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Illegal Migrants: proposals for a common EU returns policy

Report with Evidence

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ABSTRACT

- The principle of a common EU policy for the return of illegally staying third-country nationals is one with which we sympathise, though it is questionable whether the EU should proceed with this before a common policy governing admissions is in place.

- The current proposal is right to give primacy to voluntary return. Forcible removal is an alternative which should be used only when all opportunities for voluntary return have been exhausted.

- The mandate given to the Commission in the Hague Programme was to provide for common standards for persons to be returned in a humane manner, and with full respect for their human rights and dignity. The proposed Directive could have been an opportunity for raising those standards to the highest currently in force in the Member States. This opportunity has not been taken. The standards proposed are generally a compromise between the best and the worst. There is a danger that this may result in the lowering of standards in some Member States.

- The proposals for judicial supervision of detention and removal are a welcome exception. They set high standards which all Member States should attain.

- Incorporation into the Directive of the Council of Europe Guidelines on Forced Returns would do much to safeguard the position of vulnerable persons, especially children.

- We reiterate our view that the United Kingdom should in general participate fully in immigration measures under Title IV of the Treaty, but we believe that the Government were in this particular case justified in not opting in to the proposed Directive.

- This is not a reason for the Government to be complacent. They should strive to raise United Kingdom standards to the high levels we recommend, and use such influence as they have in the negotiations on the draft to improve the standards it seeks to set.

Illegal Migrants: proposals for a common EU returns policy

CHAPTER 1: INTRODUCTION

Background

1. The return of illegal migrants is a topic never far from the headlines. This is a problem which, to a greater or lesser extent, affects all Member States of the EU. In this report we look at an EU initiative for dealing with it.

2. It is now just over four years since the Commission published its Green Paper on *A Community Return Policy on Illegal Residents.*[1] This followed from the Commission's earlier *Communication on a Common Policy on Illegal Immigration*[2] which we considered and reported on during 2002.[3] We considered the Green Paper in the course of that inquiry, and we sent our comments to the Commission,[4] broadly supporting the paper's general thrust. The Government's response was somewhat more ambivalent.[5]

3. In our report we stated that we saw considerable scope for adopting a common approach to returns, and emphasised that this should be based on returning illegal immigrants to their countries of origin, rather than moving them round the EU. Our conclusion was that "the Member States have a common interest in securing the removal of illegal immigrants, not just from the country where they happen to be when detected but from the territory of the Union as a whole."[6] We urged that this approach should be further explored.

4. The Commission's Green Paper was followed on 14 October 2002 by a policy paper.[7] This Communication was the basis for the Return Action Programme adopted by the Council on 28 November 2002, which called for improved operational cooperation between the Member States and with third countries, and the establishment of common standards to facilitate operational return.

5. Thereafter this project, which at the time was accorded a high degree of priority, seems to have lost any sense of urgency. There was certainly action on other aspects of the return process. A Directive had already been agreed

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1 COM(2002)175 final, 10 April 2002.

2 COM(2001)672 final, 15 November 2001.

3 A Common Policy on Illegal Immigration, 37th Report, Session 2001–02, HL Paper 187.

4 Letter of 17 July 2002 from Lord Brabazon of Tara to Mr Adrian Fortescue, Director-General, Justice and Home Affairs Directorate-General, European Commission, and to Lord Filkin, Under-Secretary of State, Home Office; published in *Correspondence with Ministers,* 49th Report, Session 2002–03, HL Paper 196, at page 222. Lord Filkin's reply is also at page 222; Mr Fortescue's is at page 231.

5 Correspondence with Ministers, 49th Report, Session 2002–03, HL Paper 196, at page 224.

6 A Common Policy on Illegal Immigration, 37th Report, Session 2001–02, HL Paper 187, paragraph 92.

7 Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, COM(2002)564 final.

on the mutual recognition of expulsion decisions,[8] and under the Return Action Programme further measures were agreed on transit assistance for removal by air,[9] and on the organisation of joint flights.[10] Readmission agreements were also concluded between the EU and a number of countries of origin or third countries from which irregular migrants originally travelled, in particular Hong Kong,[11] Macao,[12] Sri Lanka[13] and Albania,[14] facilitating the identification and return of persons to those countries.[15]

6. However there were no developments on the proposal for common procedures on returns between November 2002 and the adoption by the European Council on 4–5 November 2004 of the Hague Programme, a new five-year programme for EU action in justice and home affairs.[16] The Commission, in its quinquennial assessment of the Tampere proposals, had confined itself to saying:

"A stronger fight against trafficking in human beings, and the development of an effective policy on returns and re-admission, will be facilitated by the future Constitutional Treaty."[17]

7. However the Hague Programme itself specifically called for a return and re-admission policy, stating:

"Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, a compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity."[18]

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8 Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ 2001 L 149/34.

9 Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ 2003 L 321/26 (transposition deadline 6 December 2005).

10 Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ 2004 L 261/28.

11 Council Decision 2004/80 of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization, OJ 2004 L 17/23.

12 Council Decision 2004/424 of 21 April 2004 concerning the conclusion of the Agreement between the European Community and the Macau Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization, OJ 2004 L 143/97.

13 Council Decision concerning the conclusion of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, Council doc.10666/03, 9 July 2003.

14 Council Decision on the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, Council doc.5614/05, 15 February 2005.

15 As at 14 March 2006 the agreements with Hong Kong and Macao were in force, but not the agreements with Sri Lanka and Albania. Negotiations on an agreement with Russia have been concluded, but the agreement is not yet signed. Negotiations are ongoing with Algeria, China, Morocco, Pakistan, Turkey and Ukraine: supplementary written evidence of Tony McNulty MP, page . See also the reply of Lord Triesman to Q 738.

16 See our report *The Hague Programme: a five year agenda for EU justice and home affairs*, 10th Report, Session 2004–05, HL Paper 84.

17 Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations, COM(2004)401 final, 2 June 2004, paragraph 2.4.

18 Presidency Conclusions (document 14292/04), Annex 1, paragraph 1.6.4.

8. The Council called for Commission proposals which would enable the Council to begin discussions "in early 2005". In the event, it was not until 1 September 2005 that the Commission submitted the *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*.[19] This is the draft Returns Directive which is the subject of our inquiry.[20] We set it out in full in Appendix 5.

The position of the United Kingdom

9. Because the legal basis of the Directive is Article 63(3)(b) of the Treaty establishing the European Community, which falls within Title IV of that Treaty (Visas, asylum, immigration, and other policies related to free movement of persons), the Directive once adopted will not be binding on the United Kingdom unless it opts into it. If it wishes to do so, it must notify the Council within three months of the proposal being presented to the Council, and in that case, but not otherwise, it can participate in the adoption of the Directive.[21] If it does not at that stage opt in, it is still open to the United Kingdom, once the Directive is adopted, to notify the Council and the Commission that it wishes to accept it and be bound by it.[22] There is however no precedent for the United Kingdom having done so in similar situations.

10. The Government had always been doubtful of the value of setting standards in this field, and their first reaction was to list a number of provisions which gave particular cause for concern, and to say that they would "make a decision on [United Kingdom] participation in the directive, based on a careful analysis of the benefits and risks, before the Christmas recess".[23] On 8 December 2005 they told us that "our initial position is that we are minded not to opt into this Directive".[24] In the event, the Government decided not to opt in,[25] and so informed us.[26] Subsequently a Home Office witness summarised the position thus: "The Directive as it stands would, in total, be a hindrance to the sort of common action that we would like to see take place and would not facilitate returns."[27] The view of Mr Tony McNulty MP, the Minister of State, was: "I do not think, for our purposes, this Directive written in this form is appropriate to what we seek in terms of those common standards."[28]

11. "Adoption" of an instrument includes the negotiations leading to its adoption. It is however not the case that the United Kingdom, by not opting

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19 COM(2005)391 final, document 12125/05. Also published as 12125/05 ADD 1 was an Impact Assessment, and as ADD 2 a Commission staff working document with detailed comments.

20 We refer to this throughout as "the Directive", although it is of course still only a proposal for a directive.

21 Protocol to the Treaty of Amsterdam on the Position of the United Kingdom and Ireland, Articles 1 and 3.

22 Ibid, Article 4. And see the evidence of Susannah Simon, Q84: "It does remain open to us to opt in. Once the negotiations are finished, once the Directive has been adopted, we could opt in after the event. This would be subject to the Commission's agreement."

23 Explanatory memorandum of 26 October 2005, paragraphs 16 and 19.

24 Home Office evidence to the inquiry, p 27.

25 Ireland has also not opted in: Q 526.

26 Letter of 11 January 2006 from Tony McNulty MP, Minister of State, Home Office, to Lord Grenfell.

27 Tom Dodd, Q83.

28 Q 407.

in, will have no say in the forthcoming negotiations on the Directive. The Home Office told us that British officials and ministers will be present during negotiations and will be able to seek to have changes made, though other Member States, and in particular the Commission, are less likely to take account of their views.[29] Jonathan Faull, the Director-General of DG Justice, Freedom and Security at the Commission, told us that British representatives were listened to because they were respected, but that "it is of course a great handicap, which everybody will be aware of…that they are not part of the final legislative process".[30] **We hope that changes suggested by the United Kingdom will include those we recommend in this Report, and that the Directive may thereby be improved and so facilitate the establishment of a safe, fair and effective common approach on returns.**

The timetable for negotiations

12. It does not seem that work on this Directive is being given a high priority by the Austrian Presidency,[31] possibly because the Presidency shares a view we have heard expressed elsewhere that Governments hold widely differing views, so that there is little prospect of early agreement in the Council. Lord Triesman, the Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office, told us that other Member States had even more reservations than the United Kingdom: "I have not a strong sense that the Directive is at the top of anybody's agenda".[32] But even once the Council has agreed on a common position, the Directive could be adopted only if agreement is reached with the European Parliament under the co-decision procedure.[33] The Parliament has taken the view that money should be spent on the return of third-country nationals only in accordance with common EU standards, and has therefore made the adoption of the proposed European Return Fund, which would run from 2007–13,[34] subject to agreement with the Council on the Directive. But it was suggested to us that the positions of the European Parliament and the Members States are so far apart that there is little prospect of any early agreement.[35]

13. A failure of the Council and the Parliament to reach any agreement would be fatal to the Directive. Our inquiry proceeded however on the assumption that

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29 Susannah Simon, Q85; Tony McNulty MP, Minister of State, Home Office, Q417–420.

30 Q 531.

31 Q 503. In an address to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006, Liese Prokop, the Austrian Federal Minister of the Interior, listed the matters to which the Presidency was giving priority. The Directive was not among them.

32 Q 745.

33 The procedure set out in EC Treaty Article 251 now applies to Title IV instruments other than those dealing with legal migration, and gives the European Parliament an equal voice with the Council in the adoption of instruments under Title IV. This proposal is the first in the field of immigration to be governed by this procedure.

34 Proposal for a Decision of the European Parliament and Council establishing the European Return Fund for the period 2007–2013 as part of the General programme 'Solidarity and Management of Migration Flows' (COM/2005/0123 final).

35 Susannah Simon (Home Office) Q 449; Cristina Castagnoli, Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, (LIBE Committee), Q 621; Mr Manfred Weber MEP, rapporteur of the LIBE Committee, Q770.

negotiations on the text are continuing, and that it may be possible to improve it sufficiently for it ultimately to be acceptable to both institutions.

Conduct of the inquiry

14. This inquiry was undertaken by our Home Affairs Sub-Committee (Sub-Committee F). The membership is shown in Appendix 1. Our Call for Evidence is set out in Appendix 2, and a full list of witnesses in Appendix 3. We are most grateful to all of those who gave us written and oral evidence, not least those whom we heard on our visit to Brussels on 2 and 3 March 2006.

15. We were particularly interested in the conditions under which vulnerable persons, and especially children, are held in detention in this country, and on 7 March we visited the immigration detention centre at Yarl's Wood, near Bedford. A full account of our visit is set out in Appendix 4. We are grateful to our hosts, and to all those who helped us on that visit.

16. We were fortunate to be assisted during our inquiry by Professor Jörg Monar, holder of the Marie Curie Chair of Excellence at the Université Robert Schuman de Strasbourg (currently on leave from the University of Sussex). He has acted for us in previous inquiries, and his help was invaluable.

17. **In view of the significance of the issues raised by the draft Directive, we make this Report to the House for debate.**

CHAPTER 2: THE PRESENT DRAFT OF THE DIRECTIVE

18. Since November 2005 there have been negotiations at Council Working Party level on the text of the draft Directive.[36] As we have said,[37] the United Kingdom, although it has not opted in, takes part in the negotiations. Ireland is in the same position. A third Member State not bound by the Directive is Denmark, which has no possibility of opting in at any stage.[38] Recitals (22) and (23) make clear that the Directive will be part of the Schengen *acquis* within the meaning of the agreements between the EU and Iceland, Norway and Switzerland, and those countries are therefore represented on the Working Party. At the date of this report no changes have been agreed to the text of the Directive, which therefore remains as set out in Appendix 5.

The text of the Directive

19. Article 1 states that the draft Directive "sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations." In outline, the Directive:

- obliges Member States to issue a return decision to those falling within the scope of the Directive, and a removal order where necessary to enforce the obligation to return, subject to granting a period for voluntary departure which cannot exceed four weeks (Articles 6 and 7);
- allows postponement of removal in specific circumstances linked to the situation of the individual concerned, such as personal and family reasons, and provides for exceptions to removal in circumstances linked to the physical or mental health of the individual, or when removal cannot be enforced for practical reasons (for instance for lack of appropriate transport facilities), or when minors are involved (Article 8);
- obliges Member States to issue an EU-wide "re-entry ban" of up to five years, or longer in cases of a serious threat to public policy or public security (Article 9);
- requires any coercion used in forcible removals to be proportionate and in accordance with fundamental rights (Article 10);
- governs the form and content of return decisions and removal orders (Article 11);
- provides for a right to an effective judicial remedy against return decisions and removal orders; it is left to Member States to decide whether the remedy should have automatic suspensive effect (Article 12);
- provides for a minimum level of support for those whose removal has been postponed, or who cannot be removed (Article 13);

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36 As at 2 March there had been four sessions of the working party: Q490.

37 Paragraphs 10 and 11.

38 Under the Protocol to the Treaty of Amsterdam on the Position of Denmark, Articles 1 and 2, Denmark does not take part in, and is not bound by, measures adopted pursuant to Title IV of the Treaty establishing the European Community.

- introduces a maximum time limit of six months for the use of temporary custody, and provides for review by a court or tribunal of the reasons for detention at not more than monthly intervals (Article 14); and
- requires those held in detention to be treated in a humane and dignified manner, and not in prison accommodation, special consideration being given to children and other vulnerable persons (Article 15).

The return decision, its form and content, and any detention involved, are matters considered in Chapter 3. Chapter 4 deals with judicial remedies, and Chapter 5 with the re-entry ban.

20. We did not specifically call for evidence on Article 16, which governs the rules applicable when a third-country national subject to a removal order or return decision in one Member State is apprehended in another Member State, nor have we considered this provision.

