absconding to systematically detain migrants in return proceedings. The Directive vaguely defines the risk of absconding as “*the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a person under return procedures may abscond*” (Article 3(7)). The task to better define the “objective criteria” indicating a potential risk of absconding is left by the Directive to the national legislator. Controversially, the existing “objective criteria” identified by the national legislators significantly differ across Europe and the national legislation of several Member States lists amongst the “objective criteria” for defining the risk of absconding the mere lack of identity documents or an instance of irregular entry and/or irregular stay, thus establishing a *de facto* presumption of risk of absconding towards all undocumented migrants issued with removal directions.³⁹ In these circumstances, national authorities, in breach of the safeguards established within the Return Directive, fail to give due consideration to the individual circumstances of the person involved when identifying a risk of absconding to justify detention.

39 In 13 Member States, the “lack of documentation” provided by returnees is the main grounds on which the risk of absconding is assessed. See: European Commission Communication on EU Return Policy, 28 March 2014, COM(2014) 199, p. 15, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

In fact, in several Member States (including Slovenia, Belgium and Italy), individual circumstances do not appear to play an important role in the assessment of a risk of absconding. For example, in Belgium, the assessment of individual circumstances is mostly “formal” and a risk of absconding is often assumed, based on the migrants’ inability to provide the authorities with an official address in Belgium.⁴⁰ Similarly, in Italy, when requested to assess the individual circumstances of the case, justices of the peace⁴¹ and competent administrative authorities seem to give only superficial consideration of the individual circumstances and make wide use of repetitive and standardised judicial formulae in their official determinations and validations of arrests.⁴²

Issues concerning lengthy and prolonged detention, coupled with the lack of a clear definition of the risk of absconding, as a ground justifying the administrative detention of migrants facing forced removal procedures, create the conditions for the systematic use of detention as a tool for migration management in the context of removal. This clearly contravenes the principles of necessity, reasonability and proportionality, therefore not ensuring protection against the arbitrariness of detention in line with international human rights standards.

- 40 The Belgian Immigration Act (article 1,11^o) defines the concept of risk of absconding as “*a real and actual risk that the third-country national, who is the subject of a procedure of removal, may abscond from the authorities*”. The law states that the Immigration Office should decide on the basis of objective and serious elements, however, the legislation does not list objective criteria to measure the risk of absconding. An explanatory memorandum of the Immigration Act lists some examples of elements that can give an indication of the risk of absconding, including: change of place of residence during the period of validity of the return decision without informing the Immigration Office, staying on the territory after the period foreseen in the return decision or having entered irregularly into the Schengen territory and not having asked for international protection or a residence permit. An internal service note of the Immigration Office also contains a non-exhaustive list including the case where the address of the migrant is unknown. See: EMN Focused Study 2014, “*Detention and alternatives to detention in Belgium*”, June 2014, p. 20, available at: http://www.emnbelgium.be/sites/default/files/publications/be_report_emn_study_detention_and_alternatives_to_detention_2014_-_final_0.pdf.
- 41 The Justice of the peace, in Italian “*giudice di pace*” is an honorary position, not a career judge, nominated on the basis of fixed requirements; the office is held for a period of four years, which may be renewed once. There are approximately 4,700 “*giudici di pace*” in Italy, distributed in 848 offices throughout the national territory (as of January, 2003). They are remunerated in the form of a fee for work carried out. The Italian Parliament adopted Law no. 271 of 12 November 2004, which converted into legislation the emergency Law Decree no. 241/2004 of 14 September 2004. This legislation assigned the task of judicial supervision in relation to expulsion, forced accompaniment and detention to the justice of the peace, removing it from professional judges in tribunals. For more information see: International Commission of Jurists (ICJ), “*Undocumented Justice for Migrants in Italy*”, October 2014, pp. 9-15, available at: <http://www.asylumlawdatabase.eu/en/content/icj-%E2%80%9Cundocumented%E2%80%9D-justice-migrants-italy>. See also: European Commission, European Judicial Network, “*Organisation of Justice in Italy*”, available at: http://ec.europa.eu/civiljustice/org_justice/org_justice_ita_en.htm.
- 42 For more information see: Osservatorio sulla Giurisprudenza del Giudice di pace in Materia di Immigrazione, University of Roma Tre, available at: http://giudicedipace.giur.uniroma3.it/wp-content/uploads/2014/05/RapportoGdPconvalide_prorogheNovembre2014.pdf. See also: E. Rigo, L. Gennari, Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, “*Rapporto preliminare sullo stato della ricerca*”, May 2014, p. 10, available at: <http://clinicalegale.giur.uniroma3.it/wp-content/uploads/2014/10/Rapporto-gdpMaggio2014.pdf>.

