



(c) Daria Samokhina - Pexels

WHY IS THE COMMISSION'S PUSH TO LINK ASYLUM AND RETURN PROCEDURES PROBLEMATIC AND HARMFUL?

Briefing paper

Why is the Commission's push to link asylum and return procedures problematic and harmful?

In recent [years](#), EU migration policies have consistently focused on increasing the rate of returns. Yet such an approach rests on the mistaken belief that for undocumented people, the only option is to return – either by force or “voluntarily”. The EU Pact on Migration and Asylum is built on this assumption and attempts to entrench it throughout the EU’s immigration and asylum procedures. Three recent proposals, the [Recast Return Directive](#), the [Screening Regulation](#) and the amended [Asylum Procedures Regulation](#) go one step further in this direction, by assuming that all people who arrive or reside in the EU irregularly and whose asylum applications are unsuccessful should immediately return or be deported.

In reality, people continue to reside irregularly for a wide range of reasons, and may indeed have other grounds for residence than an asylum application. According to official estimates, every year [300,000 people](#) cannot return from the EU for different reasons, including human rights and factual considerations. Furthermore, [60 national protection statuses exist in the EU](#), in addition to international protection (i.e. asylum and subsidiary protection). The Pact proposals would risk practically closing access to these and other national-level residence permits.

Key messages:

- Under international and EU law, there are **several human rights reasons for which people who do not qualify for asylum cannot be deported**, such as the principle of non-refoulement, protection of family and private life, the best interests of the child and the prohibition of arbitrary detention (see [Annex 1](#));
- In addition, **several circumstances that are outside of an individual's control can make deportation or return impossible** (see [Annex 2](#));
- **Most EU member states foresee different pathways to obtain a permanent or temporary regular status for people in situations of irregularity** (e.g. permits for humanitarian, best interests of the child, medical, family or other reasons); In 2020, the European Migration Network identified 60 national protection statuses in 23 Member States, the UK and Norway. These permits are often assessed outside of the asylum procedures.
- **The proposed Recast Return Directive and EU Pact on Migration and Asylum would practically close access to these national-level residence permits;**
- **It is pivotal for EU law not to restrict access to these pathways, and for Member States to improve and expand them in line with realities on the ground** (see section on recommendations).

Brief overview of permits which would risk becoming inaccessible

Several EU member states foresee different pathways to obtain a permanent or temporary regular status for people in situations of irregularity. These pathways do not fall under the asylum/return binary approach.

At least seventeen EU member states [provide residence permits](#) based on **humanitarian reasons**.¹ In addition, specific statuses based on the **principle of non-refoulement** exist in at least seven EU member states.²

In addition, [twelve](#) EU member states provide a temporary residence permit on **medical grounds**;³ at least [five](#) member states have legislation granting special permits for **undocumented victims of domestic violence**;⁴ at least [eight](#) member states have **regularisation mechanisms accessible to children, young people or families**;⁵ and at least [six](#) member states have **procedures for stateless people**.⁶

Some countries also provide access to [residence permits](#) based on factors such as length of residence, employment, school attendance of children and other local social ties.

Some member states grant residence permits to some [victims of crimes](#) (e.g. domestic violence, trafficking in human beings or particularly exploitative working conditions), to allow them to seek protection and report abuse in a safe way and to access remedy. The EU legal framework requires or encourages permits to be granted in some circumstances, in particular for **victims of domestic violence** with a dependent status ([Citizens Directive](#) and [Family Reunification Directive](#)), **victims of human trafficking** ([Residence Permit Directive](#)) and **labour exploitation** ([Employers' Sanctions Directive](#)).

These various permits are based on criteria which are often not assessed in the asylum procedure. At least [half of the 60 national protection statuses](#) existing in the EU are currently examined by other authorities than those handling asylum applications, and in many instances are not part of the international protection procedure. The refugee status determination procedure, which is the core of asylum procedures, evaluates whether the person has been or has a risk of persecution because of their "race, religion, nationality, membership of a particular social group or political opinion," or would suffer serious harm as defined by article 15 of the [EU Qualification Directive](#). What is usually not considered is: whether it's in the best interests of the child's development and long-term well-being to live in the country or a third country; whether people might face risks of serious harm when they are deported or return to a country of transit or another third country; whether their health condition might prevent their return; whether they might have strong private or family ties in the country (in particular, but not only, for people who have been living in the EU for years); and whether they might qualify for other national-level residence permits.