Scope

21. The question which immediately arises is the categories of persons to which the Directive applies. They are described as "illegally staying third-country nationals", and the expressions "third-country national" and "illegal stay" are defined in Article 3(a) and (b). We have referred before to the pejorative use of the word "illegal" in this context,[39] with its imputation of criminality. The expression probably does not immediately conjure up in most people's minds a picture of a gap year student who has overstayed his conditions of entry, yet such British students are one of the largest groups of "illegally staying third-country nationals" in Australia. We note that the French text refers to those "en séjour irrégulier", and the Joint Council for the Welfare of Immigrants (JCWI) urged that the term "irregular migration" should be used,[40] a term which the European Economic and Social Committee also prefer.[41] On the other hand, "illegal immigrant" is a commonly used English expression, and Article 63(3)(b) of the Treaty establishing the European Community, the legal base of the Directive, refers to "repatriation of illegal residents". **We emphasise that this Directive is dealing with widely differing categories of persons, some of whom will have entered the EU legally and resided there legally.**

22. This is not merely a question of semantics, or of verbal infelicity. Professor Elspeth Guild pointed out to us the difficulties there would be in implementing this Directive so long as there was no "definition independent of the vagaries of national law, which can determine EU status of regularity and irregularity".[42] The JCWI took the same view: "There has to be much more clarity on the definition of what constitutes an 'illegal' third country national".[43] UNHCR thought the definition needed to make clear that asylum-seekers on whose application a final decision had yet to be issued at first instance or on appeal were not included.[44] **The definition must in any**

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39 *A Common Policy on Illegal Immigration*, 37th Report, Session 2001–02, HL Paper 187, paragraph 18.

40 Written evidence, p 220.

41 Q 701.

42 Q384.

43 Written evidence, p 221.

44 Written evidence, p 55.

case clarify the position of those with pending appeals, and those whose rights of appeal have not been exhausted.

The need for a Directive

23. There is as yet no EU instrument governing the conditions of entry of third-country nationals into the Member States. This is still a matter for the law of the individual Member States. It may seem anomalous to be negotiating a Directive on a common returns policy when there is no instrument governing a common arrivals policy, nor any immediate prospect of one. The Refugee Council were disappointed that the Member States had not "first addressed the serious deficiencies in their asylum procedures before going on to look at returns".[45] This was a view also put to us by the JCWI,[46] and we understand that it is shared by the European United Left Group and the Political Group of the Greens in the European Parliament.[47] Professor Elspeth Guild thought there was some merit in the argument that one should start at the beginning.[48]

24. The Commission's view is that a common return policy is "an integral and crucial part of the fight against illegal immigration"[49] and "an essential component of a well managed and credible policy on migration".[50] The Commission was in any event required by the Hague Programme to produce a policy on the establishment of common standards for returns. It did not however follow that this should necessarily take the form of a Directive. Other options considered by the Commission included the adoption of a non-binding legal instrument, such as a Recommendation, or full harmonisation by the adoption of a Regulation. The first was rejected precisely because it would not have been legally binding, the second because it would have been too rigid and inflexible.[51]

25. Some of our witnesses have questioned whether there is any need for or advantage in an EU initiative for returns. MigrationWatch UK believe that "these are largely domestic matters better handled on a national basis", and "purely a matter of internal law and order".[52] In their written evidence they said that "the Commission document reeks of mission creep".[53] Other witnesses, like Mr Illka Laitinen, the director of FRONTEX,[54] simply believe that for someone dealing with the practicalities of removals the Directive is of limited value.[55] Mr Manfred Weber MEP, the rapporteur of the LIBE Committee,[56] told us that in many countries returns were still seen as an

45 Q195

46 Written evidence, p 220.

47 Q 651.

48 Q 381.

49 Communication of 15 November 2001 on a Common Policy on Illegal Immigration.

50 COM(2005)391 final, page 3.

51 COM(2005)391 final, Annex, Impact Assessment, section 3.

52 QQ49, 51.

53 Paragraph 4, p 17.

54 European Agency for the Management of the Operational Cooperation at the External Borders of the Member States of the European Union (established by Council Regulation (EC) 2007/2004 of 26 October 2004, OJ L 349/1 of 25 November 2004).

55 Q 614.

56 The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.

internal matter, and there was a lot of fear about EU agreements in this area.[57]

Subsidiarity

26. A further question has also been raised: whether the matters covered by the Directive not only could with advantage have been left to the Member States for policy and practical reasons, but should for reasons of subsidiarity not have been the subject of a Directive. It has to be acknowledged that regulating this matter at EU level will not automatically lead to more advantageous results than those obtained at national level, where Member States have over very long periods of time developed mechanisms and rules which are often well adapted to their particular situations and needs.

27. However there can be no doubt that through the Treaty of Amsterdam the EU has acquired competence to act in this field, and that through paragraph 1.6.4 of the Hague Programme the Council has given a political mandate to the Commission to propose a Directive on the issues concerned. One may have different views as to whether this is justified in principle, but the political and legal decision not to leave this to the Member States has clearly been taken, and taken with the full consent of the Government, although they have—in the case of the proposed Directive—made use of the United Kingdom's right not to opt in to measures in this field.

28. As far as the more specific question of subsidiarity is concerned, it is the view of the Commission that the objectives of the Directive, in its current form, could not be achieved by the Member States alone, without Community rules. The re-entry ban is the most obvious example of this.[58] No Member State has argued that there is a subsidiarity problem,[59] and the Home Office also takes this view.[60] It seems difficult not to agree that, in accordance with the principle of subsidiarity as formulated in Article 5 TEC, the objectives of the proposed Directive are likely not to be sufficiently achieved by the Member States individually, and that common rules are more likely to do so. We regret however that the proposed Directive fails in many respects to set standards for return procedures at EU level which are significantly higher than current average standards at national level. In this respect at least there is some doubt as to whether the Directive actually passes the subsidiarity test for EU measures by achieving better results than national measures.

Views on the current draft

29. The Commission witnesses explained to us more than once that there were wide differences between the national laws and practices of the Member States on the matters covered by the Directive, and that the proposal was a compromise which attempted to steer a middle course between these extremes.[61] They "expect…the majority opinion in the Council to be that [they] are erring on the side of protection, but expect the European

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57 Q 762.

58 COM(2005)391, Explanatory Memorandum, page 5, and Q 520.

59 Q 517.

60 Explanatory memorandum, paragraph 9, and the evidence of Mr Tony McNulty MP, Minister of State, Home Office, Q406.

61 QQ 505, 521, 547.

Parliament, or at least the Civil Liberties Committee…to say the contrary".[62] Some of our witnesses supported particular provisions of the Directive,[63] but not a single one of the witnesses who gave evidence to us, written or oral, favoured adoption of a Directive in the form of the current draft. Usually the reason given was that the draft did not do enough to protect the rights of those to be returned.[64] We understand that this is the view of a majority of members of the European Parliament, and is likely also to be the view of the LIBE Committee when it reports. [65] The Government however believe that existing United Kingdom laws are adequate to protect the rights of individuals, and that the Directive would limit the Government's freedom of action. In this they are not alone; other Member States too believe that the Directive is too rights orientated.[66] **The Commission themselves, by attempting a compromise which would please all, appear to have satisfied none.**

30. As will be seen from the following chapters, we too believe that there must be "an effective removal and repatriation policy", but we do not believe that the current draft sufficiently provides "for persons to be returned in a humane manner and with full respect for their human rights and dignity".[67] We recognise therefore that our recommendations will be urging the Government to adopt, both in their negotiating stance on the Directive and in domestic law (whether or not complying with provisions of the Directive), a position some distance removed from the one they currently occupy. We hope nevertheless that our arguments may persuade them to think again.

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62 Q 491.

63 For example, the Children's Commissioner supported the provisions of Article 5 on the best interests of the child: Q 248.

64 A conspicuous exception is MigrationWatch UK, which takes the opposite view.

65 Q 628.

66 Tom Dodd (Home Office) told us that a number of Member States would have liked, like the United Kingdom, to be able to opt out of the Directive (Q 94).

67 The language of the Hague Programme: see paragraph 7 above.

CHAPTER 3: RETURN AND REMOVAL

31. The Directive is built around the mandatory return of illegally staying third-country nationals. The return can take the form of voluntary return, perhaps with encouragement from the State, or forcible removal by the State. In this chapter we consider first the countries to which individuals are repatriated. We then look at voluntary return, and at removal. Removal frequently involves detention pending removal, and we examine the periods for which, the places in which, and the conditions under which, persons in detention are held. Lastly we look at the position of those who, though subject to a removal order, are for whatever reason not in fact removed.

Return where?

32. Where a third-country national is staying illegally in the territory of a Member State, Article 6 of the Directive requires that State to issue a return decision, that is "an administrative or judicial decision or act, stating or declaring the stay of [the] third-country national to be illegal and imposing an obligation to return".[68] Article 3(c) defines "return" as "the process of going back to one's country of origin, transit or another third country, whether voluntary or enforced". There is however no requirement that the return decision should identify the country of origin, country of transit, or third country to which the individual is directed to return.

33. In the case of voluntary return, the destination of the individual is of no great concern to the authorities of the Member State. So long as the individual leaves that Member State, and does not go to another Member State, the obligation imposed by the return decision will be satisfied.

34. Matters are altogether different in the case of forcible removal, since it will then be for the State to determine the country to which the individual will be sent. Sometimes, as in the case of young children born in the Member State, the notion of 'return' is almost meaningless, since the child may never have known another country, or indeed another language. Sometimes there will be no doubt about the country to which the return should be made, but every doubt as to whether an individual can safely be returned to that country without risk of ill-treatment, torture or worse. Article 6(4) of the Directive forbids the issue of a return decision in a number of cases, prominent among which are cases where return to a particular country would be in breach of the right to non-refoulement,[69] or other fundamental rights arising in particular from the ECHR. Member States therefore have to decide which countries can be regarded as "safe" countries for returns.

35. It is only to be expected that organisations acting on behalf of immigrants and asylum-seekers have different views from Member States as to which countries are "safe". It is more surprising that there are differences between the Member States themselves. The United Kingdom starts from the proposition that no country is intrinsically unsafe, and is for example

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68 The definition in Article 3(d).

69 This expression, used in the English as well as the French text of the Directive, is derived from Article 33(1) of the 1951 Geneva Convention on the Status of Refugees: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

prepared to enforce removals to Iraq. The Netherlands has recently followed this example. Other European countries strongly disagree that Iraq is a safe country for return; Sweden for example grants status to Iraqis who seek protection.[70]

36. More frequently it is not so much the safety of the country of origin that is an obstacle to return as the difficulty of ascertaining the identity of the third-country nationals, and the problems experienced in obtaining travel documentation from the countries concerned. A few bilateral readmission agreements at Member State level, and an even smaller number at EU level, have been negotiated with third countries.[71] More are in the process of negotiation,[72] and the Commission regards them as essential to the working of the Directive.[73] Ultimately they facilitate the identification and re-documentation of those whose passports have expired or been lost or destroyed, which is a cause of substantial delay and hence lengthened detention. Attempts have also been made to increase the use of the EU travel letter[74] as a substitute for official passports. Mr Fabian Lutz from the Commission told us that the problem is that "the EU cannot create an obligation on third countries to recognise these documents."[75] **We believe that more effort should be made by the EU in the negotiation of readmission agreements, and in promoting the use of EU travel letters as a substitute for official passports.**

37. In the particular case of third-country nationals who are a threat to security, some Member States negotiate bilateral agreements with the States concerned to ensure that their nationals can safely be returned. The United Kingdom has negotiated Memoranda of Understanding (MoUs) with Jordan, Lebanon and Libya, and is negotiating further MoUs with other countries. These agreements seek assurances from the country of origin as to the treatment on their return of named individuals who are believed to threaten the security of the United Kingdom. The Minister of State at the Home Office, Mr Tony McNulty MP, told us that the United Kingdom was "at the cutting edge" of such agreements.[76] Whether the agreements, and the bodies supposed to monitor their working, are adequate to secure the safety and protection of persons returned to those countries is a matter which has been exercising the Committee outside the context of this inquiry, and which we have been pursuing with ministers.[77]

38. Apart from assurances specific to individual cases, such as those dealt with by MoUs, the general question whether a particular third country is safe for returns should be assessed as an objective matter. Even if a country is

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70 Evidence of Ms Juma for the Refugee Council, Q198.

71 *A Common Policy on Illegal Immigration*, 37th Report, Session 2001–02, HL Paper 187, paragraphs 93–94.

72 See the details in paragraph 5 above.

73 Address by Jean-Louis de Brouwer, Director for Immigration, Asylum and Borders, DG JLS, to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006.

74 EU travel letters are standard travel documents used for the removal of third-country nationals. They were introduced by a Council Recommendation of 30 November 1994.

75 Q513.

76 Q414.

77 Letters from Lord Grenfell to Mr McNulty of 10 November 2005, and to Mr Douglas Alexander MP, the Minister for Europe, of 2 February 2006 can be found on the website: http://www.parliament.uk/parliamentary_committees/lords_s_comm_f/cwm_f.cfm

objectively assessed as safe, it may still be unsafe for some individuals or categories of individuals; the merits of each case need to be carefully assessed. In the United Kingdom for instance Ghana and Nigeria are treated as safe for men but not women;[78] and it is arguable that Jamaica is unsafe for the return of gays, and Afghanistan unsafe for apostate Muslims. If in a specific case a country is safe, it should be safe for returns from all Member States—including the United Kingdom, despite its not having opted in. To achieve this, information on conditions in countries of origin should be shared and assessed, and conclusions as to the safety of individual countries reached, on a common basis.[79] It would still be for States to decide on individual cases, but at least decisions would be made on the basis of the same information. Mr McNulty made it clear to us that there was at present no discussion of the development of a Europe-wide country of origin information service, but that there was "at the very least an enthusiasm to start to discuss all these areas".[80] We believe that this enthusiasm should be translated into action, and we were glad to hear from Liese Prokop, the Austrian Federal Minister of the Interior,[81] that the Austrian Presidency shares our view of the importance of establishing a common list of safe countries of origin.

39. It was suggested to us by the Refugee Council that the information should be prepared by an independent body to agreed criteria.[82] In his evidence to us Lord Triesman, though enthusiastic about sharing country of origin information, thought that this would add an unnecessary additional layer of bureaucracy.[83] We note however that the Commission has already proposed the setting up of a European Support Office which, among other things, would collate all national country of origin information on a single website in accordance with agreed guidelines.[84] The Home Office supports the principle of practical cooperation, but is less supportive of moves to harmonise the collation of information unless this can be done without compromising standards, and without undue cost.[85]

40. **There must be close cooperation between Member States in determining the conditions prevailing in countries to which illegal residents are to be returned. The Government should support the setting up a central country of origin information service for processing information about conditions in those countries, and monitoring changes in those conditions. The Commission proposal is a useful starting point.**

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78 See the United Kingdom list of designated countries set out in section 94(4) of the Nationality, Immigration and Asylum Act 2002, as amended from time to time. See further paragraph 91, post.

79 In our report *Handling EU asylum claims: new approaches examined,* 11th Report, Session 2003–04, HL Paper 74, paragraph 117, we recommended that an independent documentation centre should be managed on an EU, if not UNHCR, basis, to ensure that decisions taken throughout the EU were based on the same country information.

80 QQ 415–416

81 In an address to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006.

82 Q 205.

83 Q 753.

84 Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation: *New structures, new approaches: improving the quality of decision making in the common European asylum system,* COM(2006)67 final, 17 February 2006.