3. DETENTION IS NEVER IN THE CHILD'S BEST INTERESTS (ARTICLE 17)

Although international human rights law stipulates that a child should never be detained, the Return Directive establishes that children and families can be detained as a measure of last resort and for the shortest appropriate period of time. The directive also highlights that the best interests of the child shall be a primary consideration in the context of the detention of children pending removal, but fails to establish that detention or separation from their parents or caregivers, as a consequence of detention of the parent or caregiver, is never in a child's best interests.⁴³

Despite the strict limitations on the use of detention for children and families in the Return Directive, and although many EU member states' legislation prohibits detention of vulnerable people or limits their detention to 'exceptional circumstances', the EU-

funded evaluation of the implementation of the Return Directive⁴⁴ found that 17 EU member states reportedly detain unaccompanied children.⁴⁵ Evidence collected within the evaluation report suggests that 19 countries detain families with children. Eight reported that they do not detain families with children.⁴⁶ Some countries, as for example Sweden, allow for the detention of unaccompanied children only in "exceptional circumstances". It is however worth noting that, in the case of Sweden, "exceptional circumstances" were identified on 14 occasions throughout 2013, when 99 children were detained, of which 14 were unaccompanied.⁴⁷ Recent jurisprudence on the national level is also challenging the legitimacy of member states' practices in detaining families with children through the reference to the right to family life in the Return Directive.⁴⁸

43 Arts. 5, 10 and 17 of Directive 2008/115/EC.

44 Matrix, "Evaluation on the application of the Return Directive (2008/115/EC)", 22 October 2013, available at: <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855>.

45 Ibid., p. 11.

46 Ibid.

47 See: EMN Sweden, "The use of detention and alternatives to detention in the context of immigration policies in Sweden", 2014, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/27a-sweden_detention_study_august2014_en.pdf.

48 In a ruling issued on 28 January 2015, the Spanish Supreme Court established that Spain's separation of families in detention, through articles 7.3 (2) and 16.2 (K) of the Real Decreto 162/2014 of 14 March 2014, violate Article 17.2 of the Return Directive recognising the right to family life. The Supreme Court clarified that families can only be detained if their family unit and right to privacy can be guaranteed in a separate accommodation. The ruling is the result of a claim presented by Andalucía Acoge, SOS Racismo and APDH, available at: <http://acoge.org/wp-content/uploads/2015/01/La-demanda-punto-por-punto.pdf>.

The detention of children for immigration purposes is a direct violation of the United Nations Convention on the Rights of the Child (CRC), which is the most widely ratified UN human rights.⁴⁹ When initially adopted in November 1989, the UN Convention on the Rights of the Child clearly stated in Article 37(b), that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The CRC also states that, where a child is nevertheless deprived of liberty, arrest, detention or imprisonment shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The United Nations Committee on the Rights of the Child, the governing body of the CRC, has further clarified that children should never be detained for immigration purposes, and detention can never be justified as in a child's best interests.⁵⁰ Through General Comment n. 6 adopted in 2005, and more recently, in February 2013,⁵¹ the Committee clearly established that the detention of a child because of their or their parent's migration status, whether they are unaccompanied, separated, or together with parents or other caregivers, always constitutes a child rights violation and contravenes the principle of the best interests of the child.

Similarly, various regional bodies in recent months have weighed in on the issue, reaffirming that detention of children can never be justified on the basis of their or their family members' migration status. For example, when consulted on the interpretation of the "last resort" principle of detention as a preventive measure in the context of migration-related proceedings, the Inter-American Court of Human Rights recently stated in an Advisory Opinion that states may not resort to the deprivation of liberty of children as a precautionary measure to protect the objectives of immigration proceedings.⁵² The Court also specified that States may not detain a child on the basis of a failure to comply with entry and residence requirements and urged states to adopt other less harmful alternatives and, at the same time, to protect the rights of the child integrally and as a priority. The Council of Europe's Parliamentary Assembly also recently adopted Resolution 2056 (2014), which urges member states to introduce and enforce laws banning the detention of children for immigration reasons.⁵³

49 Only two states have not ratified the UN CRC: South Sudan and the United States of America. See: United Nations Office of the High Commissioner for Human Rights, Status of Ratification Interactive Dashboard, available at: <http://indicators.ohchr.org/>. See also: UN News Centre, 20 January 2015, available at: <http://www.un.org/apps/news/story.asp?NewsID=49845#.VRPaqOH8iQk>.

50 UN Committee on the Rights of the Child (UN CRC), General Comment No. 6 (2005), on the treatment of unaccompanied or separated children outside their country of origin, paragraph 61.

51 See: UN Committee on the Rights of the Child, "*Report of the 2012 Day of General Discussion on The Rights of All Children in the Context of International Migration*", para. 32, available at: <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.

52 Inter-American Court of Human Rights, Advisory Opinion OC-21/14 of 19 August 2014, requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf.

53 Council of Europe Parliamentary Assembly, Resolution 2056 (2014), Provisional version, available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21296&lang=en>.

BELGIUM

Detention is never in the child's best interest: the evolution of law and practice

Following the condemnation of child detention practices in Belgium by two rulings of the European Court of Human Rights, Belgian authorities have taken measures to limit the administrative detention of both families with children and unaccompanied children.