1 Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Slovak Republic, Spain, and Sweden.

2 Cyprus, Czech Republic, Hungary, Italy, Poland, Slovenia, and Spain.

3 Belgium, Czech Republic, Finland, Germany, Greece, Malta, Netherlands, Poland, Portugal, Slovak Republic, Spain, and Sweden.

4 France, Greece, Italy, the Netherlands, and Spain.

5 Belgium, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, and Spain.

6 Bulgaria, France, Hungary, Italy, Latvia and Spain.

The impact of the new proposals

The proposed recasting of the Return Directive and the Pact proposals foresee asylum and return as the only two procedures applicable to undocumented people.

Proposal for a Recast Return Directive:

Art. 8(6): Member States shall issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation].

Proposal for a Screening Regulation:

Art. 14: The third country nationals referred to in Article 3(1) point (a) and (b) of this Regulation who –have not applied for international protection and –with regard to whom the screening has not revealed that they fulfil entry conditions set out in Article 6 of Regulation (EU) 2016/399, shall be referred to the competent authorities to apply procedures respecting Directive (EU) 2008/115/EC (Return Directive). In cases not related to search and rescue operations, entry may be refused in accordance with Article 14 of Regulation 2016/399.

Proposal for an amended Asylum Procedure Regulation:

Art. 35a: Where an application is rejected as inadmissible, unfounded or manifestly unfounded with regard to both refugee status and subsidiary protection status, or as implicitly or explicitly withdrawn, Member States shall issue a return decision that respects Directive XXX/XXX/EU [Return Directive].

Art- 41a: Third-country nationals and stateless persons whose application is rejected in the context of the procedure referred to in Article 41 shall not be authorised to enter the territory of the Member State.

The articles above show that the Pact projects international protection or return as the two only options. While one could argue that art. 6(4) of the Return Directive, which foresees the possibility to grant at any stage a permit for humanitarian, compassionate or other reasons would still apply, in practice **this would only apply after a return decision has already been issued**, because states would be obliged to adopt a return decision immediately after having considered the asylum application. In practice, **the only way to apply for other permits would then be by appealing against a return decision**. Furthermore, in the new Pact the possibility to appeal against a return decision is limited by:

- Impossibility to access a lawyer during the Screening Procedure (this is exacerbated for unaccompanied children, who will not be appointed a guardian during the screening procedure);
- Extremely short time limits for appealing against the rejection of the asylum application and the issuance of a return decision;
- No automatic suspensive effect of the appeal, which means that people could be deported before a decision on their appeal is taken.

This would go against the principle of efficiency, as it would force people to seek judicial remedies as the only way to enforce their rights. It will likely drain the already-limited resources of many judicial systems too.

In addition, return decisions often cannot be enforced because doing so would amount to *refoulement*, or because of administrative or other reasons. Investing in good quality decision-making, prior to issuing return decisions, would vastly reduce the number of unenforceable return decisions and prevent human suffering.

Recommendations

A migration system that **respects the fundamental rights of everyone** ensures people can access **residence permits granted at national level**. A fair and efficient system **does not leave hundreds of thousands of people in limbo**. We recommend member states to comprehensively assess fundamental rights considerations (including but not limited to the right to health care, private and family ties, best interests of the child and non-refoulement) and whether third country nationals fulfil the criteria to apply for an autonomous residence permit or other authorisation granting a right to stay before a return decision is issued. For children, this means including a formal, individual and fully-documented procedure examining all aspects of a child's situation and considering all options in order to identify which durable solution⁷ is in the best interests of the child (see annex 1).