85 Supplementary written evidence of Tony McNulty MP, p 139 .

Voluntary return

41. Voluntary return is more dignified and more humane than enforced removal. This hardly needs elaboration. Voluntary return is also quicker, easier, and more cost-effective. These are aspects we now consider.

42. Though in the great majority of cases voluntary return takes less time than enforced return, the time needed varies greatly. At one extreme there will be individuals with no strong ties to this country and with all the necessary documentation who want to leave as soon as they are able, and can often do so in a matter of days. At the other extreme are those who have been in this country for some time, who may have jobs, mortgages, children at school, and other links which will have to be severed. They will need time to wind up their affairs. Others, whether or not they have links with this country, will find it difficult to get the appropriate documentation to return to their country of origin. It is therefore a matter of concern to us that Article 6(2), which requires the return decision to set "an appropriate period for voluntary return", sets a four week limit on that period. Two questions arise: should there be any fixed limit to what is "an appropriate period"; and if so, is four weeks the right cut-off point.

43. The Government are firmly opposed to any fixed limit. Mr McNulty told us that, whether a person sought to go on a voluntary basis or subsequently on an enforced basis, there was no compelling reason why that should be within a four week period. "It smacks of arbitrariness and flies in the face of practicalities and flexibilities."[86] The International Organization for Migration (IOM), the inter-governmental organisation which implements on behalf of governments programmes for voluntary returns, agreed that a limit—any limit—was inappropriate. They pointed out that, after the initial application is made to them, the return most commonly took "several weeks" to arrange, and longer where they needed to go to embassies or high commissions to get documents. In those cases, it could take more than a month just to get the documents.[87]

44. We have no doubt that persons who have indicated a wish to return voluntarily to their country of origin, and are making all reasonable efforts to do so, should not be penalised because their affairs take an unusually long time to sort out, or their documentation is delayed through no fault of their own. The setting of an arbitrary time limit will result in persons who are unable to return within that time being subject to forcible removal, when a little extra time might have allowed them to return without coercion. What is an "appropriate period" should depend on the individual case. In the case of someone who would have been able to leave in a matter of days, it may be clear after a fortnight that there is no intention of going voluntarily. In other cases, it may be appropriate to allow five or six weeks, or more. If any time limit is to be imposed, it should be considerably longer than four weeks.[88] But we believe that the better solution is to have no fixed upper limit.

45. **We agree with the requirement of Article 6(2) that a return decision should "provide for an appropriate period for voluntary departure". We do not however believe that there should be a fixed upper limit**

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86 Q 424.

87 Evidence of Mr Jan de Wilde, QQ 349, 350.

88 In the United Kingdom voluntary return remains an option until all rights of appeal have been exhausted.

(whether of four weeks, or any longer period). In some cases a few days may be sufficient to prepare for return. In others, considerably longer than four weeks will be necessary. It should be for the authorities to determine, on a case by case basis, what is the appropriate period.

46. The IOM told us that it was odd—almost counter-intuitive—that among the top countries of voluntary return were countries such as Iraq, Zimbabwe, Sri Lanka and Iran. The reasons were usually personal.[89] However, it was also put to us that in many such cases people apply for 'voluntary' return as a way out of forced destitution.[90] But whatever the country and whatever the reason, the return process will be eased if assistance is provided for reintegration, training, education and self-employment. This is one of the tasks of the IOM, which for returns from the United Kingdom is assisting returnees after their arrival in the country of origin.[91] Reintegration assistance is provided on an individual basis, with specific advice in business planning for the large proportion who wish to go into small businesses.[92] The Government announced on 12 January a scheme offering failed asylum seekers voluntarily leaving the country between 1 January and 30 June a further £2,000 (over and above the £1,000 in reintegration assistance), to be taken either as further reintegration assistance, or in cash. The Government thought this might increase the number of returns predicted for that period from 1,950 to over 3,000. Mr de Wilde told us on 8 February that the number of phone calls received by the IOM had been "overwhelming".[93]

47. We do not suggest that the Directive should attempt to harmonise national voluntary return programmes, or the practice of offering incentives, or their amount; this must be a matter for the individual Member States. We do however support the Council in its call for the exchange of best practice between Member States, the promotion and implementation of voluntary return programmes, and the strengthening of cooperation between Member States, third countries and international organisations.[94]

48. The National Audit Office calculated that the cost of an enforced removal was between £11,000 and £12,000, as against £1,700 for voluntary return.[95] Even with the additional £2,000, cost-effectiveness is still a strong argument for the United Kingdom, and the Directive, to promote voluntary return.

Enforced removal

49. However great the advantages of voluntary return, both for the individual and the State, provision still has to be made for those who choose for whatever reason not to avail themselves of this option. The only alternative contemplated by the Directive is enforced removal.

50. Because under the Directive it is mandatory for Member States to issue return decisions, in the absence of any voluntary return enforced removal

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89 Q 363.

90 Written evidence of Refugee Council and Amnesty International, paragraph 3.6.1, page

91 Q 336.

92 Q 348.

93 Q 373.

94 Justice and Home Affairs Council, 12 October 2005; document 12645/05.

95 Q 132.

also becomes mandatory. There are however a number of exceptions listed in paragraphs (4) to (8) of Article 6: fundamental rights obligations such as non-refoulement; compassionate or humanitarian grounds; the holding of a residence permit issued by another Member State; and a pending application for the grant or renewal of a residence permit. There are also provisions for the postponement of execution of a removal order on grounds of physical or mental incapacity, technical reasons such as lack of appropriate transport, or doubts whether an unaccompanied minor will be met by a qualified person. The Commission view is that it is precisely because so many matters are left to the discretion of Member States that a majority of them are able to support the principle of a mandatory return decision.[96]

51. There is here a basic contradiction. The purpose of the Directive is to set common standards; that is its title, and Article 1 so provides. But we doubt whether there will be uniform interpretation, or uniform application, by 25 Member States, or even 22,[97] of a prohibition on issuing a return decision where there is a risk of breaching fundamental rights. There will certainly not be a uniform application of the right to grant a residence permit on compassionate or humanitarian grounds, which by definition is a matter left to the discretion of individual Member States.

52. The Immigration Law Practitioners' Association (ILPA) gave us examples of cases where it might well be in the interests of this country not to expel illegal residents. The Secretary of State might tolerate illegal stayers while awaiting a decision of the Appellate Committee of the House of Lords on how to deal with a particular group of people; it might be expedient for the Secretary of State not to remove individuals (for example Zimbabweans) though without conceding that their removal would breach human rights; or there might be borderline cases where it was more costly and burdensome for the State to carry out a removal decision rather than to leave things be.[98] All those seem to us to be examples of cases where it is right for each Member State to retain a discretion additional to those already provided for. Some at least of the other Member States may take the same view, and may wish to see Article 6 amended accordingly. If this happens, that Article will have changed from an absolute obligation to issue a return decision, and enforce it by compulsory removal, into a provision requiring those Member States which at present readily remove illegal residents to apply exceptions which they would not apply now.

Detention

53. Whatever form Article 6 ultimately takes, forcible removal will continue to be the ultimate sanction. At the time of removal the State must have immediate and unfettered access to the person concerned. Often this means that the person must be detained by administrative order—or be in "temporary custody", in the language of Articles 14 and 15. We turn now to consider the periods and conditions of detention envisaged by those Articles, and we compare them with the current position in the United Kingdom and other countries. Judicial supervision we leave to the following chapter.

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96 Q 541.

97 Assuming the absence of the United Kingdom, Ireland and Denmark: see paragraph 18 above.

98 Q 8.

Period of detention

54. Article 14 provides that where there is a serious risk of absconding, and where other measures such as regular reporting, financial guarantees, handing over of documents or staying in a designated place, are inadequate, Member States are obliged to keep under temporary custody third-country nationals subject to a removal order. This detention is subject to regular judicial supervision, but subject to that, it can last for a maximum of six months. The Directive provides for no possibility of extension, even subject to judicial supervision. This is one of the most contentious provisions of the Directive, and not just for the United Kingdom.

55. The laws of the Member States on periods of detention at present vary widely. Until 2003 the upper limit in France was just 12 days, but this was then increased to 32 days.[99] This compares with an upper limit of 40 days in Spain, 60 days in Italy, 3 months in Portugal, 6 months in Austria, the Czech Republic, the Slovak Republic and Slovenia, 8 months in Belgium, 1 year in Poland, Hungary and Lithuania, 18 months in Germany and 20 months in Latvia. There is no limit in the United Kingdom, Denmark, Estonia, Finland, Greece, Ireland, the Netherlands or Sweden.[100] In its Green Paper the Commission simply asked for views on this. The United Kingdom, in its response of 31 July 2002, argued against any fixed time limit. The European Economic and Social Committee (EESC) suggested 30 days.[101] In its White Paper the Commission acknowledged that there should be a time limit, without however suggesting what it should be. It was only when the draft Directive was published that the time limit of six months was first proposed. This was "a political decision taken at Commission level", and believed to be "a reasonable basis for discussion".[102]

56. It is unfortunate that the Commission, in proposing an upper limit, should have picked a figure which is above the current limit in a number of Member States. This surely would have been an appropriate opportunity for it to enquire why there is such a disparity in current maximum times of detention. Presumably all Member States face similar obstacles in organising the return of third-country nationals. Why then is it possible for some of those States to operate a successful policy with a maximum period of detention lower than 6 months—in some cases, much lower? An earlier examination of this problem might have resulted in a common standard being proposed which brought all countries up to the level of the best. It is not yet too late for this. We urge the Commission to undertake such an inquiry.

57. For the present, however, Article 14(4) proposes a six month limit. Inevitably, those States which have high time limits will feel that their laws are to some extent vindicated, and will be reluctant to compromise. Equally inevitably, for those States which at present have lower limits, any compromise will represent a considerable increase in those limits. Finally if, as seems quite possible, no agreement is reached on the Directive, the fact

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99 The initial period set by the Préfet is limited to two days. A judge can authorise two extensions of 15 days each. Detention is on average for 11 days, and the maximum of 32 days is seldom reached. Anyone not removed and still in detention at the end of that time must be released. France has no particular surveillance methods, and so relies on readmission agreements and cooperation with third countries.

100 As at January 2004. These figures from the IOM were given to us by the Commission, QQ 506, 507.

101 Opinion on the Green Paper on a Community return policy on illegal residents, 18–19 September 2002, CES 1019/2002, paragraph 5.3.

102 QQ 545, 547.

that a six month limit has been proposed will itself incline States to believe that it would not be wrong for them to raise their limits.[103] This was accepted by a Commission witness who told us: "As we consider six months would be appropriate we do not see a problem if some Member States even without the Directive align themselves to these standards."[104] The EESC may have been unrealistic in suggesting a limit lower than that of any Member State except (at that time) France, but the Commission should have suggested a lower limit than six months as a basis for discussion.

58. Our criticism of the Commission position may sound strange, coming as it does from the Parliament of a country which has no limit at all, but it is in line with the views of many of our witnesses. ILPA pointed out that six months of detention was equivalent to a year's prison sentence, and argued that in the vast majority of cases it should be possible to remove migrants and asylum seekers within 60 days.[105] Bail for Immigration Detainees (BID) argued that a six month upper limit "would normalise detention of this length", and urged us to recommend a limit of 28 days "which should be plenty of time for removal to take place".[106] Church Pressure Groups[107] were among witnesses who argued that six months was too long, but without suggesting a specific shorter maximum period.[108]

59. The Home Office, as might be expected, held the opposite view. In their written evidence they stated that detention for over six months was only in "exceptional cases"; but the Quarterly Asylum Statistics for July to September 2005 show that, out of 1,695 people held in detention on 24 September, 140 had then been held for more than 6 months, and 55 for more than 12 months.[109] The Home Office added that knowledge of an upper limit, whether of six months or some other period, "would in many cases inevitably provide applicants or those who have exhausted their appeal rights with further motivation to frustrate and delay the immigration and asylum processes, refuse to cooperate with identification procedures and documentation prior to return, and do all that they can to frustrate any actual removal attempts. A fixed upper limit on length of detention would…at the very least significantly reduce the possibilities of successful removal in many cases."[110] The oral evidence of officials was to the same effect.[111] Lord Triesman expressed a similar view: "Where you have an explicit limit…and that is known to people, they tend not to cooperate for that period. The documents vanish, their capacity to speak the language

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[103] A draft Resolution tabled on 12 April 2006 in the French Assemblée Nationale by the Rapporteur of the Delegation for the European Union "questions the opportunity of introducing in the directive a maximum six month period for remand in custody", and states in its explanatory memorandum: "Admittedly, the directive would not impose a lengthening of the French period to six months, but the adoption of such a period in a European text would tend to make it a European standard in this field." (Official translation)

[104] Q 578.

[105] QQ 35, 36.

[106] Written evidence, paragraph 17, p 101.

[107] Caritas Europa, Churches' Commission for Migrants in Europe, Commission of the Bishops' Conferences of the European Community, International Catholic Migration Commission, Jesuit Refugee Service Europe, and Quaker Council for European Affairs.

[108] Written evidence, paragraph 24, p 209.

[109] Written evidence of the Commission for Racial Equality, page [9]; Home Office Asylum Statistics, 3rd Quarter 2005.

[110] Written evidence, paragraph 17, p 29.

[111] Q 103.

vanishes, they turn out to be coming from a different country from the country they first said they came from…"[112] Somewhat to our surprise, Mr Manfred Weber MEP wondered whether there was in fact a need for a maximum limit, and saw no need to harmonise the maximum period of detention in Europe. He thought each country should be able to do as it pleased.[113]

60. **In the EU, deprivation of liberty is a State sanction normally imposed only on those who have been accused or convicted of a crime. Using it for the wholly different purpose of detaining illegal immigrants is a serious matter. Where detention is essential, it must be for as short a period as possible, not only for the sake of the individual concerned but also to lessen the burden on the taxpayer.**

61. How that is best achieved is more debatable. The key is effective judicial supervision, a matter we consider in the next chapter. With such supervision, no detention will continue, whether for six weeks or six months, unless a court or tribunal is satisfied that it is essential and that there is no alternative. Once that supervision is in place, it will make no difference to the individual whether he is governed by a provision imposing no limit to his detention, but with regular judicial supervision, or by a provision imposing a six month limit which is extendable by judicial authority in exceptional cases. **We do however accept that an absolute and non-extendable maximum (whether of six months, as proposed by Article 14(4), or any other period) will give Member States insufficient flexibility to deal with exceptional cases.**

Statistics

62. There is a remarkable paucity of detailed statistics on periods of detention—or at least of publicly available statistics. As Anne Owers, the Chief Inspector of Prisons, explained: "…what you can get…is a snapshot of the number of people detained at one moment in time. The last snapshot that was provided by the Immigration and Nationality Directorate was that there were 2200 people in detention all together, of whom I think around 60 were children…what crucially we do not have is two other bits of information, which is how many people over a year, how many children over a year, were detained in total, and for what kind of lengths of time they were detained."[114] Professor Aynsley-Green, the Children's Commissioner for England and Wales, agreed, and his senior legal adviser, Professor Carolyn Hamilton, told us: "…they can tell you at any one time how many children are there on a particular day. What they cannot tell you is: 'How long has each child been there?'."[115] Professor Aynsley-Green asked for "regular information on children and young people; particularly, how many are in the whole process and the breakdown by ages, country of origin and family structure. We want to know how long they have been here and where they have been detained. We want to know more about those whose applications have failed and those who have experienced a frustrated removal process."[116] We confirmed from

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[112] Q 751.