In a 2006 case brought before the European Court of Human Rights (ECHR), the court condemned Belgium for violations of Article 3 (prohibition of inhuman treatment), Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.⁵⁴ The case concerned the decision by Belgian authorities to detain a 5-year-old Congolese girl named Tabitha who was trying to join her mother in Canada. The girl was held in a closed centre for two months without an appointed guardian and then deported, alone, to her country of origin.⁵⁵

In January 2010, the ECHR ruled on a second case involving the detention of children in Belgium. In the case of *Muskhadzhiyeva et autres c. Belgique*, four Chechen children were detained along with their mother in a detention centre,⁵⁶ with a view of returning them to Poland under the EU's Dublin II Convention.⁵⁷ The Court ruled that, although the mother was lawfully held in detention, the detention of her children was unlawful. The court stated that Belgium violated Article 3 and Article 5 of the European Convention on Human Rights.⁵⁸

Further to the negative decisions of the European Court of Human Rights and public concern around the detention of undocumented migrant children, Belgian authorities took measures to limit the administrative detention of families with children, as well as unaccompanied children. The rulings established by the European Court on Human Rights drove Belgium to move towards a better system to ensure protection of migrant children's fundamental rights in the area of detention.⁵⁹

On 1 October 2008, the Minister for Asylum and Migration Policy created specialised housing, called "open return houses", addressed at families awaiting removal.⁶⁰ Families apprehended at the border continued to be initially detained at the closed detention centre "Transit Centre 127 bis". However, in October 2009, the Minister for Asylum and Migration Policy made a commitment to effectively end the detention of families in Belgium.⁶¹

While Belgium has been lauded for its promising practice in developing alternatives to detention, there remain concerns around these 'open return houses'. It is increasingly common for the family to be separated and one parent or other family members detained while the children and their mother are kept in the open return house. Further, placement in an open return house is not the least restrictive alternative to detention necessary in some cases.

"Open return houses" are designated residences for apprehended undocumented families, individual houses and apartments in the community. Family members are allowed to exit the house, providing that one adult member of the family remains present in the unit at all times. They can also receive visitors. They are provided educational, medical, logistical and administrative assistance.

Each family is assigned a coach by the Immigration Office who acts as the official intermediary between the Belgian authorities and all other stakeholders (for example medical costs are only reimbursed if the appointment with the doctor was made by the coach). The maximum duration of stay is 2 months, which can be extended to a maximum of 5 months total. During this time, families are given counselling from a 'return coach' to encourage cooperation with return. Though the focus is on return, the return coach should also consider possibilities for regularisation, providing a case resolution approach.

Immigration authorities can decide to detain the family in a closed centre if the rules of the family units are not respected, if the family refuses to cooperate with return and it is deemed the only option at the end of the accompaniment procedure, or if the family absconds.





A new law⁶² has been adopted that introduces the possibility for some undocumented families to reside in their own homes during the return procedure and addresses some of these concerns. Families that meet the conditions do not need to be displaced from their homes. This also avoids negative impacts on children's access to education, which is difficult in practice in 'open return houses' due to lack of available space in schools, short windows of time prior to the return, etc. The conditions include that they are a home owner or have an official rental contract or an agreement with the owner, and that the family meets regularly and cooperates with their case officer, and that they can meet their subsistence needs. However, this alternative to detention does not provide for coaching, and requires direct cooperation with return.

Further, despite the "open return houses" being considered a successful alternative to detention, as well as the ministerial commitment to end child detention in October 2009, the legal framework still allows children and their families to be detained in closed detention centres.⁶³ An amendment of the law, that came into force on 27 February 2012, provides that "normally" a family would not be placed into a closed center, "unless this center is adapted to the needs of families with minor children", and that "a family (...) may be detained in order to proceed to the deportation (...) in a center adapted to the needs (...) for a duration as short as possible". The agreement of the new federal government published on 10 October 2014 reiterates plans to establish closed family units within the detention centre 127bis, for some border cases and for families considered not to be cooperating with 'open return house' procedures. The law introducing the possibility for some undocumented families to reside in their own homes during the return preparations establishes three sanctions for families that do not comply with the conditions of the agreement: transfer to an open return house, transfer of one adult family member to a closed detention centre, and transfer of the whole family to a family unit in a detention centre. This law raises serious concerns, as it both reiterates the policy of detaining children in family units in closed detention centres and formalises the policy of family separation by detaining one adult. Family units are under construction. The failure to establish a legal interdiction on detaining families with children within the Belgian legal framework by the government has been criticised by Belgian civil society organisations, as it paved the way for the return of a practice of detention of children.⁶⁴

54 *Affaire Mubilanzila Mayeka et Kaniki Mitunga c. Belgique* 2006, Para. 58-9,82, 87, 90-1, 103-5, 113-4, available at: [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-77445#<itemid>\[<001-77445>\]](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-77445#<itemid>[<001-77445>]).

55 *Ibid*, para.8-37.

56 The children and their mother were detained in the Centre 127 bis. Pictures and more information on the detention centre are available at: http://www.cire.be/sensibilisation/photos/centres-fermes-reportage-au-127bis-et-a-vottem#!reportage_centre_ferme_8.

