

EU Returns Directive: Proposed amendments

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Detention of irregular migrant children in the EU in the Trump era



EU Returns Directive: Background

- Existing Directive adopted 2008
- Deadline to apply: Christmas Eve 2010
- Extensive CJEU case law
- Commission report, 2014
- 2017: soft law action plan, recommendation, returns handbook
- Frustration at perceived liberalism of directive/case law

EU Returns Directive: Proposal

- Commission proposal, Sept 2018
- JHA Council discussion scheduled Oct 2018
- Must be agreed between Council (QMV) and European Parliament
- Enough time to agree by April 2018 (last EP plenary session before EP elections)?
- New Frontex proposal also includes returns issues
- New law on SIS and returns adopted soon

EU Returns Directive:

Main points

- Definition of ‘risk of absconding’
- Impact: grounds to refuse voluntary departure possibility; means detention & forced removal; more entry bans
- Grounds for detention
- Possible use of definition in Dublin IV Reg?
- Text: 16 factors listed; non-exhaustive list
- Some factors are broad: “illegal entry”

EU Returns Directive: Main Points

- Risk of absconding, contd
- Case-by-case application of the principle
- Four cases where factor creates a rebuttable presumption of risk of absconding
 - using false documents et al
 - opposing expulsion violently or fraudulently
 - not complying with a measure like a reporting requirement
 - violating an entry ban

EU Returns Directive: Main points

- Change in process: must issue returns order as soon as asylum application fails at first instance
- Reflects *Gnandi* judgment of CJEU: preference for one instance of asylum appeal; then failed asylum seeker regarded as irregular migrant and has remedy within the Returns Directive
- Shifts failed asylum seekers into the returns process at a specific stage
- But asylum rules on detention & reception apply

EU Returns Directive: Main Points

- Voluntary departure
- seven-day minimum period dropped
- Three cases where MS can *opt* to refuse voluntary departure become an *obligation* to refuse
- Namely: risk of absconding (cf definition), manifestly unfounded or fraudulent application for legal stay, and risk to public policy, public security and public health
- CJEU has narrowly interpreted the exception for public policy, et al – but this matters less now that the ‘risk of absconding’ ground is widely defined.

Returns Directive:

Main points

- Remedies
- Must be before a judicial authority
- Only one instance of an appeal for a failed asylum seeker, if there was an effective review during the asylum process; 5 days to appeal
- Suspensory effect in case of refoulement concern
- Can request suspensory effect if second instance appeal exists; 48 hours to rule; this applies to failed asylum seekers only if new evidence

Returns Directive: Main Points

- Detention
- Two grounds for detention become three
- List will become non-exhaustive ('only' will be deleted)
- Risk of absconding now broadly defined
- 'avoids or hampers the preparation of return or the removal process' – remains the same, but still broad
- New ground: irregular migrant 'poses a risk to public policy, public security or national security' - matches one of the grounds to detain asylum seekers in EU asylum legislation, which the CJEU has interpreted narrowly
- but other two grounds for detention are broadly defined, and the whole list is non-exhaustive.

Returns Directive: Detention

- Maximum time for detention must be at least three months.
- Not a 'minimum sentence' but a possibility on the books as a maximum period of detention.
- Other detention time limits – six months as the normal time limit, a further twelve months as a possibility in special circumstances – are retained.

Returns Directive: Detention

- Special rules at for failed asylum seekers at border posts
- Standard 'tick-box' form setting out the return decision, rather than a reasoned explanation.
- In principle no chance for voluntary departure, except where the migrant holds a valid travel document (handed over to the authorities) and cooperates fully.
- Only 48 hours to appeal a return decision
- Suspensive effect only applies where there are significant new findings or there was no effective judicial review already

Returns Directive: Detention

- Border posts/failed asylum seekers contd
- Detention apparently always justified, with a four-month time limit
- Regular time limits can be applied on top of this, if return is not possible
- Existing emergency exceptions re detention are retained
- Rules on detention conditions are retained
- Case law limit on criminal law detention retained

Returns Directive: detention

- Implications: no additional use of criminal law detention (scope of directive not changed)
- Criminal law detention of irregular migrants therefore remains limited to exceptions in the case law
- “Trump” policies of family separation based on criminal law detention of asylum seekers hard to apply therefore

Returns Directive: detention

- *Administrative* detention based on the directive will be *easier* to apply however
- The wide interpretation of detention ground of 'risk of absconding'
- New ground of detention
- New minimum period rule
- obligation to refuse voluntary departure if 'risk of absconding' (broad definition) and other cases

Returns Directive: detention

- Possible that EP could object to changes, suggest some more liberal amendments
- Example of reception conditions directive, child detention
- Agreed text of Article 11(2), revised RCD, from June 2018, would 'Trump-proof' the law

Returns Directive: Detention

- 2. Minor shall, as a rule, not be detained. They shall instead be placed in suitable accommodation in accordance with Articles 22 and 23.
- The principle of family unit shall, generally, lead to the use of adequate alternatives to detention for families with minors. Families with minors shall be accommodated in accommodation suitable for them.

Returns Directive: Detention

- However, in exceptional circumstances, as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively, and after detention is assessed to be in their best interests in accordance with Article 22, minors may be detained:
 - (a) in case of accompanied minors, where the minor's parent or primary care-giver is detained; or
 - (b) in case of unaccompanied minors, where it safeguards the minor.

Returns Directive: detention

- Such detention shall be for the shortest possible period of time, and never in prison accommodation or another facility for law enforcement purposes. All efforts shall be made to release the detained minors and place them in accommodation suitable for minors.
- The best interests of the child, as referred to in Article 22(2), shall be a primary consideration for Member States.

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