[113] Q 763.

[114] Q 249.

[115] Q 262.

[116] Q 250

our conversations with staff during our visit to the Yarl's Wood detention centre[117] that such figures are not routinely kept, but we formed the view that it would be neither difficult nor expensive to collate them.

63. We find it difficult to believe that the Home Office do not have such figures available for their own purposes. It would be hard otherwise for them to tell us that detention in excess of six months was only in "exceptional cases". If the relevant figures are indeed not collated and statistics are not kept, this is something which should be put right immediately; if they are kept for the Home Office's own purposes, they should be made public. No policy can be formulated unless the basic facts are available. Professor Aynsley-Green told us that he had put this view to the Home Office, and was awaiting their response.[118]

64. The provisions of the Directive on maximum periods of detention would not be workable unless national authorities kept the relevant figures. Member States at present collect and collate them on different bases, so that they are not directly comparable. In parallel to this Directive, the Commission has proposed a Regulation on Community statistics on migration and international protection.[119] This would include non-Schengen countries like the United Kingdom. It is also subject to co-decision, and is currently being discussed in the Council and Parliament. It is hoped that it would come into force in time for the figures for 2010 to be available.[120]

65. We agree with those of our witnesses who have complained about the remarkable lack of statistics on those in detention. Figures should be readily available which will show how many persons are detained at any one time, and what numbers have been detained for different lengths of time. Separate statistics should be kept in the case of children. Figures on the frequency of absconding among families with children who are receiving support would help to show whether there is a case for taking them into detention at all. **The Directive provides a good opportunity to make the systematic collection of comparable data on detention a mandatory EU-wide requirement.**

Conditions of detention

66. Once it is accepted that States have a right to detain illegally staying third-country nationals for checks on their identity or nationality, or pending voluntary return or enforced removal, the manner in which they are taken into detention and the conditions under which they are held become all-important. On our visit to Yarl's Wood we heard anecdotal evidence of people being taken into detention in the middle of the night. This confirms what the Chief Inspector of Prisons told us in her written evidence, where she referred to detention taking place at home in the early hours, at school, or at an immigration reporting centre; if not detained at home, children could be detained with only the clothes they stood up in.[121] In a report published last month she highlighted the case of a woman who had been left at a Leeds police station from the morning of 4 October 2005 until midnight

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[117] A report of this visit is at Appendix 4

[118] Q 251. This evidence was given on 1 February 2006.

[119] COM(2005)375 final.

[120] QQ 554, 555.

[121] Paragraph 10, p 84.

the following day with no change of clothing, no shower, no exercise and no telephone access; she was subsequently found to be 16–20 weeks pregnant.[122] We heard of children taken into detention "literally days before sitting GCSE exams".[123] We have seen correspondence about a mother who was taken into detention without warning and separated from her six-month old baby, whom she was breast-feeding.[124]

67. Article 15(1) of the Directive requires Member States to ensure that "third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law". However it says nothing about the manner in which persons are initially taken into detention. We believe it should be expanded to cover this. These are not criminals; they have not been charged with, let alone convicted of, any offence; and the only reason for their detention is the administrative purpose of facilitating their removal, and preventing them from absconding in the mean time. We accept that this may occasionally require persons to be detained unexpectedly at home, but there can never be any justification for detention to take place in the ways we have described. **The requirements of Article 15 in relation to conditions of temporary custody should apply to the manner in which third-country nationals are taken into custody, as well as to their treatment when in custody.**

68. It is precisely because detainees are not criminals that Article 15 requires them to be held in specialised custody facilities rather than in prison. Where holding them in prison is unavoidable (as in Northern Ireland, where there is no immigration detention centre), they are to be "permanently physically separated from ordinary prisoners". However the evidence we have received shows that in some centres and in some countries the conditions are deplorable, and worse than those in which many "ordinary prisoners" are held. We have not received any direct evidence that the conditions of detention in this country are inhumane or undignified, but we have seen recent reports of a hunger strike at the Haslar detention centre in Portsmouth, with all but five of the 130 inmates (including children as young as 15) refusing food in protest at the conditions under which they are held.[125]

69. Matters seem to be worse in some other Member States. Lampedusa, an island near Sicily, has a detention centre notorious for its poor conditions: Cristina Castagnoli, from the LIBE Secretariat of the European Parliament, described to us a visit by five members of the LIBE group who had found up to one thousand people held in accommodation designed for 180.[126] She also told us of horrifying conditions in the Ile de la Cité in the heart of Paris.[127] The underground holding centre under the Palais de Justice was described by *Le Monde* as "the equivalent of Lampedusa, except that in Lampedusa

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122 Report on unannounced inspections of short-term holding facilities at Heathrow, 5 April 2006, paragraph 1.20.

123 Professor Aynsley-Green, Q 255.

124 Correspondence between a member of the Sub-Committee and Mr Tony McNulty MP, 16 and 17 March 2006; not published.

125 The Guardian, 17 April 2006. The report of the Chief Inspector of Prisons on a visit to the Haslar centre in May 2005 contains severe criticisms of some aspects of the accommodation.

126 Q 640.

127 QQ 636–639.

there's a little more light".[128] Alvaro Gil-Robles, the Council of Europe Human Rights Commissioner, described the conditions there as "catastrophique et indigne de la France".[129] We are glad to record that Nicolas Sarkozy, the French Interior Minister, announced on 15 February that this centre is to close in June 2006.

70. The chief problem is that the Directive is wholly lacking in any detailed explanation of what conditions of custody will satisfy the high-sounding aspirations of Article 15(1). Fortunately, the Committee of Ministers of the Council of Europe has recently issued Guidelines on Forced Returns which we reproduce in Appendix 6. It will be seen that Guideline 10 sets out in some detail the conditions under which detainees should be held. We commend these Guidelines, which make it unnecessary for Member States to consider expanding Article 15. The Directive must simply make it mandatory for Member States to keep detainees in conditions not less favourable than those set out in these Guidelines which Ministers have already endorsed in the context of the Council of Europe. We can see no reason why EU standards should be lower than those of the Council of Europe.

71. **The provisions of Article 15 are insufficiently precise, and do not adequately take into account the needs of particularly vulnerable groups. The Directive should mention in its recitals and incorporate into its substantive provisions the Council of Europe Guidelines on Forced Return, which would thus be given statutory force.**

Children

72. In looking at detention conditions, all vulnerable groups need special consideration. Article 15(3) of the Directive acknowledges this in a somewhat cursory manner by requiring Member States to pay particular attention to the situation of vulnerable persons. No group is more vulnerable than children. At present the Directive refers to "children" and "minors" without attempting to define what is meant by those words. Before provision can be made in the Directive for children, a common definition is needed. In a different context, the EC Directive on the right to move and reside for citizens of the Union[130] treats children under 21 of an EU migrant citizen as children for family reunification purposes.[131] However Article 5 of this draft Directive requires Member States to "take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child", and Article 1 of that Convention defines a child as a person under 18. This is also the age favoured by the European Parliament,[132] and accords with our domestic law. This Directive should adopt this definition for both 'child' and 'minor' (since it uses the two terms indiscriminately, sometimes even in the same sentence).

73. **We recommend that the Directive should define a child, and a minor, as a person under the age of 18.**

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128 22 February 2006.

129 Report of 15 February 2006 to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, paragraph 239.

130 Directive 2004/38 EC.

131 Q 393.

132 Q 645.

74. Professor Elspeth Guild thought that it was unsatisfactory for Article 5 simply to rely on the UN Convention. She told us: "…there are a substantial number of continental Member States where the expulsion of minors is prohibited—completely, utterly and totally…You have other Member States where the expulsion of minors is considered perfectly normal and part of the daily routines of life. What has happened in this Directive? It seems to me that there has been an attempt to paper over a very fundamental difference about how we treat children by saying, 'The best interests of the child shall prevail'." There was a fundamental difference between those States where children were first and foremost children and entitled to protection, and only secondarily foreigners, and those States like the United Kingdom where children were first and foremost foreigners and only children subsidiary to their status as foreigners.[133]

75. The United Kingdom has ratified the UN Convention but has entered a reservation to the effect that the protection it accords does not apply to children who do not have the right to enter and remain in the United Kingdom.[134] This led Anne Owers, the Chief Inspector of Prisons, to say: "We know that the welfare of the child cannot be paramount because of the UK's reservation in regard to the Convention on the Rights of the Child, but that does not mean that the child, as often happens in immigration decisions, in our view, becomes invisible. The interests of the child are not even noted."[135] The Refugee Children's Consortium believed that children should not be detained for more than seven days prior to removal,[136] while the Churches Pressure Groups thought the Directive should forbid the detention of minors altogether.[137] Tim Baster, on behalf of Bail for Immigration Detainees, thought the detention of children was "completely inconsistent with the culture and traditions of this country". He thought that until five or six years ago it would not have crossed the mind of senior immigration officers to detain children.[138]

76. We do not believe it is practicable altogether to eliminate the detention of children as part of a family group, though collection of the figures on the frequency of families absconding, which we recommend in paragraph 65, might show that more are at present being detained than is necessary. We agree with the Chief Inspector of Prisons that "the detention of children should be exceptional, and for the shortest possible time".[139] Her written evidence gave us examples of "cases where those effects [of detention] are so adverse that it is hard to believe that the child's interests were even considered when detention was authorised."[140] Professor Carolyn Hamilton, the legal adviser to the Children's Commissioner, referred in oral evidence to the requirement of Article 5 of the Directive that account be taken of the best interests of the child, but thought minimum standards should be specifically

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133 Q 391. One State which prohibits the expulsion of minors is France.

134 The Government currently have no plans to review the decision to maintain this reservation: supplementary written evidence of Tony McNulty MP, p 138.

135 Q 255.

136 Written evidence, p 230.

137 Written evidence, paragraph 28, p 210.

138 QQ 305, 325.

139 Written evidence, paragraph 5, p 83.

140 Paragraph 11, p 84.

set out in the Directive itself.[141] Here again we believe that reference to the Council of Europe Guidelines would make a major difference; Guideline 11 requires separate accommodation, adequate privacy, and the rights to education, leisure, play and recreational activities.[142]

77. **We agree that, in accordance with the Council of Europe Guidelines, children should be detained only as a measure of last resort, and for the shortest appropriate period of time.**

78. In this country the chief detention centre at which children are held, and the only one considered appropriate for longer-term detention, is Yarl's Wood near Bedford. This is the only centre where children can be detained for more than 72 hours. Ms Owers told us in her written evidence of the results of an inspection carried out in February 2005, and of the recommendations made by her inspectors. Subsequent to that inspection the Children's Commissioner, Professor Aynsley-Green, had visited Yarl's Wood on 30 October 2005 at 24 hours' notice. At the time of his visit the majority of children were detained for between 1 and 3 days, but over the previous six months 15% of children had passed more than 3 weeks in detention, and 3 children over 8 weeks.[143] He stressed particularly the need for better explanation to children, in terms that they could understand, of why they were in detention, for how long it was likely to be, and where they might be going at the end. Not one child he had spoken to could say why they were there. Some thought that they had no links with countries other than this country. Many of those aged 15 to 18 were concerned with what was going to happen to them in their countries of origin; they were concerned in particular about trafficking, safety and security.[144]

79. We visited Yarl's Wood ourselves on 7 March 2006. A full note of our visit is at Appendix 4. Plainly security must be one of the first aims of a detention centre. We are not qualified to comment on whether the security was in fact excessive, but in places it certainly gave us that appearance, and we were glad to hear that efforts are to be made to make it less obtrusive.[145] The buildings we saw were relatively spacious, comfortable and clean; children were accommodated only with their families, and there were adequate medical and nursing facilities. Given that detention was thought to be essential, our impression was that caring staff were doing their best to make it as painless as possible, though we were concerned that they might not be receiving the support needed to make their work fully effective.[146] Some of the

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141 Q 285.

142 When the Guidelines were adopted on 4 May 2005 the United Kingdom entered a reservation to a number of guidelines, including guideline 11. This reservation would of course have to be lifted.

143 Children's Commissioner's report on his visit to Yarl's Wood, paragraph 25.

144 QQ 279, 288.

145 In his report on his visit to Yarl's Wood the Children's Commissioner said (paragraph 18): "In order to reach the gym, children had to pass through the barred cell door, and then through another locked door. Any child wishing to re-enter the wing, for instance to use the toilet, had yet again to pass through the two locked doors, and pass through a security check involving a search. The children at Yarl's Wood are detained for immigration purposes and not because they are in conflict with the law. It is questionable, given this, whether the level of security needs to be so high. The UN JDL Rules require that minimum security should be used with respect to children. The need for a barred, cell door is particularly questionable." The contractors have told us that consideration is being given to replacing the barred gate, if this can be done consistently with security.

146 The national minimum standards for children's homes require all staff to receive at least 1½ hours of one to one supervision from a senior member of staff each month. The contractors have told us that all staff

recommendations of the Chief Inspector's report had already been implemented. There was for example a full-time social worker in post, but rejection of other recommendations of the Chief Inspector means that the social worker may have little influence on the manner and circumstances in which families are first gathered out of the community or in which they are physically removed from the country.

80. We believe that progress is being made towards achieving the minimum standards set out in the Directive, and in the Council of Europe Guidelines. Nevertheless there was among those we spoke to, especially older children, deep unhappiness, not so much about the conditions of detention as about the fact of detention. They did not know what their fate might be, and they felt powerless to control it.

Return of unaccompanied children

81. Article 8(2)(c) requires Member States to postpone the return of unaccompanied minors unless there is an assurance that they will be met on arrival by a family member, a guardian, or "an equivalent representative…or competent official". This last phrase caused concern to the Refugee Council, particularly with regard to returns to Albania and Vietnam, both notorious for child trafficking.[147] We have been told of fears that children can be met by persons who purport to be family members but are in fact themselves involved in trafficking. We share that concern, and believe that wherever possible children should be accompanied.

82. **Ideally, children should be removed only in the company of a family member or other responsible adult. Where unaccompanied removal is unavoidable, the child should be handed over only to a person with proven parental responsibility. The legal guardian in the Member State in question must be informed of the identity of that person. Article 8 of the Directive should be amended accordingly.**

Status of those not removed

83. Illegally staying third-country nationals who, for whatever reason, cannot be returned pose particular problems. Should the return decision and removal order continue in force indefinitely unless and until conditions (whether of the individual or of the country of return) change sufficiently for the return to take place? What should be their conditions of stay? What in the long term should be their status?

84. Article 13 of the Directive does not deal with the first and third of these questions, but does specify that the minimum conditions of stay should be not less favourable than some of those of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the Reception Directive).[148] Among those conditions not included are those on employment, social assistance and housing. The Refugee Council and Amnesty International believe that "by allowing states to

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have confidential access to an independent counselling service, and that there are plans to develop the group of staff working on the family unit.

147 Written evidence, paragraph 3.8.4, p 65; oral evidence of Ms Nancy Kelley, Q 229. Mr McNulty confirmed (Q 409) that these two countries are the principal sources of unaccompanied children.