57 *Affaire Muskhadzhiyeva et autres c. Belgique* 2010, Para. 6-23, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96774#<itemid>\[<001-96774>\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96774#<itemid>[<001-96774>]).

58 *Ibid*, Para. 63, 74-5.

59 See: Jacqueline Bhabha, "Child Migration & Human Rights in a Global Age", Princeton University Press, pp. 264-266. For more information see also: Point of No Return, "The Futile Detention of Unreturnable Migrants. Factsheet: The Detention of Migrants in Belgium", January 2014, available at: http://pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_BE_HR.pdf.

60 For more information see: Liesbeth Schockaert, "Alternatives to detention: open family units in Belgium", September 2013, available at: <http://www.fmreview.org/en/detention/schockaert.pdf>.

61 In October 2008, a pilot project of the "open family units" was launched. Families with children who were already present on the territory and received a removal order, were included in the program. In October 2009, it was enlarged to include asylum-seekers families who were not allowed to enter into Belgium but needed to stay more than 48 hours before they could be returned.

62 Royal Decree of 17 September 2014.

63 See : Article 74/9 §1 of the Immigration Act (inserted by the Law of 16 November 2011), Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

64 See for example: Plateforme Mineurs en Exil, Press Release, 21 March 2012, available at: <http://www.mineursenexil.be/files/Image/Communique-s-de-presse/Communique-detention-def.pdf>; Ligue des droits de l'homme, 15 December 2011, available at: <http://www.liguedh.be/espace-presse/116-communiqués-de-presse-2011/1321-condamnation-de-la-belgique-pour-traitement-inhumain-a-des-enfants-migrants--tris-repetitae>; CIRE, December 2014, available at: <http://www.cire.be/presse/communiqués-de-presse/1385-asile-et-migration-un-accord-de-gouvernement-inquietant>. In a policy paper on detention of children in Belgium, UNICEF also highlights the lack of guarantees as part of the Belgian legal framework, see: UNICEF Belgium, "Policy Paper, La Detention des Enfants Migrants en Centres Fermes", May 2011, available at: http://www.lacode.be/IMG/pdf/Policy_paper_UNICEF_Belgique_detention2011.pdf.

4. ENSURING ACCESS TO JUSTICE AND REMEDIES TO CHALLENGE THE RETURN DECISION AND THE DETENTION ORDER (ARTICLES 12-14)

The Return Directive establishes procedural safeguards aimed at ensuring access to justice for migrants in the process of return and for migrants who are held in the detention pending removal. According to Article 12 of the Return Directive, return decisions and entry-ban decisions on removal shall be clearly motivated in law and in fact and should be issued in writing. Article 13 of the directive establishes that

migrants shall be afforded an effective remedy to appeal against or to seek review of decisions related to return, before a competent judicial or administrative authority. The Return Directive also provides for the possibility for the competent authorities to temporarily suspend the enforcement of a removal, pending a decision relating to return.

Civil society organisations monitoring the situation along the Melilla and Ceuta border fences report summary expulsions of people from Spanish soil and extensive violations of fundamental rights by border authorities and security forces.⁶⁵

A video filmed on 13 August 2014 by the NGO Prodein in a camp on Gurugu Mountain in Morocco, reports violence used in response to migrants' attempts to enter the Spanish territory and shows the death of a migrant.⁶⁶ Highlighting that this was not an isolated incident, members of the European Parliament submitted a formal question to the European Commission to ask for an investigation to be started in relation to the situation in this area.⁶⁷

In a reply dated 20 October 2014 to members of the European Parliament, the European Commission clarified that Spain has decided not to apply the EU Return Directive to migrants intercepted at the borders. While Article 2.2 (a)⁶⁸ of the directive gives member states the prerogative to do so, the Commission stresses that, even if they do so, member states must still comply with the minimum guarantees laid out in the directive, as well as to ensure respect for the principle of non-refoulement and effective access to the asylum procedure.⁶⁹

65 See for example: APDHA, "Los Derechos Humanos en la Frontera Sur 2014", March 2014, available at: http://www.apdha.org/media/frontera_sur_2014_web.pdf. See also: Human Rights Watch, "Spain: Excessive Force in Melilla", 21 October 2014, available at: <http://www.hrw.org/news/2014/10/21/spain-excessive-force-melilla>.

66 The video is available at: <http://vimeo.com/103407413>.

However, in many cases, the lack of access to just remedy and reparation in the case of undocumented migrants in detention and in removal procedures, is not always ensured in practice. In particular, lack of access to justice is caused by extensive difficulties in accessing their right of information and access to legal aid. For detained migrants, having access to a legal representative and legal aid often provide the only safe opportunity to report complaints of past abuse or of violence inside the detention centres or as part of apprehension and removal procedures. Migrants who do not have access to legal representation face significant hurdles to advocating affectively for their own human rights, medical needs, and safety while in custody.

In cases where the Directive requires Member States to postpone the removal, such as when it would violate the principle of non-refoulement, Article 14(2) of the Return Directive requires Member States to provide the persons concerned with written confirmation that the return decision will temporarily not be enforced. Although such confirmation does not provide unreturnable migrants with a proper residence status, it constitutes written proof of the impossibility of their return before law enforcement authorities to avoid unlawful detention.

