PICUM RECOMMENDATIONS ON THE ASYLUM PROCEDURES REGULATION

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A COMMON PROCEDURE FOR INTERNATIONAL PROTECTION IN THE UNION AND REPEALING DIRECTIVE 2013/32/EU

APRIL 2021

PICUM is a network of more than 160 organisations working in more than 30 countries, mostly in the EU, to ensure social justice and human rights for undocumented migrants. The following amendments focus on the area of PICUM's expertise, which is ensuring and protecting human rights for undocumented migrants. Therefore, provisions affecting the right to asylum are outside of the scope of the following analysis. For an analysis and recommendations on the asylum border procedures, please refer to ECRE "Comments: on the Commission Amended Proposal for an Asylum Procedures Regulation COM (2020) 611 Border Asylum Procedures and Border Return Procedures"

For a Pact-wide overview of our concerns, read More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations.

Preserving safeguards with regard to detention:

The return border procedures would seriously lower safeguards and would likely entail prolonged detention of asylum seekers for up to 12 weeks (20 in situations of crisis), either as provided for in Article 41a paragraphs 5 and 6 or in de facto circumstances which are likely to amount to detention (cf. FMS v others). This is in addition to the 12, or 20, weeks of detention under the asylum border procedure.

Under international and EU law and jurisprudence, the right to liberty can only be infringed upon in exceptional circumstances and if no other less coercive

measure is effective. This requires that each case is assessed individually and that alternatives to detention are always prioritised. This is consistent with language from the Return Directive, CJEU jurisprudence and Council of Europe guidance.

EuroMed Rights estimated that in Italy, the implementation of the Asylum Procedures Regulation (APR) would require multiplying the number of places in detention facilities by 7,5 times - 50 in situations of crisis. Beyond evident concerns on the humanitarian consequences, it is also unclear how this provision can be legitimate under alleged goals of cost-efficiency.

We recommend:

- Deleting the return border procedure (art. 41a).
- Ensuring that a detention order can only be issued based on an individualised assessment and if no other sufficient but less coercive measures can be applied effectively in a specific case.
- Ensuring that any decision affecting individuals' right to liberty is ordered and approved by a judge or other judicial authority and subject to period reviews.
- Amending article 53 to ensure access to effective remedy against a detention order.
- Ensuring the right to free legal aid.

Promoting voluntary return:

Voluntary returns should always be preferred above forced returns: they are more humane, more durable and cheaper. Voluntary departures constitute, according to Frontex, around 50 % of the total number of returns in the EU. However, it takes time to prepare one's return, both physically and mentally. For this reason, it is essential to set a minimum time period for voluntary departure.

We recommend:

- Granting a period for voluntary departure of at least 30 days (art. 41a§5).

Ensuring that children are not detained:

By allowing the detention – potentially up to 24 weeks (40 weeks in situations of crisis) – of children above 12 years old, as well as younger children and unaccompanied children "for national security reasons", the proposed APR violates international and regional standards that clearly consider child

immigration detention as a violation of the rights of the child. Prohibiting child detention ensures consistence with international legal standards as well as medical evidence showing that even short periods of detention have long- term detrimental effects on children development and health.

Setting an additional threshold at the age of 12 conflicts with the internationally recognised definition of children being every person until the age of eighteen. Moreover, in TQ v Staatssecretaris van Justitie en Veiligheid, the CJEU found that EU Member States may not distinguish between children only on the basis of their age.

We recommend:

- Excluding all children (both unaccompanied and with their families, and until the age of 18) from the asylum and return border procedures (art. 41 and 41a).

Preserving the right to effective remedy:

Being able to remain in the country is an essential part of the right to effective remedy. If applicants were to be sent back to third countries, this would clearly hinder their right to be heard, to legal assistance and to information. Moreover, there are risks that this would lead to irreparable harm, e.g. if the return leads to violations of the principle of non-refoulement, to serious breaches of the right to health or to violation of the right to family life. This is also in line with CJEU jurisprudence (Gnandi).

We recommend:

- Ensuring that everyone is allowed to remain in the country pending the examination of their appeal against a return order (art. 54).
- Interpretation should be provided by qualified personnel. Several NGOs reported the negative effect of interpretation being provided through unofficial channels, including misunderstandings and important information being omitted due to fear of stigmatisation / lack of confidence (art. 53§4).
- Translation of documents is key to ensure access to an effective remedy and should not be left to the discretion of the court (art. 53§5).
- Ensuring two levels of jurisdiction is an important safeguard to the right to effective remedy and is foreseen by the constitution of some Member States (art. 54§9).
- People might have to prepare the appeal in situations of detention, with limited access to information, no access to legal aid nor NGOs. Considering these circumstances, one week would be too short to prepare and submit an appeal. We suggest a minimum of one month instead.

PICUM

Maintaining access to existing residence permits regulated at national level:

The obligation to issue a return decision with the rejection of an asylum application would close access to residence permits outside asylum which are currently available under national law. For instance, more than half of EU member states provide a temporary residence permit on medical grounds; at least five countries have legislation granting special permits for undocumented victims of domestic violence; and at least eight countries have regularisation mechanisms for children, young people or families. As a consequence, several people who would have access to options for regularisation under national legislation (including humanitarian permits) would risk being deported nonetheless, leading to risks of violations of fundamental rights including family life and non-refoulement.

Moreover, **this goes against the objective of efficiency** as several categories of people who might be non-returnable for different reasons (i.e. non-refoulement, family reasons, best interests of the child) will have to appeal the return decision if this fails to take into consideration all elements that should be analysed under EU and international law. For instance, the ECtHR found that article 3 of the European Convention on Human Rights was violated when governments let an unaccompanied child travel/return alone, did not ensure that a returned child would be properly looked after upon return, and when governments did not have regard for the real situation the child was likely to find upon return (Rahimi v. Greece; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium). In addition, in TQ v Staatssecretaris van Justitie en Veiligheid, the CJEU confirmed once again that before returning an unaccompanied child, of any age, Member States have an obligation to evaluate the adequacy of reception facilities. This would require an in-depth assessment which would go beyond the scope of the asylum application.

The proposed APR would multiply the levels of jurisdiction and risking causing backlogs in higher courts.

The suggestion to issue a return decision with the rejection of an asylum application also appears to limit Member States' discretion under Article 6(4) of the Return Directive, which they may need to use to ensure respect for human rights (e.g. the right to respect for family and private life).

We recommend:

- Deleting recital 31a and article 35a.
- Ensuring that a return decision can only be issued after it is assessed that the applicant does not fulfil the conditions to apply for a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons under Member States legislation and that their return would not lead to risks of violations of the principle of non- refoulement,

the best interests of the child, and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations. When children are concerned, a documented best interests procedure should precede the return.

Simplifying and aligning procedures:

The multiplication of procedures that can be applied in cases of a rejection of an asylum application (refusal of entry, return border procedure, Return Directive or procedures under art. 2(2) of the Return Directive) is unclear and risks leading to legal uncertainty, thus contradicting the regulation's purposes to set uniform procedures. It also sets different standards lowering safeguards for certain groups of people on a discriminatory basis.

We recommend:

- Deleting the second part of recital 40g and paragraph 8 of Article 41.

For any questions, please contact Marta Gionco: marta.gionco@picum.org

PICUM