148 Considered in our report *Minimum standards of reception conditions for asylum seekers*, 8th Report, Session 2001–02, HL Paper 49.

disregard a large number of these minimum standards in relation to those who are in their territory but who cannot be returned, the draft directive is countenancing a situation where large numbers of people will be vulnerable to destitution and homelessness, surviving at the fringes of society for an indefinite period of time."[149] Refugee Action would also like to see enhanced support.[150] Mr Jeremy Oppenheim, Director, National Asylum Support Service, told us that the Government does not accept this, believing that Member States should be free to put in place any arrangements which provide adequate safeguards, in line with the ECHR.[151]

85. **We would like to see Article 13 amended so that all the relevant provisions of the Reception Directive,[152] including those on employment, social assistance and housing, apply to those who for whatever reason cannot be returned to their countries of origin.**

86. We agree with ILPA witnesses that a return decision and removal order cannot be left indefinitely hanging over the head of an individual who cannot return.[153] The time has to come when the State acknowledges that return is not going to be possible in the foreseeable future, and grants a residence permit on compassionate grounds in accordance with Article 6(5). When that time should come must be a matter for the discretion of the State in individual cases since circumstances, particularly in the country of origin, will vary greatly. But when that time does come, we believe that some status must be granted. We welcome and endorse the view of Mr Oppenheim that in the case of those who cannot return (as opposed to those who will not), some status has to be granted.[154] We accept however that this cannot be done by the Directive, since conditions of residence would require an instrument with a different legal base (Article 63(3)(a) of the EC Treaty), and unanimity in the Council.[155]

87. **Where, for whatever reason, the removal of an illegally staying third-country national is impossible, it is inequitable that such a person should remain indefinitely without legal status, and with a continuing threat of removal. Where there is no foreseeable prospect of removal, the position should be reviewed, the removal order should lapse, and some temporary status should be granted.**

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149 Written evidence, paragraph 3.13.3, p 67.

150 Written evidence, p 226.

151 Supplementary evidence, p 53.

152 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

153 Dr Toner, Q 36.

154 Q 184.

155 Evidence of Mr Fabian Lutz from the Commission, Q 512.

CHAPTER 4: JUDICIAL SUPERVISION

88. A mandatory order to leave a country and not return is a matter which must be subject to judicial control. Article 12 of the Directive provides for judicial remedies against return decisions and removal orders. Likewise, since deprivation of liberty is now the most serious sanction available to Member States, it too must be subject to judicial oversight. This is dealt with in Article 14. In this chapter we consider whether those provisions are adequate.

89. Article 12(1) refers to "review of a return decision", and Article 14(3) to "review by judicial authorities". We refer specifically to judicial review only when we mean a claim in the High Court for judicial review of an administrative act[156] (and comparable procedures in Scotland and Northern Ireland). Otherwise we use the terms judicial control, judicial supervision or judicial oversight.

Appeals against return decisions

90. Article 12(1) requires Member States to give a third-country national a right to appeal to a court or tribunal against a return decision or removal order. This is plainly essential, and none of our witnesses has questioned this provision. The problems start when considering where and how this right is to be exercised. This is dealt with by Article 12(2), and the drafting is opaque. It states that the judicial remedy is either to have suspensive effect, or must include the right of the third-country national to apply for enforcement of the return decision or removal order to be postponed. This appears to mean that no one can be removed without some form of access to a court. In effect, there would be an in-country right of appeal. This however is apparently not the intended meaning of the provision. According to the Commission's written evidence, "it is left to Member States to determine whether an appeal should be given suspensive effect. Article 12(2) provides that in those cases in which the appeal has no suspensive effect, the third-country national shall be permitted to apply for special leave to remain in the Member State."[157] Mr Fabian Lutz confirmed that this was the intended meaning: "The choice whether [the] legal remedy should be given suspensive effect or not, and in which cases, is left with Member States."[158]

91. The present position under United Kingdom law is that where a person is to be returned to a country listed in section 94(4) of the Nationality, Immigration and Asylum Act 2002—the list of designated countries—the right of appeal can normally be exercised only after the return to that country.[159] Inclusion of a country in that list implies that the Secretary of State is satisfied that there is no serious risk of persecution, and that removal of a person to that State will not "in general" contravene this country's obligations under the European Convention on Human Rights. An in-country appeal is allowed only where the person has made an asylum claim, a

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156 i.e. a claim under Section I of Part 54 of the Civil Procedure Rules 1998.

157 Paragraph 8, p 152.

158 Q 571

159 The list of countries was last amended in December 2005, and now comprises Albania, Bulgaria, Serbia and Montenegro, Jamaica, Macedonia, Moldova, Romania, Bolivia, Brazil, Ecuador, Sri Lanka, South Africa, Ukraine, India, Mongolia, and (in respect of men only) Ghana and Nigeria.

human rights claim or a claim based on the Community Treaties, and even then only if it is not certified by the Secretary of State as clearly unfounded.

92. The Government argue strongly that a right of appeal without suspensive effect—an out-of-country right of appeal—is more than adequate.[160] Bridget Prentice MP, the Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (DCA) said: "I do not accept that because an application has to be made outside the United Kingdom that it cannot be made in as fair and as robust a way as any within the country…I do not think that the process is any different because you have to make your application from outside the country."[161] Certainly this procedure has every advantage—from the Government's point of view. It allows the individual to be returned without spending time in this country exercising a right of appeal, and being supported during that time. It is also far less likely that an appeal will be brought once the would-be appellant has been returned.

93. We asked Home Office officials how many people had successfully appealed from overseas and been returned to this country. The answer was that in the three years 2003 to 2005 just four people had done so: one Jamaican, one Albanian and two Romanians.[162] We have no means of knowing how different the figure would have been if there had been an in-country right of appeal, but we suggest that the number might have been many times greater.

94. MigrationWatch UK had no problems with out-of-country appeals,[163] but all our other witnesses who considered the issue strongly supported the requirement for a suspensive appeal. The Refugee Council and Amnesty International believed that all those subject to a removal order should have an in-country right of appeal and be able to raise fears of refoulement or ill-treatment on return contrary to Articles 3 and 8 of the ECHR.[164] They criticised the fact that those removed had to demonstrate severe protection needs in the very country where they were at risk.[165] ILPA considered that only in exceptional circumstances should a remedy not have suspensive effect, and in such cases the right to apply for suspension must be to a judicial body and not to an administrative body.[166]

95. Two of our witnesses were even concerned that Article 12(2) did not go far enough. UNHCR felt it should ensure an automatic suspensive effect, saying: "A judicial remedy against a removal decision is ineffective if the third country national is not allowed to await the outcome of an appeal."[167] The Church Pressure Groups had the same concern: "Migrants facing removal may have to 'apply for the suspension of the enforcement of the return decision or removal order'. In practice, the lack of information or the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. The suspensive effect of appeal against a return or removal

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160 Written evidence, paragraphs 31–36, p 31; oral evidence of Tom Dodd, Q 93.

161 Q 458.

162 Letter from Tom Dodd of 15 February 2006, p 44. Although this does not appear from the letter, the Home Office confirmed that the return of the four persons was over the three years 2003–2005.

163 Written evidence, paragraph 11, p 20.

164 Written evidence, paragraph 3.12.1, p 67.

165 Q 242.

166 Written evidence, paragraph 60, p 8.

167 Written evidence, p 57.

order should be automatic in order to allow migrants to stay in the territory of Member States before a final decision about their removal is taken."[168]

96. The Home Office in their written evidence also raised a jurisdictional objection: "We do not contest the need for an effective remedy, but instruments should not prescribe the content and nature of that remedy to be provided by Member States. Indeed were they to do so, it may raise questions of competence. Therefore, the proposal should not address the suspensive nature of a remedy, and the notification of such a remedy."[169] We do not understand this argument, which seems to be based on a misunderstanding of the meaning—or intended meaning—of the provision. It is of course not for the Directive, nor for the Member States, but for the courts of the Member States to prescribe the content and nature of the remedy in each individual case. Article 12, in referring to the "right to an effective judicial remedy",[170] is talking about the right to apply to a court or tribunal for a remedy, not about the order made on that application. In stating that the judicial remedy should have suspensive effect, it is requiring the fact of having applied to a court to have the consequence that the return decision will not be implemented until the application has been disposed of. Whether at that stage the return decision will be implemented depends on the order made by the court. We do not see any issue of competence here, but we do see a case for further clarifying the English text of this provision.

97. We agree with those of our witnesses who believe that out-of-country rights of appeal are not always adequate. The fact that, since out-of-country appeals became the norm when Part 5 of the Nationality, Immigration and Asylum Act 2002 came into force on 1 April 2003, barely one person a year has successfully appealed from overseas and been returned to this country, may be evidence that such appellants seldom have very strong cases, but perhaps also demonstrates the problems of bringing proceedings in another country without adequate access to legal advice, and probably without adequate resources.

98. This is a Directive whose aim is to bring common standards to return procedures. It is unacceptable that the important question whether or not the lodging of an appeal should suspend the return process is left entirely to the discretion of Member States. We accept that in this country and, we believe, in many other Member States, large numbers of appeals against decisions on asylum applications are manifestly ill-founded. The rapid disposal of such cases can be achieved by appropriate rules of procedure. In other cases, an appeal against or review of a return decision or removal order should have suspensive effect, and the appellant should be allowed to remain in the State pending the outcome of his appeal.

99. **The drafting of Article 12(2) is defective. It must be amended so that, in all Member States, appeals which are not rejected at a preliminary stage as manifestly ill-founded should result in suspension of the return decision or removal order until the appeal is disposed of.**

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168 Written evidence, paragraph 18, p 208.

169 Paragraph 36, p 31.

170 In the French, "un droit de recours effectif devant une juridiction".

Judicial oversight of detention

100. "There is no greater interference with the liberty of the individual permitted in EU Member States than detention…Therefore, in view of the seriousness of detention, it seems to me to be self-evident that…detention has to be subject to judicial control; there has to be the opportunity for the individual to test whether or not the administration's decision of detention is correct…Judicial oversight is only repellent to poor administrators making bad decisions."[171] These words of Professor Elspeth Guild are self-evidently true. A person accused of a criminal offence and arrested must be released unless a court orders otherwise. A person convicted of a criminal offence loses his liberty only if the court so orders. Deprivation of liberty by administrative decision cannot be right without judicial oversight.

101. Article 14(2) and (3) of the Directive requires detention orders to be issued by judicial authorities. Where in urgent cases they are issued by an administrative authority, they have to be confirmed by a court within 72 hours, and the order is subject to reconsideration by the court at least once a month. This is a laudable objective, and one already achieved in a few Member States, but for many, including the United Kingdom, this is perhaps a counsel of perfection.

102. In their written evidence, the Department for Constitutional Affairs (DCA) told us that there was provision for any detained person to challenge the lawfulness of his detention before the courts. If there was currently an appeal before the Asylum and Immigration Tribunal, an application for bail could be made to the tribunal.[172] However Bail for Immigration Detainees (BID) pointed out that the provisions for automatic bail hearings in the Immigration and Asylum Act 1999 were repealed without being brought into force. Many detainees had no legal representation and so no access to bail procedures, with the result that the Home Office were never required to justify their detention decision.[173]

103. In the great majority of cases of detention pending removal there is no pending appeal to the Asylum and Immigration Tribunal, so that judicial review will remain the sole possible source of judicial oversight. However judicial review is primarily concerned with the legality of the procedure by which the administrative decision was taken; it is concerned with the administrator's exercise of his discretion only where human rights issues are involved. There is no automatic recourse to judicial review; it is subject to permission, and the decision whether or not to grant that permission is usually made only on the papers. Although in emergencies (usually to prevent an imminent removal in violation of a court order or of some basic human right) claims for judicial review can be heard in a matter of hours, a claim for review of a detention decision will take weeks rather than days.

104. Finally, the Government do not regard themselves as being under any obligation to bring the possibility of a judicial review claim to the attention of a detainee. Article 11 requires the Government to inform a third-country national in writing about available legal remedies. However that Article applies in terms only to return decisions and removal orders, and DCA

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171 Professor Elspeth Guild, Q 401.

172 DCA written evidence, p 140; Home Office written evidence, paragraph 35, p 31.

173 Written evidence, paragraph 14, p 101.

believe that it is not clear whether the requirement extends to generally available legal procedures such as judicial review.[174] We have little doubt that a failure to notify a detainee of the right to apply for judicial review would be treated as a violation of Article 5(4) of the ECHR, particularly if this was the only available remedy.[175] **We believe the Governments of the Member States should regard themselves as bound to inform detainees of all available judicial remedies.**

105. In the previous chapter we mentioned criticisms made of French detention centres by Alvaro Gil-Robles, the Council of Europe Human Rights Commissioner.[176] He has also been critical of this country. "The possibility of effectively contesting one's detention is all the more important, as it is indefinite and subject only to internal administrative review…Of the 1,514 asylum seekers detained on 27th December 2004, 55 had been detained for between 4 and 6 months, 90 for between 6 months and a year and a further 55 for over one year…It is not acceptable…that such lengthy detention should remain at all times at the discretion of the immigration service, however senior the authority may be. It seems to me that there ought, at the very least, to be an automatic judicial review of all detentions of asylum seekers, whether failed or awaiting final decisions, that exceed 3 months, and that the necessary legal assistance should be guaranteed for such proceedings."[177]

106. The stricter regime proposed by Article 14 is of course greatly preferable, and we hope that it will survive the negotiation process in the Council working parties. Whether or not the United Kingdom ever becomes party to the Directive, we hope the Government will adopt this as a model. We recognise however that they are unlikely to do so before the Directive is adopted, if then. For the present therefore we believe that as an absolute minimum the Government should set up a system of judicial oversight of detention within the first month, and thereafter (in line with the recommendations of the Human Rights Commissioner) at not less than three-monthly intervals. It would not be lawful for the detention to continue beyond one month, and thereafter for any period in excess of three months, unless the Home Office obtained from a court or tribunal an order confirming the legality of the continuing detention. We do not suggest that the court in question should necessarily be the High Court; the Asylum and Immigration Tribunal might be thought suitable. The procedure would in any event involve legally aided representation for the detainee, a matter which we examine below.

107. It will be argued that this would involve considerable resources, both financial and by way of court time. To this we make two answers. The first is

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174 DCA written evidence, p 141; Home Office written evidence, paragraph 35, p 31.

175 Article 5(4) reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." In *Farmakopoulos v Belgium*, 4 December 1990, the applicant was held in detention pending extradition. He had 24 hours in which to lodge an appeal, but was not informed of this right. The European Commission of Human Rights held that the shortness of time and lack of information did not afford the applicant a real opportunity to have the lawfulness of his detention reviewed..