The European Ombudsman, Emily O'Reilly, announced in October 2014 that her office has opened an investigation into how Frontex ensures respect of fundamental rights in the context of forced returns under the agency's joint return operations (JROs). The EU Ombudsman addressed a list of questions to Frontex, including a question on how independent monitoring during JROs can be guaranteed. The inquiry is also looking at Frontex's cooperation with national monitoring bodies as per Article 9(1b) of the Frontex Regulation and Article 8(6) of the Return Directive. In its letter to Frontex, Ms O'Reilly highlighted that *"by their very nature, forced return operations have the potential to involve serious violations of fundamental rights. Through this investigation, I want to find out how Frontex is equipped to deal with potential violations and how it minimises the risk of such violations"*.

67 Parliamentary question for written answer to the Commission, Iosu Juaristi Abaunz MEP (GUE/NGL), 16 September 2014, E-006912-14, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-006912+0+DOC+XML+V0//EN>.

68 Article 2.2 (a) of the Return Directive states: *"Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State"*.

69 It is also to be noted that Spain has not explicitly stated the intention of applying the exception envisaged as part of Article 2.2 (a) of the Return Directive. The Spanish legal framework does not mention the possibility for the national authorities not to apply the safeguards –including the obligation on the member states to issue a removal decision- established within the Return Directive in line with Article 2.2 (a) of the Return Directive. The absence of explicit legal provisions in relation to this prevents migrants from having access to an effective remedy against their removal, as summary expulsions are carried out at the Spanish-Moroccan border in the absence of formal return decisions being issued to the returnees. This situation is causing serious concerns in relation to lack of compliance with the principle of the rule of law.

In relation with the principle of non-refoulement, it is important to note that it prohibits the return of a person to a country in which they would face a real risk of ill-treatment, such as torture and inhuman and degrading treatment, or where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.⁹ Non-refoulement is a *jus cogens*, or fundamental principle of international law, and its definition may apply to a person who is refused access to vital medical treatment, as the hindrance itself would amount to persecution.

According to Article 15(4) of the Return Directive, “[W]hen it appears that a reasonable prospect of removal no longer exists for legal or other considerations, or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately”. However, the Directive fails to include any obligation for Member States to issue a temporary residence permit where return of an irregularly staying third-country national has proven to be impossible, thus leaving unreturnable migrants in a “legal limbo” and

often unable to access their fundamental rights, including access to healthcare, housing, education and justice.⁷⁰

The lack of access to justice of undocumented migrants in detention and in the removal process is also caused most specifically by the fact that procedures before the courts against a measure of deprivation of liberty in the case of migrants in detention often does not have a suspensive effect against the removal order. Migrants are thus deported before they have had a chance to access justice and claim just remedies and compensation.

The UN Working Group on Arbitrary Detention (WGAD) has reported that, despite recognition of detained migrants’ right to access justice through the courts in national and regional law, migrants are often deported before they are able to realise their right to access the courts.⁷¹ Further, the UN WGAD noted that compensation is rarely afforded mainly due to expulsion from the territory before proceedings can be initiated or completed.⁷²

The Council of Europe’s Committee for the Prevention of Torture (CPT) has conducted its first monitoring mission of a Frontex Joint Return Operation by air on a charter flight from Rotterdam, Netherlands, to Lagos, Nigeria.⁷³ The countries participating in the joint operation were: Bulgaria, Germany, the Netherlands, Slovenia and Spain. The monitoring mission took place from 16 to 18 October 2013. In its final report on the monitoring mission, issued on 5 February 2015, the CPT stresses that the removal of migrants by air is becoming a widespread practice across Europe and highlights that these operations “entail a manifest risk of inhuman and degrading treatment (during preparation for the removal, the actual flight or when the removal is aborted)”. The CPT noted at some stages of the removal procedure an excessive use of physical constraints and highlights that one of the returnees was body-cuffed from 6.10am to 3.45pm, despite being under constant and close surveillance by escorts. Among its recommendations, the CPT stressed that an individual risk assessment should be carried out to justify the use of physical constraints and recommended that healthcare professionals on return flights should be equipped with emergency tools. The CPT also stressed that the returnees should always be prepared and informed about the removal procedure well in advance.

70 For more information see: A Face to the Story Project, “*Point of No Return. The futile detention of unreturnable migrants*”, January 2014, available at: http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf.

71 See: UN Working Group on Arbitrary Detention, Stakeholders’ Consultation, Geneva 1 and 2 September 2014, “*The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention*”, Background Paper on “*State Practice on Implementation of the Right*”, available at: <http://www.ohchr.org/Documents/Issues/Detention/BPConsultation2014.pdf>.

72 Ibid., para. 57.

73 See: Council of Europe, “*Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 October 2013*”, Strasbourg, 5 February 2015, available at: <http://www.cpt.coe.int/documents/nld/2015-14-inf-eng.pdf>

ITALY

Ensuring procedural guarantees: the case of lack of protection

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, and requires that they have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative have the opportunity to be heard before the court. Judicial review of detention must provide a practical, effective and accessible means of challenging detention.