This requires:

- Amending Recital 7 and Article 8(6) of the Recast Return Directive (see proposed [amendments 489 and 499](#))
- Amending recital 31a, 40 and article 35a of the Asylum Procedure Regulation
- Amending recital 5 and article 14 of the Screening Regulation

Example of possible language (*Recast Return Directive*):

Art. 8(6): Member States shall issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation], ***provided 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 grounds under the applicable national legal framework and that their return would not lead to risks of violations of the principle of non-refoulement and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations. When a minor is concerned, a return decision should only be adopted if the return is found to be in the best interests of the child according to a best interests procedure. These grounds should be assessed on an individual basis before a return decision is issued.***

This would also comply with the European Parliament [Resolution](#) on the implementation of the Return Directive (2019/2208(INI)), which "*stresses the importance of successfully exhausting the options provided in the directive to enforce return decisions, with an emphasis on voluntary return; [...] underlines the fact that granting residence permits to individuals who cannot return to their country of origin could help to prevent protracted irregular stays and reduce vulnerability to labour exploitation and may facilitate individuals' social inclusion and contribution to society; notes that this would also help to get people out of administrative limbo where they may be stuck*" (para 23).

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

⁷ Three durable solutions are possible: integration in the country of residence, integration in the country of return or integration in a third country (e.g. family reunification). For more on durable solutions and how to identify them, www.picum.org/durable-solutions

ANNEX 1: Main human rights grounds for which return would not be possible

Non-refoulement

International [law](#) prohibits states from removing people from their jurisdiction to a place where they would be at risk of serious human rights violations, including persecution, torture, ill-treatment or other fundamental rights violations, or of further transfer to a third state where there would be a real risk of such violations. The principle of non-refoulement **requires cases to be examined individually by the state**. Each deportation decision should be reviewed in light of this principle and the appeal against a return decision which could lead to a violation of this principle should always have a [suspensive](#) effect.

One of the cornerstones of the principle of *non-refoulement* is the **prohibition of ill-treatment and torture** ([European Convention on Human Rights](#) (ECHR), art. 3; ECtHR, [Saadi v. Italy](#)). This requires setting up adequate procedures to assess the risk of refoulement ([Auad v. Bulgaria](#)).

The principle of *non-refoulement* also requires states to assess the impact of return procedures on individuals' **medical condition and overall health situation**. In this context, states have the obligation to assess the impact of removal on an applicant by considering how an applicant's condition would evolve after transfer to the receiving State (ECtHR, [Paposhvili v. Belgium](#)). This should be evaluated on a case-by-case basis.

When assessing whether the return or deportation would amount to *non-refoulement*, states should also take into consideration the **mental health state of the individual** ([A.H.G. v Canada](#), [Aswat v. the United Kingdom](#), [Savran v. Denmark](#), App. No. 57467/15 Eur. Ct. H.R (2019))

In [Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida](#) (2014), the **Court of Justice of the European Union** clarified that the enforcement of a return decision entailing the removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available and which might lead to serious and irreparable harm may constitute an infringement of Article 5 of Directive 2008/115 (para 49, 50).

The principle of non-refoulement also precludes states from deporting individuals when there are risks of breaches of different human rights violations, including serious forms of **gender-based violence** (CEDAW, [General Recommendation No. 32](#), para 23), **prolonged solitary confinement** (CCPR, [General Comment No. 20](#), para 6) and **degrading living conditions** (ECtHR, [MSS v Belgium and Greece](#)).

Protection of family and private life

Based on art. 8 European Convention of Human Rights and art. 7 CFR; art. 5(b) RD:

- In [Boultif v. Switzerland](#) (para 48) and [M Üner v. the Netherlands](#) (para 58), the European Court of Human Rights clarified that when the return of a third country national would separate them from their family or when the person is settled in the country, states should balance different factors including the length of stay in the country, family situation, nature of any criminal offences, best interests and well-being of the children and the solidity of social, cultural and family ties to the country of residence and to the country of origin ([Boultif v. Switzerland](#); [M Üner v. the Netherlands](#)). General immigration policy considerations cannot be regarded as sufficient justification for refusing a residence permit for an immediate family member ([Rodrigues da Silva and Hoogkamer v. the Netherlands](#) and [Jeunesse v. the Netherlands](#)).