176 Paragraph 68.

177 Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th–12th November 2004; Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para. 49. Cited in the evidence from Bail for Immigration Detainees, p 101.

that it will involve no resources at all unless detainees are kept for more than a month. Since Home Office policy is that detention should be for as short a period as possible, it has nothing to fear except a failure of its own policy. The second answer was given by Professor Guild: "[This question] poses the possibility that the necessary instruments of the rule of law are in fact an unreasonable burden on the taxpayer…if we decide to pass laws which interfere with the liberty of the individual…to place them in detention and to expel them…the corollary obligation is to ensure that those laws are carried out in conformity with the rule of law."[178]

Legal advice and assistance

108. Judicial review would still remain an option. It requires legal advice and assistance. So would the judicial oversight of detention which we have recommended, and so do appeals against return decisions. Article 12(3) requires Member States to ensure that third-country nationals are able to obtain legal advice and representation, and that legal aid is available to those who lack sufficient resources "insofar as such aid is necessary to ensure effective access to justice". As in the case of Article 11 (notification of rights of appeal), this provision is in terms confined to remedies against return decisions and removal orders. As in the case of that Article, DCA express doubt as to its applicability to detention. Again, we believe that whether or not the provision is amended, the Government should regard itself as bound to apply this provision to judicial oversight of detention.

109. DCA argue that it is not clear whether Article 12(3) covers all stages of any proceedings irrespective of merit, or whether, in cases where the grounds for challenging removal are weak, its requirements may be met by providing legal aid to obtain advice on the merits of a claim without providing further funding to bring proceedings. They do not contest the need for legal aid to be available for those who lack sufficient resources, but they do not accept that this should extend as far as providing funding to pursue claims where statutory tests have been applied and the claim has not satisfied these tests.[179] The argument on the language of Article 12(3) seems to us to confuse the broad objects sought to be achieved by a directive with the detailed provisions of the implementing regulations. To us it is quite clear that what is intended is legal advice and assistance on the same scale and subject to the same conditions as for domestic criminal proceedings. What is at issue is mandatory expulsion and deprivation of liberty.

110. During our visit to Yarl's Wood detention centre we were told of improved access to legal advice. Bridget Prentice MP told us that the Legal Services Commission had for two and a half months been running pilot schemes providing on-site legal advice surgeries open to any individual detained in a removal centre. These were available twice a week at Campsfield, Colnbrook, Dover, Harmondsworth, Tinsley House, and Yarl's Wood. She would be deciding in May whether these should be continued. We look forward to hearing her conclusions.[180]

111. With, again, the exception of MigrationWatch UK, which believes that Article 12(3) "appears to give a blank cheque to appellants to draw on UK

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178 QQ 397, 398.

179 Written evidence, p 141.

180 QQ 463, 464.

public funds",[181] all our witnesses agreed on the need for legal advice and assistance. The Refugee Council and Amnesty International reiterate that "in order for a judicial remedy to be effective, it is essential that publicly funded legal advice and representation is available for all those who require it."[182] ILPA are unhappy with the requirement that legal aid should be subject to a test that it is necessary to ensure effective access to justice. "The decision by a Member State to issue a return decision, removal order or a re-entry ban is a serious matter for the individual concerned. It may include forcible removal and prevent re-entry to the territory for some time. Effective access to justice on such matters will always require provision of legal assistance where requested".[183] UNHCR agree, saying that the wording of Article 12(3) should be adjusted in line with the Article 15(2) of the Asylum Procedures Directive, which establishes the right to free legal assistance for all asylum-seekers whose claims have been rejected at first instance. That provision permits States to limit that assistance under some conditions, but does not impose the same mandatory constraints as Article 12(3).[184]

112. We are not persuaded that the words "insofar as such aid is necessary to ensure effective access to justice" have the pernicious effect suggested by ILPA and UNHCR. They seem to us however to be unnecessary. If DCA intend to rely on them in order to limit their obligations, then we agree that they should be deleted.

113. Inevitably, legal advice and assistance on this scale will involve considerable resources. We believe such expenditure is justified, for the reasons we have already given in relation to judicial oversight of detention.

114. **We urge the Government to use their influence in negotiations to ensure that the strict regime of judicial oversight of detention proposed by Article 14 is not diluted. United Kingdom law on judicial oversight of detention should as far as possible be brought into line.**

115. **If the regime of Article 14 does not prove attainable, we recommend as a minimum that detention by administrative decision should be unlawful unless the detaining authority obtains from a court or tribunal, not less than one month after the beginning of the detention, and thereafter (in line with the views of the Council of Europe Human Rights Commissioner) at not less than three-monthly intervals, an order certifying the continuing lawfulness of the detention.**

116. **We accept that such regular judicial oversight will impose a considerable burden on the courts, and a financial burden on legal aid budgets. We nevertheless regard it as an essential concomitant of the assumption by the State of the power to place in custody persons who have not been accused, still less convicted, of a criminal offence.**

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[181] Written evidence, paragraph 12, p 20.

[182] Written evidence, paragraph 3.12.2, p 67.

[183] Written evidence, p 8.

[184] Written evidence, p 57.

CHAPTER 5: THE RE-ENTRY BAN

117. A Directive on common standards for returns might have confined itself to just that topic. It might have dealt only with the return, whether voluntary or enforced, of an illegally staying third-country national to a non-Member State. This draft goes further and proposes, in Article 9, a ban on re-entry to any of the Member States. In this chapter we consider this proposal in detail.

The legal base of Article 9

118. Before doing so, we raise an important question on the legal base of Article 9. As we have said,[185] the legal base for the Directive is Article 63(3)(b) of the Treaty establishing the European Community. Article 63(3) is the base for—

> "measures on immigration policy in the following areas:
>
> (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
>
> (b) illegal immigration and illegal residence, including repatriation of illegal residents".

Plainly sub-paragraph (b) is the correct legal base for the rest of the Directive, dealing as it does with the repatriation of illegal residents. However a re-entry ban, which deals with persons the majority of whom wish to enter and reside in a Member State legally, seems to us to concern "conditions of entry and residence", and so to fall under sub-paragraph (a). Article 9(5) in particular (the exception for asylum applications) can come into play only if and when a person on whom a re-entry ban has been imposed makes an application to enter a Member State as an asylum-seeker.

119. It is only instruments under Article 63(3)(b) which are subject to the co-decision procedure, that is, a decision jointly of the Council (acting by qualified majority voting) and the Parliament. Instruments under Article 63(3)(a) still require unanimity in the Council, and the Parliament has no legislative role. It might therefore not be possible for a single instrument to have both legal bases.

120. The issue of the correct legal base or bases is not a matter on which we have received any evidence, and it does not appear to have troubled any of the EU institutions, or the Government. The jurisprudence of the Court of Justice is well-established:

> "If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component… By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases."[186]

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[185] Paragraph 9 above.

[186] Case C-338/01, *Commission v Council,* [2004] ECR I-4829, at paragraphs 55 and 56.

121. It can be argued that the re-entry ban is merely incidental to the removal order or return decision which imposes it, which is the predominant purpose of the Directive. In that case Article 63(3)(b) of the Treaty is an appropriate legal base for a re-entry ban. This, we understand, is the view of the Home Office. It seems to us to be equally arguable that, if the re-entry ban is indeed inseparably linked to the removal order or return decision which imposes it (which we doubt), neither is secondary to the other. In that case, sub-paragraphs (a) and (b) of Article 63(3) would both be required as a legal base. This is not a matter on which we can reach any conclusion. **The Government should consider whether Article 63(3)(b) of the Treaty is an adequate legal base for a Directive dealing with returns which includes a re-entry ban as proposed in Article 9.**

The provisions of Article 9

122. The full text of Article 9 is set out in Appendix 5. In summary, what is proposed is that a return decision may, and a removal order must, incorporate a re-entry ban. Curiously, Article 9 does not itself state whether this is intended to be a ban on re-entering only the Member State issuing the return decision, or a ban on re-entering all Member States, but it is clear from recital (10) that it is the latter which is intended. There would in fact be no need for an EU instrument to allow a Member State to ban a person from re-entering only that State.

123. The ban is without prejudice to the right to seek asylum in a Member State. It can be for an indefinite period where the person concerned presents a serious security risk. Otherwise it is limited to a maximum of five years, and a number of matters are listed which must be taken into account when determining the length of the ban in any particular case. The ban may be suspended "on an exceptional and temporary basis". It may be withdrawn altogether where the third-country national (a) is the subject or a return decision or removal order for the first time; (b) has reported back to a consular post of a Member State; (c) has reimbursed all the costs of his previous return procedure. It is not clear from the text (either English or French) whether these three conditions are cumulative, which is perfectly possible, or alternative (as seems to have been assumed by our witnesses). At the very least, Article 9(3) needs to be amended to make this clear and to provide adequate legal certainty.

Arguments of principle

124. Mr Faull, the Director-General of DG Justice, Freedom and Security, described imposing a re-entry ban for the whole of the European Union as a novel proposal, but justified it in these terms: "We believe that adding this European-wide dimension to the effects of national return measures will promote prevention, i.e. will send discouraging signals to would-be illegal immigrants and those who exploit their vulnerable positions, and make the European return policy more credible…these are proportionate and flexible rules and they do allow for sufficient discretion on the part of the national authorities to take account of the specific characteristics of individual cases."[187]

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[187] Q 516.

125. The proposal is novel in the sense that neither the Commission Green Paper nor the White Paper contained any such suggestion. The White Paper confined itself to distinguishing between voluntary and forced returns, saying that "A refusal of a future visa application in order to re-enter the EU some time in the future should not be based only on the fact the he or she has previously stayed in the Member State illegally, if the person has returned voluntarily. On the other hand restrictions should be imposed in cases of forced returns."[188] It was not at that stage suggested that those restrictions should take the form of an EU-wide re-entry ban.

126. Under our current law, re-entry bans are in effect only for those who have been deported under the Immigration Act 1971, either where a person has been convicted of a criminal offence and the court itself recommends deportation as part of the sentence, or where deportation is considered to be conducive to the public good. To introduce into our law a re-entry ban on anyone who has been forcibly removed (subject to the exceptions noted above) would therefore be a major departure. In the words of the JCWI it "would constitute a levelling down of current legal principles." [189]

127. The only aspect of a re-entry ban which received support was the potentially indefinite ban on those constituting a serious security risk. That apart, not one of our witnesses had a good word to say for it. Although, as we have said, the ban is subject to an exception for asylum applications, some of the organisations most strongly opposed to the ban believed that it would nevertheless hinder returnees attempting to seek asylum. For example, Ms Juma for the Refugee Council, after saying that they were "entirely opposed to the introduction of an EU-wide re-entry ban", added that "an EU-wide entry ban is just not compatible with the right to asylum."[190] On the other hand, UNHCR welcomed the specific exception made by Article 9(5) for asylum claims, and suggested useful ways in which the exception could be made more effective in practice.[191]

128. Opposition to the principle of a re-entry ban came from across the spectrum. Perhaps most serious was the opposition from the European Parliament; the re-entry ban was described by Cristina Castagnoli as the most controversial point of the Directive. As she explained, "…at the moment in the majority of the Member States if someone is asked to leave the country he can come back the day after as a legal migrant who has a contract and can work. The re-entry ban is something that is considered to be really controversial because for five years someone cannot be back…That is one of our red lines that we are not accepting."[192]

129. Home Office officials were among the strongest critics of the ban. Mr Tom Dodd told us that they regarded it as arbitrary. Deportation orders should have flexibility to state how long the ban should be. "The other point in our system is that, just because you have been removed from this country for entering illegally or overstaying, it does not necessarily mean that you cannot then apply to come back to the United Kingdom as a legal entrant. You

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188 Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, COM(2002)564 final, paragraph 2.3.6.

189 JCWI written evidence, p 223.

190 Q 226.

191 Written evidence, p 57.

192 Q 629.

could seek a visa; you could seek to enter using immigration rules from a country which does not have a visa regime placed upon it; and the case would need to be judged on its merits at that time."[193]

130. The most outspoken language was reserved for the provision allowing a re-entry ban to be withdrawn where the third-country national "has reimbursed all costs of his previous return procedure". While a number of Member States which have re-entry bans have shorter bans (or none) for those who have left voluntarily, we have been unable to discover any Member State which has in its law a provision comparable to this. Mr McNulty said: "…at the risk of being intemperate, that was probably one of the most outrageous suggestions in the whole Directive, that somehow if you paid for your own return, you would be treated in a different way to if you did not. I just cannot see the public policy call of that at all".[194] On behalf of the European Parliament, Mr Manfred Weber took the same view: "I do not think people should be able to pay for their re-entry. We should not allow this by giving them back the costs of removal. That cannot be the reason. In the end we have to ask ourselves: 'Is this person dangerous? Is this a person who can earn his own livelihood? Are there good reasons for letting him back in?' I do not think it should be whether he has the money to buy."[195] We agree.

131. **The withdrawal of a re-entry ban should not be in any way dependent on or influenced by the ability of a third-country national to repay the cost of his previous return procedure.**

132. A further difficulty with the re-entry ban is the absence of any legal remedy. One is needed for a matter as important as this, but no appeal system is specified. This is a matter of concern to the European Parliament,[196] and also to the Bar Council, which thought Article 12(1) should be extended to cover re-entry bans.[197]

Practical problems facing the United Kingdom

133. A re-entry ban operating throughout the EU presupposes that each Member State has access to the information from other Member States on, at the very least, the persons who have been returned, the date, whether the return was voluntary or forced, and the length of the re-entry ban imposed. Only in this way can each State decide whether to admit someone returned from another State. As the Commission explained in its written evidence, the proposal itself makes no express link to reliance on the Schengen Information System (SIS), but recital (15) makes clear that this information sharing should take place in accordance with the provisions which will govern the SIS II.[198]

134. While the SIS is the only sensible way in which this information can be shared, data entered in the SIS will, in the absence of harmonised European standards on removals, not necessarily reflect the same legal and factual conditions leading to the issue of a return decision. This is very likely to compound the problem, already acute, of inconsistency of immigration data

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193 Q 152.

194 Q 428.

195 Q 764.

196 Q 629.

197 Written evidence, p 201.

198 Written evidence, p 152.

entered by Member States under Article 96 of the Schengen Convention. Professor Guild gave the example of Germany which, unlike other Schengen countries, enters into the SIS the details of failed asylum seekers; the data are not removed if the persons concerned become family members of citizens of the EU.[199] A recent judgment of the European Court of Justice found that a refusal to allow into Spain two nationals of a third country who were members of the family of EU citizens, solely on the ground that they appeared on the SIS list, violated Community rules on freedom of movement.[200] **We are concerned at the lack of equivalence in the data entered by the different Schengen countries in the Schengen Information System, and we hope that their practices may be brought into line.**

135. The United Kingdom and Ireland are not full participants in the SIS, and in particular do not have access to the immigration section.[201] This means that in practice we, like the Irish, could not put the relevant data into the system in order to inform other Member States of any third-country nationals who are the subject of a re-entry ban issued by us, nor could we access information on third-country nationals who are the subject of re-entry bans issued by other Member States in order to monitor the re-entry ban.[202] The Commission suggests that those Member States which do not participate in the SIS will have to look for other forms of information sharing, such as bilateral administrative cooperation between competent authorities. This would be wholly impracticable. Instead of sending information to one central body, and receiving it in the same way, the data would have to be sent to 24 other Member States, and each of those would in turn have to send information separately to the United Kingdom and Ireland. Lord Triesman told us that this would "pose some very sharp operational difficulties".[203] The simplest and most cost-effective way of overcoming this difficulty would be for the United Kingdom to negotiate an agreement on access to the immigration data in the Schengen Information System. Such an agreement would be useful even in the absence of a re-entry ban. **We recommend that the Government should initiate such negotiations.**

136. A failure to have any sort of access to the immigration data in the SIS would in practice make it impossible for us to apply the re-entry ban, or for other countries to apply it to persons returned from the United Kingdom. This would be a matter of concern only if Article 9 as currently drafted were to remain part of the Directive. We do not believe it should. Quite apart from the problems with the legal base, we regard the concept of an indiscriminate re-entry ban as flawed. If a third-country national comes to the borders of a Member State seeking leave to enter either as a legal migrant or as an asylum-seeker, the application should be assessed on its merits. The applicant may be refused entry on the basis of an alert on the SIS resulting

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199 Q 390.