The Return Directive states that, when a decision is made to detain, the detention order must be in “*writing with reasons being given in fact and in law*”.⁷⁴ According to the Italian legislation, a detention order initially issued by the competent administrative authority (*Questore*), has to be validated, within the 48 hours following the notification of the decision, by a justice of the peace, who has jurisdictional competence in this area. As part of a hearing, to be held with the mandatory presence of a defense lawyer, and, if needed, of an interpreter, the justice of the peace must verify that the deadlines and procedural safeguards provided for by Article 13 and Article 14 of the Italian Immigration Law are respected.⁷⁵

Research carried out in Italy in 2014 shows that the judicial system currently in place does not guarantee adequate protection of fundamental rights of undocumented migrants, especially in relation to their rights to access to a due process and fair trial. As part of the study, the Observatory on Justice of the Peace’s Jurisprudence on Migration Issues (*Osservatorio sulla Giurisprudenza del Giudice di pace in Materia di Immigrazione*)⁷⁶ collected and systematically analysed decisions adopted in 2013 and the first trimester of 2014 by justices of the peace in Rome, Bologna, Bari, Florence and Naples in relation to 639 cases concerning the validation or extension of detention of undocumented migrants for the purpose of identification and forced removal. The research highlights that the decisions are generally lacking sufficient motivations justifying detention. For example, researchers found that, in the case of the justice of the peace in Rome, of a total of 67 decisions analysed, 35 were motivated only through standard formulas (i.e. “Detention is approved”, in Italian: “*Nulla osta al trattenimento*”) and that 10 decisions were completely lacking a motivation.⁷⁷ The research also highlights that alternatives to detention are generally not provided, with the exception of the justice of the peace in Florence and in Bologna, where alternatives to detention were applied in four cases between January and March 2014.

The preliminary report of the research further reveals that, even in a case in which the migrant was already in possession of the tickets to leave the country, the justice of the peace considered that there were conditions to justify detention, and subsequently validated the detention order, although recognizing the migrant’s will to leave the country.⁷⁸

The research highlights serious gaps in the knowledge and application of international human rights law and EU law during the validation of detention orders and extension hearings.³⁹ The situation highlighted by the research and legal practitioners in Italy amounts to the risk of violations of the right to judicial review of detention, under articles 5.4 of the European Convention of Human Rights, articles 9.4 of the International Covenant on Civil and Political Rights, and 6 and 47 of the EU Charter on Fundamental Rights for lack of adequate reasoning.

74 Article 15.2, EU Return Directive.

75 Article 14.4, Italian Immigration Law.

76 For more information see: Osservatorio sulla Giurisprudenza del Giudice di pace in Materia di Immigrazione <http://giudicedipace.giur.uniroma3.it/>.

77 See: Osservatorio sulla Giurisprudenza del Giudice di pace in Materia di Immigrazione, University of Roma Tre, available at: http://giudicedipace.giur.uniroma3.it/wp-content/uploads/2014/05/RapportoGdPconvalide_prorogheNovembre2014.pdf.

78 See: E. Rigo, L. Gennari, Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, “*Rapporto preliminare sullo stato della ricerca*”, May 2014, p. 10, available at: <http://clinicalegale.giur.uniroma3.it/wp-content/uploads/2014/10/Rapporto-gdpMaggio2014.pdf>.

79 For more information see: International Commission of Jurists (ICJ), “*Undocumented’ Justice for Migrants in Italy*”, October 2014, available at: <http://www.refworld.org/pdfid/5452554a4.pdf>.

CONCLUSIONS

PICUM is particularly concerned that the increasing practice of administrative detention for migration purposes is not systematically accompanied by legal guarantees and human rights protection for detained migrants. While the Return Directive does contain fundamental rights guarantees for migrants in the process of return (articles 14-18), these principles are often not applied in most EU countries.⁸⁰

PICUM is also concerned that apprehension practices and measures criminalising irregular entry and irregular stay disproportionately interfere with the fundamental rights of undocumented migrants. Across Europe, it is particularly striking to witness apprehensions of undocumented migrants close to service providers, such as public schools or hospitals, as these practices seriously undermine undocumented migrants' fundamental rights to access health care, education and the rights to security and physical integrity.⁸¹ Additionally, national legislation may often require public authorities and service providers to report irregular entry or irregular

stay to immigration authorities. The promotion and implementation of a correct monitoring of the practices undertaken by state authorities to detect, arrest and eventually deport undocumented migrants would ensure a better protection of migrants' fundamental rights.