Based on Article 7, 20 and 24(2) of the EU Charter of Fundamental Rights:

- In several instances, the European Court of Justice has determined that EU-citizen children of undocumented parents may not be forced to leave the territory.
 - > In the [Zambrano](#) case, the Court held that, by not giving the third country national father of a Belgian child a derived residence right, Belgium would oblige the child to leave the territory of the EU as a whole, and therefore deprive the child of the genuine enjoyment of the substance of the rights conferred by the EU citizenship status.
 - > In [Chavez-Vilchez](#), the Court clarified that it is not enough for member states to determine that the child can live with the other (EU-citizen) parent. Instead, Member States must determine whether the third country national parent is the actual caregiver to the child, and to what extent the child is dependent on that parent. The Court mentioned the following factors to be considered in the assessment: whether the other parent can take care of the child, the age of the child, the physical and emotional development of the child, the strength of the affective bond between the child and both of its parents, and the risks to the development and wellbeing of the child if it is separated from the third-country national parent.
- In [K.A. and Others](#), the Court of Justice of the European Union clarified that, when issuing a return decision, including with respect to an individual who has been previously subject to an entry ban, member states should take into consideration their family life and in particular the interest of children (see also [Rendón Marín](#) and [Zambrano](#)).

Best interests considerations

Under the [UN Convention on the Rights of the Child](#) (art. 3) and the [EU Charter on Fundamental Rights](#) (art. 24), before issuing a decision on return, states are required to consider, as a primary consideration, the best interests of each child affected by the decision. This is the precondition to any return of any child, whether they are unaccompanied, separated or within a family, and requires specific procedures to be implemented in every decision-making process.

For children, this means including a formal, individual and fully-documented procedure examining all aspects of a child's situation and considering all options in order to identify which durable solution⁸ is in the best interests of the child. It must be undertaken by a multi-disciplinary, independent and impartial team that duly hears and considers the views of that child and provides or ensures the provision of child-friendly information, counselling and support. It must lead to a reasoned, documented decision that can be appealed with suspensive effect. A fully-fledged best interests procedure should always precede a return decision for it to be in line with international standards and children's needs. For more on this, see [Guidance to respect children's rights in return policies and practices Focus on the EU legal framework](#) developed by Unicef, IOM, UN Human Rights, Save the Children, ECRE, PICUM and Child Circle.

The UN Committee on the Rights of the Child has clarified that general migration control considerations cannot outweigh the best interests of the child (UNCRC, [General Comment No. 6](#)) and the European Court of Human Rights has reproached Member States twice for not taking due consideration of the best interests of the child before denying a residence permit (a.o. [Rodrigues da Silva and Hoogkamer v. the Netherlands](#) and [Jeunesse v. the Netherlands](#)).

⁸ Three durable solutions are possible: integration in the country of residence, integration in the country of return or integration in a third country (e.g. family reunification). For more on durable solutions and how to identify them, www.picum.org/durable-solutions

Prohibition of arbitrary detention (art. 5 ECHR, art. 6 CFR)

In [Othman v. UK](#), the European Court of Human Rights found that the deportation of an individual to a country in which they would face a violation of article 5 ECHR (right to liberty and security) and article 6 ECHR (right to a fair trial) would represent a breach of the European Convention on Human Rights.

Annex 2: Other reasons for which voluntary return and deportation might be impossible

Practical reasons or technical obstacles to removal (e.g. lack of travel documents)

When travelling is not possible due to medical reasons: Frontex's "[Code of Conduct](#)" for return operations and return interventions coordinated or organised by Frontex" (art. 8) clarifies that a return operation can only take place if returnees are "fit to travel".

Statelessness: According to UNCHR [Handbook](#) on Protection of Stateless Persons (2014), protection can only be considered available in another country when a stateless person is **able to acquire or reacquire nationality** through a simple, rapid, and non-discretionary procedure, which is a mere formality; **or enjoys permanent residence status** in a country of previous habitual residence to which immediate return is possible. In all other circumstances, their return would be unlawful.

Protection concerns, when people would be returned to a country which is not their country of origin or prior habitual residence (e.g. in case of refusal of entry at the EU external borders) – this would also represent a violation of the principle of *non-refoulement*.



SIGRID RAUSING TRUST



This report has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2021-2027).
For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication does not necessarily reflect the official position of the European Commission.



PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

Rue du Congres / Congressstraat 37-41, post box 5
1000 Brussels
Belgium
Tel: +32/2/210 17 80
Fax: +32/2/210 17 89
info@picum.org
www.picum.org