200 Case C-503/03, *Commission of the European Communities v Kingdom of Spain*, 31 January 2006.

201 Ireland is in the same position as the United Kingdom, since it wishes to preserve the common travel area. Denmark is a party to Schengen. Since however it cannot participate in instruments under ECT Title IV, it has problems with regard to instruments under Title IV which build on the Schengen *acquis*. This is dealt with by Article 5 of the Protocol to the Amsterdam Treaty on the Position of Denmark, which provides that if Denmark adopts similar instruments under its national law, this will create obligations under international law similar to those assumed by other Member States under Community law.

202 Written evidence from the Home Office, paragraph 29, p 30. Oral evidence of Mr Tom Dodd, Q 152.

203 Q 750.

from the decision taken by a Member State, in accordance with Article 96 of the Schengen Convention, to enter his data because his presence is considered to pose a threat to public policy or to national security. In all other circumstances, the fact that the applicant was removed by another Member State should not be a relevant consideration.

137. It has been suggested to us that the Schengen countries may legitimately take a different view.[204] For the purpose of border controls they are treated as a single entity. They will need to know of persons returned or removed from other Schengen countries, and the reasons for this, since these are matters they may wish to take into account when deciding on their own admissions policy. But so long as each of those countries has its own admissions policy, potentially different from that of other Schengen States, it will remain within the discretion of that country to admit someone removed from another State, whether or not that removal was in the previous five years. Matters may change if and when there is a common EU policy on inward migration and the Schengen States align their admissions policies, but that is still some way off.

138. **We believe that re-entry bans should be imposed only on those persons who represent a serious security risk or have been convicted of a serious criminal offence.**

[204] For example, the explanatory memorandum to a draft Resolution tabled on 12 April 2006 in the French Assemblée Nationale by the Rapporteur of the Delegation for the European Union states: "The creation of a re-entry ban valid throughout the EU, banning any re-entry into the territory of the EU for a person who has been the subject of a removal order, would, in particular, represent genuine progress." (Official translation)

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

General conclusions

139. Given that the European Union has competence to act with regard to the return of illegally-staying third country nationals, we sympathise with the aim of trying to achieve a common EU returns policy, but only if that policy allows for persons to be returned to their country of origin safely and humanely, with respect for their human rights and dignity. The current Commission proposal does not achieve this. It is deeply flawed in a number of respects, and might, if agreed in its present form, result in the lowering of the standards currently applicable in a number of Member States, including the United Kingdom.

140. The differences of opinion between the individual Member States, and between the Council and Parliament, make it likely that if an instrument is ever adopted it will bear little resemblance to the current draft Directive.

141. We believe that the United Kingdom, though justified at this stage in not having opted in to the Directive, should play an active part in the negotiations, and seek to improve the draft in line with our recommendations.

142. The slow pace of negotiations need not delay the incorporation into our domestic law of the improvements we have suggested. To do so as soon as possible will strengthen the Government's hand when arguing for a similar incorporation of higher standards into the Directive.

143. We hope that changes to the Directive suggested by the United Kingdom will include those we recommend in this Report, and that the Directive may thereby be improved and so facilitate the establishment of a safe, fair and effective common approach on returns. *(paragraph 11)*

144. In view of the significance of the issues raised by the draft Directive, we make this Report to the House for debate. *(paragraph 17)*

The present draft of the Directive

145. The use of the term "illegally staying" in the description of third-country nationals is unfortunate but unavoidable. We emphasise that this Directive is dealing with widely differing categories of persons, some of whom will have entered the EU legally and resided there legally. *(paragraph 21)*

146. The definition of "illegal stay" must clarify the position of those with pending appeals, and those whose rights of appeal have not been exhausted. *(paragraph 22)*

147. In drafting the proposal for a Directive the Commission, by attempting a compromise which would please all, appear to have satisfied none. *(paragraph 29)*

Return and removal

148. More effort should be made by the EU in the negotiation of readmission agreements, and in promoting the use of EU travel letters as a substitute for official passports. *(paragraph 36)*

149. There must be close cooperation between Member States in determining the conditions prevailing in countries to which illegal residents are to be returned. The Government should support the setting up a central country of origin information service for processing information about conditions in those countries, and monitoring changes in those conditions. The Commission proposal is a useful starting point. *(paragraph 40)*

150. We agree with the requirement of Article 6(2) that a return decision should "provide for an appropriate period for voluntary departure". We do not however believe that there should be a fixed upper limit (whether of four weeks, or any longer period). In some cases a few days may be sufficient to prepare for return. In others, considerably longer than four weeks will be necessary. It should be for the authorities to determine, on a case by case basis, what is the appropriate period. *(paragraph 45)*

151. In the EU, deprivation of liberty is a State sanction normally imposed only on those who have been accused or convicted of a crime. Using it for the wholly different purpose of detaining illegal immigrants is a serious matter. Where detention is essential, it must be for as short a period as possible, not only for the sake of the individual concerned but also to lessen the burden on the taxpayer. *(paragraph 60)*

152. We accept that an absolute and non-extendable maximum to the period of detention (whether of six months, as proposed by Article 14(4), or any other period) will give Member States insufficient flexibility to deal with exceptional cases. *(paragraph 61)*

153. The Directive provides a good opportunity to make the systematic collection of comparable statistical data on detention a mandatory EU-wide requirement. *(paragraph 65)*

Conditions of detention

154. The requirements of Article 15 in relation to conditions of temporary custody should apply to the manner in which third-country nationals are taken into custody, as well as to their treatment when in custody. *(paragraph 67)*

155. The provisions of Article 15 are insufficiently precise, and do not adequately take into account the needs of particularly vulnerable groups. The Directive should mention in its recitals and incorporate into its substantive provisions the Council of Europe Guidelines on Forced Return, which would thus be given statutory force. *(paragraph 71)*

Children

156. We recommend that the Directive should define a child, and a minor, as a person under the age of 18. *(paragraph 73)*

157. We agree that, in accordance with the Council of Europe Guidelines, children should be detained only as a measure of last resort, and for the shortest appropriate period of time. *(paragraph 77)*

158. Ideally, children should be removed to their country of origin only in the company of a family member or other responsible adult. Where unaccompanied removal is unavoidable, the child should be handed over only to a person with proven parental responsibility. The legal guardian in the Member State in question must be informed of the identity of that

person. Article 8 of the Directive should be amended accordingly. *(paragraph 82)*

Status of those not removed

159. We would like to see Article 13 amended so that all the relevant provisions of the Directive laying down minimum standards for the reception of asylum seekers, including the provisions on employment, social assistance and housing, apply to those who for whatever reason cannot be returned to their countries of origin. *(paragraph 85)*

160. Where, for whatever reason, the removal of an illegally staying third-country national is impossible, it is inequitable that such a person should remain indefinitely without legal status, and with a continuing threat of removal. Where there is no foreseeable prospect of removal, the position should be reviewed, the removal order should lapse, and some temporary status should be granted. *(paragraph 87)*

Judicial supervision

161. The drafting of Article 12(2) is defective. It must be amended so that, in all Member States, appeals which are not rejected at a preliminary stage as manifestly ill-founded should result in suspension of the return decision or removal order until the appeal is disposed of. *(paragraph 99)*

162. The Governments of the Member States should regard themselves as bound to inform detainees of all available judicial remedies. *(paragraph 104)*

163. We urge the Government to use their influence in negotiations to ensure that the strict regime of judicial oversight of detention proposed by Article 14 is not diluted. United Kingdom law on judicial oversight of detention should as far as possible be brought into line. *(paragraph 114)*

164. If the regime of Article 14 does not prove attainable, we recommend as a minimum that detention by administrative decision should be unlawful unless the detaining authority obtains from a court or tribunal, not less than one month after the beginning of the detention, and thereafter (in line with the views of the Council of Europe Human Rights Commissioner) at not less than three-monthly intervals, an order certifying the continuing lawfulness of the detention. *(paragraph 115)*

165. We accept that such regular judicial oversight will impose a considerable burden on the courts, and a financial burden on legal aid budgets. We nevertheless regard it as an essential concomitant of the assumption by the State of the power to place in custody persons who have not been accused, still less convicted, of a criminal offence. *(paragraph 116)*

The re-entry ban

166. The Government should consider whether Article 63(3)(b) of the Treaty is an adequate legal base for a Directive dealing with returns which includes a re-entry ban as proposed in Article 9. *(paragraph 121)*

167. The withdrawal of a re-entry ban should not be in any way dependent on or influenced by the ability of a third-country national to repay the cost of his previous return procedure. *(paragraph 131)*

168. We are concerned at the lack of equivalence in the data entered by the different Schengen countries in the Schengen Information System, and we hope that their practices may be brought into line. *(paragraph 134)*

169. The Government should initiate negotiations for an agreement on access to the immigration data in the Schengen Information System. *(paragraph 135)*

170. We believe that re-entry bans should be imposed only on those persons who represent a serious security risk or have been convicted of a serious criminal offence. *(paragraph 138)*

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Baroness Bonham-Carter of Yarnbury
Earl of Caithness
Lord Corbett of Castle Vale
Baroness D'Souza
Lord Dubs
Baroness Henig
Lord Marlesford
Earl of Listowel
Viscount Ullswater
Lord Wright of Richmond (Chairman)

Professor Jörg Monar, holder of the Marie Curie Chair of Excellence at the Université Robert Schuman de Strasbourg, was appointed as Specialist Adviser for the inquiry.

Declared interests in connection with this inquiry

Lord Avebury
President, Peru Support Group
Chairman, Cameroon Campaign Group
President, TAPOL (Committee on Indonesian human rights)
President, Kurdish Human Rights Project
Chairman, Friends of Kashmir
Author of the foreword for an Immigration Law Practitioners' Association publication "Challenging Immigration Detention: a best practice guide"
Member, Amnesty International

Baroness D'Souza
Redress Trust: Director 2003–2004, Consultant 2004 to present
Trustee, Zimbiala Trust (Human rights in Zimbabwe)
Member, Independent Board of Monitors for Wormwood Scrubs Prison
Governor, Westminster Foundation for Democracy

Lord Dubs
Former Director, Refugee Council, London
Former Trustee, Immigration Advisory Service

Baroness Henig
President, Association of Police Authorities

See also the Register of Members' interests, available on the Parliamentary website at www.parliament.uk

APPENDIX 2: CALL FOR EVIDENCE

Sub-Committee F (Home Affairs) of the House of Lords Select Committee on the European Union is conducting an inquiry into the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for returning illegally staying third-country nationals (COM (2005) 391 final).

The Commission's proposal for a directive aims to establish common rules and procedures across Member States for the return of illegally staying third country nationals. The proposal includes rules on removal, the use of coercive measures, pre-removal detention and appeal procedures. It includes an EU-wide re-entry ban and provisions on apprehension in another Member State.

The proposed directive follows on from the Community's policy against illegal immigration. It is based on the Return Action Programme adopted by the Justice and Home Affairs Council in November 2002, which called for improved operational cooperation between Member States, intensified cooperation with third countries, and the establishment of common standards with the aim of facilitating operational return. The Hague Programme renewed calls "for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for human rights and dignity".

Evidence is invited on all aspects of the draft directive. The Sub-Committee would particularly welcome comments on:

- the legal basis of the draft directive, and premises on which it is based;
- whether the standards proposed comply with human rights law;
- the merits of the procedural rules, particularly of a two-step process—return decision followed by removal order—and whether they allow for an informed choice of voluntary return;
- the provisions for individuals who cannot be removed, whether temporarily or indefinitely;
- the conditions and duration of detention;
- the safeguards for individuals to be removed (such as concerning their arrest and escort), particularly where removal action is sub-contracted to private companies;
- provisions allowing or requiring postponement of removal;
- the proposals for a re-entry ban, including reliance on the Schengen Information System in the application of the ban;
- the provisions on judicial remedies and the effect of delays;
- the impact of this proposal on Member States' operational cooperation, as for example in the context of the European Border Agency.

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

* Bail for Immigration Detainees (BID)

Bar Council Law Reform Committee

Sergio Carrera (CEPS)

* Children's Commissioner for England and Wales

Church Pressure Groups

Commission for Racial Equality

* Department for Constitutional Affairs

* European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)

* European Commission, Directorate-General Justice, Freedom and Security (D-G JLS)

* European Economic and Social Committee (EESC)

* European Parliament LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs)

* Foreign and Commonwealth Office

* Professor Elspeth Guild

* Her Majesty's Chief Inspector of Prisons

* Home Office

Immigration Advisory Service (IAS)

* Immigration Law Practitioners' Association (ILPA)

* International Organization for Migration

Joint Council for the Welfare of Immigrants (JCWI)

* MigrationWatch UK

Refugee Action

Refugee Children's Consortium

* Refugee Council and Amnesty International UK

* United Nations High Commissioner for Refugees (UNHCR)

* Mr Manfred Weber MEP

APPENDIX 4: VISIT TO YARL'S WOOD IMMIGRATION REMOVAL CENTRE

1. The Committee visited Yarl's Wood Immigration Removal Centre in Bedfordshire on 7 March 2006. It was welcomed by Brian Pollett, the Director of Detention Services, and greeted by a number of Home Office and contracted GSL staff working at Yarl's Wood. It also met Liz Luder, the Chair of the Independent Monitoring Board; Bruce McClerny, the welfare officer; Sarah Seekins, the full time social worker (in place since January 2006); Sue Jones, the Healthcare Manager; Matthew Beams, the Childcare Manager; and the Reverend Larry Wright, the Head of Religious Affairs.

2. The Director explained that Yarl's Wood is a purpose-built Immigration Removal Centre. It originally comprised two similar blocks. One however was damaged and razed following a disturbance and a fire in February 2002. The Prison and Probation Ombudsman published the *Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre* in October 2004. The second opened in September 2003. This is the one which the Committee visited.

3. Yarl's Wood's population consists of families and single women. It is also a fast-track asylum processing centre for single women. Men are held only as part of a family unit. There is an immigration appeals hearing centre on site.

4. The Removal Centre consists of four accommodation units, with a total capacity to hold 405 people although, given the restrictions on the sharing of accommodation by families, it is not in practice possible for more than 330 inmates to be accommodated at any one time. At the time of the visit, 288 people were detained at the Removal Centre. The fast-track facility has a bed-space capacity of about 130 people but occupancy is routinely around 50. Residential units are connected by secure corridors and passage through the different units is through a barred cell door.

5. The Centre is run for the Home Office by private contractors who themselves have sub-contractors. Some of the staff are former members of the prison service, but they try to build a different atmosphere from prisons—successfully, we thought. The contract of GSL, the main contractors, has recently been renewed for 6 years.