The Fundamental Rights Agency of the European Union (FRA) has reported that, while states have a right to control immigration, certain enforcement measures, such as reporting obligations, data sharing, or arresting migrants in front of schools, have a negative and often disproportionate impact on the effective exercise of the fundamental rights of irregular migrants.⁸² In collaboration with member states as well as civil society, the FRA has developed guidelines for immigration enforcement officials.⁸³ These common principles and guidelines have been included in the minutes of the Contact Committee established under the Return Directive to support Member States in a fundamental rights compliant application of Article 6(1).⁸⁴

80 This for example has been witnessed by the UN Special Rapporteur on the Human Rights of Migrants who, as part of his country visits to Italy, Greece, Tunisia and Turkey, repeatedly witnessed inadequate procedures for detention, including the failure to guarantee proper legal representation, lack of access for detainees to consular services, and interpretation or translation services, lack of appropriate detection procedures for vulnerable individuals and lack of recourse to effective remedies. See: Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 24 April 2013, A/HRC/23/46, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC.23.46_en.pdf.

81 In the recently concluded Joint Police Operation "Mos Maiorum" launched by the Italian Presidency of the European Union in October 2014, a total of 19,234 undocumented migrants (9,890 at the external EU borders and 9,344 within the EU territory) were apprehended. The operation took place from 13 to 26 October 2014 and was jointly conducted by all EU member states except Croatia, Greece and Ireland, with the technical and analytical support of Frontex and Europol. The number of apprehensions as part of the operation Mos Maiorum is significantly higher than the total reported as part of the previous operation "Perkunas", which led to the apprehension of a total of 10,459 migrants over an equal period of two weeks in September-October 2013. For more information see: Statewatch, 23 January 2014, available at: <http://statewatch.org/news/2015/jan/mm-final-report.html>.

82 European Agency for Fundamental Rights, "Fundamental rights of migrants in an irregular situation in the European Union", 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf.

83 European Agency for Fundamental Rights, "Apprehension of irregular migrants – fundamental rights considerations", available at: http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf.

84 See: European Union Agency for Fundamental Rights, "Practical guidance", available at: <http://fra.europa.eu/en/node/6041>.

In political and media discourses, irregular migration is often described as constituting a threat to state sovereignty and security. However, it is often a misperception that irregular migrants threaten either state sovereignty or security. It needs to be corrected through careful and objective analysis and contextualisation of available data and through the use of correct terminology.⁸⁵ For example, while detention is used as a mechanism for states to control migration, research has found that detention is not an effective deterrent of irregular migrants and asylum seekers in either destination or transit contexts.⁸⁶

A study developed by the International Detention Coalition in 2011 highlights that detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals, as undocumented migrants are usually not aware of detention policies in the country of destination and do not convey the deterrence message in their countries of origin.⁸⁷ The study also underlined that, rather than being influenced primarily by immigration policies such as detention, migrants usually choose destinations where they will be reunited with family

or friends; where they believe they will be in a safe, tolerant and democratic society; where there are historical links between their country and the destination country; or where they can already speak the language of the destination country. In May 2011, a Global Roundtable organised by OHCHR and UNHCR on the issue of alternatives to migration-related detention concluded that there is no empirical evidence that detention deters irregular migration, despite the often significant cost to States of maintaining such a detention infrastructure.⁸⁸

The Working Group on Arbitrary Detention has specifically deliberated on the importance of not promoting measures criminalising irregular migration, affirming that “*criminalising illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention*”.⁸⁹ The political sensitivity of the issue of irregular migration generally outweighs its numerical significance⁹⁰ and the increasing securitisation and criminalisation of cross-border movements of people. Irregular migration does occur in significant numbers, but it represents a fairly small proportion of

85 See for example: F. Crépeau, D. Nakache, “*Controlling Irregular Migration in Canada. Reconciling Security Concerns with Human Rights Protection*”, 1 February 2006, pp. 3-6, available at: <http://irpp.org/wp-content/uploads/assets/research/diversity-immigration-and-integration/new-research-article-4/vol12no1.pdf>. As part of their research, Crépeau and Nakache highlight that “[...] recently, states whose sovereignty is affected by many aspects of globalization in the economic and social fields, have tried to regain political ground by emphasizing their traditional mission, that of national security. In the past two decades, the phenomenon of the “securitization” of the public sphere has emerged. This phenomenon is defined as the overall process of turning a policy issue (such as drug trafficking or international migration) into a security issue”.

86 See: UN General Assembly, “*Report of the Special Rapporteur on the human rights of migrants, François Crépeau*”, 2 April 2012, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf. See also: Concluding Remarks by UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, FRA-ECTHR Seminar on European Law on Asylum, borders and immigration, 11 June 2013, available at: https://fra.europa.eu/sites/default/files/echr-fra-handbook-seminar-crepeau_en.pdf.

87 See: “*There are alternatives. A handbook for preventing unnecessary immigration detention*”, International Detention Coalition, 2011, available at: http://massivefishball.com/IDC_Handbook.pdf.

88 See: OHCHR-UNHCR Global Roundtable on Alternatives to Detention, 11-12 May 2011, available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>.

89 See: Working Group on Arbitrary Detention, Report of the Working Group, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/7/4, 10 January 2008, para. 53.

90 For example, it could be noted that, for the year 2013, the total number of visas issued at EU level (13.8 million), plus the number of new residence permits issued over the same period (2.5 million), amounts to a very low statistical rate, if compared to the total of 115,305 refusals at EU external borders reported by Frontex. (i.e. 0.7%). See Eurostat data on residence permits: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Residence_permits_statistics. Data on visas issued at EU level is available at: Frontex Annual Risk Analysis 2013, p. 16: http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf.

total migration⁹¹ and consistent and inclusive policies that avoid further categorisation of vulnerable groups and that promote social inclusion shall therefore be adopted. The current emphasis on border control in Europe significantly overshadows the need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures and difficulties in understanding the complex procedures of residence and work permits.⁹²

Finally, it is important to stress that, in the process of forced return, issues concerning reintegration of migrants into the local society and access to justice and redress mechanisms for migrants who have suffered violations during their migration process or return procedures, including experiences of violence and labour law violations, should be addressed. Policies directed at the sustainable and safe reintegration and access to justice for returned migrants should include access to legal aid and active labour market policies, taking into account the specific national and international labour market needs.

91 In 2009, the Clandestino project produced minimum and maximum estimates of the size of the irregular migrant population for 2008. The aggregate estimate presented by the Clandestino Project for the 27 EU Member States ranged from 1.9 to 3.8 million undocumented migrants. See: Clandestino project "*Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*", European Commission, DG Research, Sixth Framework Programme, Priority 8: Scientific Support to Policies. The results of the Clandestino project are now cited, amongst other institutions, by Eurostat, the European Commission and the FRA. See for example: EU Fundamental Rights Agency, "*Fundamental rights of migrants in an irregular situation in the European Union*", 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf.

92 For more information see: M. LeVoy and K. Soova, "*How Relevant, Effective and Humane is the EU Border Control Regime?*", Government Gazette, March 2013.

RECOMMENDATIONS

Based on the impacts on undocumented migrants of the provisions established within the Return Directive as identified by PICUM members, this position paper aims at informing the debate on possible further development of the EU return policy by providing concrete policy recommendations concerning the situation faced by undocumented migrants within the return process.

In light of the reasons detailed above, PICUM calls for EU and national policy makers to take into account and to give careful consideration to the following recommendations:

1. Return policies should be focused on ensuring migrants' fundamental rights through independent and systematic monitoring of return procedures.

Human rights concerns should always be the main focus of EU policies concerning migration and return. Cooperation between civil society organisations and state institutions on monitoring returns should be further explored. Effective, independent and systematic external monitoring of return procedures across Europe should be established.

2. Viable alternatives to detention should be promoted.

Viable alternatives to detention should be promoted and adopted, in accordance with the requirements of the Return Directive. The use of detention for migration purposes involves the deprivation of liberty for the administrative convenience of States and has a very detrimental impact on migrants' human rights, particularly on children and their families.

3. Children should never be detained.

The UN Committee on the Rights of the Child has stated that detention of a child because of their or their parent's migration status always constitutes a child rights violation and contravenes the principle of the best interests of the child. Relevant national and regional legislative frameworks and migration policies should be adapted accordingly.

4. Procedural safeguards and access to justice shall be granted to all migrants in detention or within the return procedure.

The effective implementation at national level of the procedural safeguards and minimum standards established within the Return Directive should be ensured. Infringement proceedings should be launched in case of violation or ineffective implementation of its measures. Access to justice shall be ensured to all migrants in the process of return, including access to: legal representation and legal aid, access to justice and labour redress mechanisms, interpretation and translation services, consular authorities and NGOs, and asylum procedures.

5. Unremovable migrants should not be detained and should be granted leave to remain.

Where return is not possible for technical or other reasons, or where it would be inhumane, people should not be detained and should be granted leave to remain. At the moment of release, unremovable migrants should receive documents proving their former stay in detention, including the reason for release and prohibition of detention. Durable solutions for migrants who cannot be returned should be explored and unreturnable migrants should be granted access to a regular residence status and access to social services, including housing, healthcare and education.

6. A clear firewall should be established in the process of detection and apprehension of undocumented migrants.

In line with the guidelines developed by the EU Fundamental Rights Agency on apprehension of irregular migrants⁹³, apprehension of migrants in an irregular situation should not entail a violation of undocumented migrants' fundamental rights. As highlighted by the EU Fundamental Rights Agency, "*return policy objectives can be met effectively, without having to resort to apprehension measures which may disproportionately affect fundamental rights*" of undocumented migrants. Public officials and service providers should not be required to report undocumented migrants to immigration authorities. Service providers should eliminate information sharing with immigration authorities; immigration enforcement action should not be conducted in or near service provision. Detection procedures of the immigration authorities should not be conducted in such a way as to disproportionately discourage undocumented migrant families from accessing essential services.

7. Ensure the suspensive effect against removal of complaints challenging a detention decision.

It is recommended that proceedings to challenges of immigration detention decisions must be suspensive to avoid expulsion prior to the case-by-case examination of migrants under administrative detention. Further, training and capacity building for the authorities responsible for establishing and enforcing the relevant procedures, as well as of the judiciary, is identified as crucial to ensure that the procedures exist and are actually applied, including to non-nationals.

93 European Agency for Fundamental Rights, "*Apprehension of irregular migrants – fundamental rights considerations*", available at: http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf.



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