6. After the brief introduction, the Committee divided into two groups and took a tour of the Removal Centre. One group was brought to the Crane Family Unit; the other group to the Avocet Single Female Unit. Each group visited the reception area, the healthcare and teaching facilities, and the gym. Every move from one room to the next required opening and locking of a number of doors, and staff carried a considerable number of keys on key-chains.

7. The standard of accommodation was found to be generally good. Detainees' rooms were clean, well equipped and had en-suite facilities. The two units that were visited had a multi-faith room, a library, association areas, laundry facilities, a kitchen and dining area, shops (operated on cashless basis) and designated telephones. Detainees were issued with a pager so that they could be notified of any incoming calls. The single female unit had a hairdressing salon.

8. Healthcare facilities were in common but were run separately for single women and families. They were clean and well equipped and included a dental surgery. Doctors were General Practitioners from the local GP practice. All

new arrivals were seen by a healthcare professional not later than 2 hours after arrival, and by a doctor within 24 hours. Counselling was offered, but language could represent a difficulty. In such cases staff often used other detainees as translators. Before leaving, detainees were seen by a nurse to ensure that they were fit to travel.

9. Members of the Committee met the social worker who has recently been appointed in accordance with recommendations of the Chief Inspector of Prisons. The Home Office has rejected other recommendations, and the social worker's authority will only become clear as her post becomes established. The Chief Inspector also recommended the appointment of an independent welfare officer. A welfare officer has indeed been appointed, but he is not independent; the Committee felt that he would be more effective if he were.

10. The care of those at risk of suicide and self-harm (SASH) was managed through four-weekly multi-agency meetings where individual cases were discussed. The Committee was shown what was referred to as the SASH room for people at suicide watch. This had soft furnishing and lighting and provided a calm and soothing environment.

11. Education for those under 16 is compulsory, and is run on OFSTED rules. Staff admitted that the short time in detention caused problems. The Committee saw teenagers having computer training, and a class of toddlers in a play-school who appeared to be enjoying themselves very much. There is a reasonably sized library, but given the large number of languages involved, the number of books in any language except English is small.

12. During the visit members of the Committee had the opportunity to meet and speak with a number of women and children individually and in the absence of staff. Many were of course unhappy their detention, some not knowing when it might end or where it might lead, some of the younger ones not even sure why they were detained at all. However we heard few complaints about the accommodation, or the way they were treated.

13. The visit ended after lunch with a brief open forum and discussion. The Committee queried whether the changes recommended by the Children's Commissioner had been implemented. Staff explained that several changes had already been implemented to make the place more child-friendly, including a recent decision to decorate the corridors with murals by the detainees. A process of deinstitutionalization was under way which included the reduction of locking. The gate separating the residential units had to stay for security reasons, but would be camouflaged.

14. Members asked about access to legal advice, and were told that detainees could learn about specialist immigration advice through the leaflets which were widely available in the centre. There were also weekly workshops giving general information on legal advice run by the Legal Services Commission. However one of the main concerns was the paucity of sources of specialist advice in the region. The Legal Services Commission was trying to address the issue of those coming to the centre from police cells, who needed advice on immigration issues rather than criminal law issues.

15. The Committee was told that IOM programmes for assisted voluntary return (AVR) were advertised in the centre, but there were not many AVR applications. Staff believed that it could be an important factor in encouraging removal and that such programmes should be more vigorously promoted.

16. Asked about the length of detention, staff told the Committee that those detained at entry point for the purpose of fast-tracking were held for an average of 34 days plus another 30 days if they failed their asylum claim and were subject to removal. In other cases, length of detention was on average one week for families and two weeks for single females. However, it was acknowledged that Yarl's Wood consistently had a significant number of people in detention for longer periods: some as long as six months and a few had been detained for over a year. This was due to problems with documentation, and lack of cooperation. Sometimes disruptive people had to wait for charter airlines because airline staff refused to take them on commercial flights. Most of those removed travelled voluntarily and with dignity; it was only a small rump who caused problems by resisting. One woman had been detained for three years because she declined to speak, and it was not possible to determine her name, nationality, country of origin or other details. Staff admitted that such cases were unsuitable for a detention regime designed to cater for short term needs; prolonged detention created boredom and institutional despondency, and was likely to result in considerable psychological harm.

17. Finally, the Committee was told that the detention centre was run on a budget of around £120 million a year. About 7000 people had come through Yarl's Wood in 2005. Those managing the centre were asked whether they believed this was a good way of spending public money. There was a general opposition to Home Office plans to open a new removal centre in Bicester; the feeling was that the immigration detention estate should be kept to a minimum, because the more you have the more you fill.

18. We are very grateful to Marina Enwright, the team leader who arranged the visit.

APPENDIX 5: FULL TEXT OF THE DRAFT DIRECTIVE

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on common standards and procedures in Member States for returning illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(2) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

(3) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for stay in a Member State.

(4) Member States should ensure that the ending of illegal stay is carried out through a fair and transparent procedure.

(5) As a general principle, a harmonised two-step procedure should be applied, involving a return decision as a first step and, where necessary, the issuing of a removal order as a second step. However, in order to avoid possible procedural delays, Member States should be allowed to issue both a return decision and a removal order within a single act or decision.

(6) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted.

(7) A common minimum set of legal safeguards on return and removal decisions should be established to guarantee effective protection of the interests of the individuals concerned.

(8) The situation of persons who are staying illegally but who cannot (yet) be removed should be addressed. Minimum standards for the conditions of stay of these persons should be established, with reference to the provisions of

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[205].

(9) The use of coercive measures should be expressly bound to the principle of proportionality and minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject of individual removal orders[206].

(10) The effects of national return measures should be given a European dimension by establishing a re-entry ban preventing re-entry into the territory of all the Member States. The length of the re-entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed 5 years. In cases of serious threat to public policy or public security, Member States should be allowed to impose a longer re-entry ban.

(11) The use of temporary custody should be limited and bound to the principle of proportionality. Temporary custody should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.

(12) Provision should be made to deal with the situation of a third-country national who is the subject of a removal order or return decision issued by a Member State and is apprehended in the territory of another Member State.

(13) This Directive includes provisions on the recognition of return decisions or removal orders which supersede Council Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals[207]. That Directive should therefore be repealed.

(14) Council Decision 2004/191/EC[208] sets out criteria and practical arrangements for the compensation of financial imbalances resulting from mutual recognition of expulsion decisions, which should be applied mutatis mutandis when recognising return decisions or removal orders according to this Directive.

(15) Member States should have rapid access to information on return decisions, removal orders and re-entry bans issued by other Member States. This information sharing should take place in accordance with [Decision/Regulation … on the establishment, operation and use of the Second Generation Schengen Information System (SIS II)]

(16) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

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[205] OJ L 31, 6.2.2003, p. 18.

[206] OJ L 261, 6.8.2004. p. 28

[207] OJ L 149, 2.6.2001, p. 34.

[208] OJ L 60, 27.2.2004, p. 55.

(17) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

(18) In line with the 1989 United Nations Convention on the Rights of the Child, the "best interests of the child" should be a primary consideration of Member States when implementing this Directive. In line with the European Convention on Human Rights, respect for family life should be a primary consideration of Member States when implementing this Directive.

(19) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(20) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(21) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement[209]—upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

(22) This Directive constitutes—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement—a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C of Council Decision 1999/437/EC[210] on certain arrangements for the application of that Agreement.

(23) This Directive constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 4(1) of Council Decision 2004/860/EC[211] on the provisional application of certain provisions of that Agreement.

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[209] OJ L 239, 22.9.2000, p. 19.

[210] OJ L 176, 10.7.1999, p. 31.

[211] OJ L 370, 17.12.2004, p. 78.

(24) This Directive constitutes—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement—an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I
GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State, i.e.
   (a) who do not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement, or
   (b) who are otherwise illegally staying in the territory of a Member State.
2. Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone of a Member State. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15.
3. This Directive shall not apply to third-country nationals
   (a) who are family members of citizens of the Union who have exercised their right to free movement within the Community or
   (b) who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

(a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

(b) 'illegal stay' means the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions for stay or residence in that Member State;

(c) 'return' means the process of going back to one's country of origin, transit or another third country, whether voluntary or enforced;

(d) 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing an obligation to return;

(e) 'removal' means the execution of the obligation to return, namely the physical transportation out of the country;

(f) 'removal order' means an administrative or judicial decision or act ordering the removal;

(g) 're-entry ban' means an administrative or judicial decision or act preventing re-entry into the territory of the Member States for a specified period.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:

   (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

   (b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

2. This Directive shall be without prejudice to any provision which may be more favourable for the third country national laid down in Community legislation in the field of immigration and asylum, in particular in:

   (a) Council Directive 2003/86/EC on the right to family reunification[212],

   (b) Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents[213],

   (c) Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[214],

   (d) Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[215],

   (e) Council Directive 2004/114/EC on the conditions of admission of third country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service[216],

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[212] OJ L 251, 3.10.2003, p. 12.

[213] OJ L 16, 23.1.2004, p. 44.

[214] OJ L 261, 6.8.2004, p. 19.

[215] OJ L 304, 30.9.2004, p. 12.

[216] OJ L 375, 23.12.2004, p. 12.

(f) Council Directive 2005/XX/EC on a specific procedure for admitting third country nationals for purposes of scientific research.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

Article 5

Family relationships and best interest of the child

When implementing this Directive, Member States shall take due account of the nature and solidity of the third country national´s family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. They shall also take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory.
2. The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.
3. The return decision shall be issued as a separate act or decision or together with a removal order.
4. Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-refoulement, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn.
5. Member States may, at any moment decide to grant an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In this event no return decision shall be issued or where a return decision has already been issued, it shall be withdrawn.
6. Where a third-country national staying illegally in the territory of a Member State holds a valid residence permit issued by another Member State, the first Member State shall refrain from issuing a return decision where that person goes back voluntarily to the territory of the Member State which issued the residence permit.

7. If a third-country national staying illegally in its territory is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State shall refrain from issuing a return decision, until the pending procedure is finished.
8. If a third-country national staying illegally in its territory is the subject of a pending procedure for granting his residence permit or any other permit offering the right to stay, that Member State may refrain from issuing a return decision, until the pending procedure is finished.

Article 7

Removal order

1. Member States shall issue a removal order concerning a third-country national who is subject of a return decision, if there is a risk of absconding or if the obligation to return has not been complied with within the period of voluntary departure granted in accordance with Article 6(2).
2. The removal order shall specify the delay within which the removal will be enforced and the country of return.
3. The removal order shall be issued as a separate act or decision or together with the return decision.

Article 8

Postponement

1. Member States may postpone the enforcement of a return decision for an appropriate period, taking into account the specific circumstances of the individual case.
2. Member States shall postpone the execution of a removal order in the following circumstances, for as long as those circumstances prevail:
   (a) inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;
   (b) technical reasons, such as lack of transport capacity or other difficulties making it impossible to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;
   (c) lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.
3. If enforcement of a return decision or execution of a removal order is postponed as provided for in paragraphs 1 and 2, certain obligations may be imposed on the third country national concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place.

Article 9

Re-entry ban

1. Removal orders shall include a re-entry ban of a maximum of 5 years.

   Return decisions may include such a re-entry ban.

2. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case, and in particular if the third-country national concerned:

   (a) is the subject of a removal order for the first time;

   (b) has already been the subject of more than one removal order;

   (c) entered the Member State during a re-entry ban;

   (d) constitutes a threat to public policy or public security.

   The re-entry ban may be issued for a period exceeding 5 years where the third country national concerned constitutes a serious threat to public policy or public security.

3. The re-entry ban may be withdrawn, in particular in cases in which the third-country national concerned:

   (a) is the subject of a return decision or a removal order for the first time;

   (b) has reported back to a consular post of a Member State;

   (c) has reimbursed all costs of his previous return procedure.

4. The re-entry ban may be suspended on an exceptional and temporary basis in appropriate individual cases.

5. Paragraphs 1 to 4 apply without prejudice to the right to seek asylum in one of the Member States.

Article 10

Removal

1. Where Member States use coercive measures to carry out the removal of a third country national who resists removal, such measures shall be proportional and shall not exceed reasonable force. They shall be implemented in accordance with fundamental rights and with due respect for the dignity of the third-country national concerned.

2. In carrying out removals, Member States shall take into account the common Guidelines on security provisions for joint removal by air, attached to Decision 2004/573/EC.

Chapter III

PROCEDURAL SAFEGUARDS

Article 11

Form

1. Return decisions and removal orders shall be issued in writing. Member States shall ensure that the reasons in fact and in law are stated in the decision and/or

order and that the third-country national concerned is informed about the available legal remedies in writing.

2. Member States shall provide, upon request, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand.

Article 12

Judicial remedies

1. Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order.
2. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.
3. Member States shall ensure that the third-country national concerned has the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 13

Safeguards pending return

1. Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7 to 10, Article 15 and Articles 17 to 20 of Directive 2003/9/EC.
2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation that the enforcement of the return decision has been postponed for a specified period or that the removal order will temporarily not be executed.

Chapter IV

TEMPORARY CUSTODY FOR THE PURPOSE OF REMOVAL

Article 14

Temporary custody

1. Where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a designated place or other measures to prevent that risk, Member States shall keep under temporary custody a third-country national, who is or will be subject of a removal order or a return decision.

2. Temporary custody orders shall be issued by judicial authorities. In urgent cases they may be issued by administrative authorities, in which case the temporary custody order shall be confirmed by judicial authorities within 72 hours from the beginning of the temporary custody.
3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.
4. Temporary custody may be extended by judicial authorities to a maximum of six months.

Article 15

Conditions of temporary custody

1. Member States shall ensure that third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Upon request they shall be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.
2. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, it shall ensure that third country nationals under temporary custody are permanently physically separated from ordinary prisoners.
3. Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation. Unaccompanied minors shall be separated from adults unless it is considered in the child's best interest not to do so.
4. Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions. Such visits may be subject to authorisation.

Chapter V

APPREHENSION IN OTHER MEMBER STATES

Article 16

Apprehension in other Member States

Where a third-country national who does not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement and who is the subject of a return decision or removal order issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"), the second Member State may take one of the following steps:

(a) recognise the return decision or removal order issued by the first Member State and carry out the removal, in which case Member States shall compensate each other for any financial imbalance which may caused, applying Council Decision 2004/191/EC mutatis mutandis;

(b) request the first Member State to take back the third-country national concerned without delay, in which case the first Member State shall be obliged to comply with the request, unless it can demonstrate that the person concerned has left the territory of the Member States following the issuing of the return decision or removal order by the first Member State;

(c) launch the return procedure under its national legislation;

(d) maintain or issue a residence permit or another authorisation offering a right to stay for protection-related, compassionate, humanitarian or other reasons, after consultation with the first Member State in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

Chapter VI

FINAL PROVISIONS

Article 17

Reporting

The Commission shall periodically report to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time four years after the date referred to in Article 18(1) at the latest.

Article 18

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by, (24 months from the date of publication in the Official Journal of the European Union) at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19

Relationship with Schengen Convention

This Directive replaces Articles 23 and 24 of the Convention implementing the Schengen Agreement.

Article 20

Repeal

Directive 2001/40/EC is repealed.

Article 21

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 22

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, […]

For the European Parliament	*For the Council*
The President	*The President*

APPENDIX 6: COUNCIL OF EUROPE GUIDELINES ON FORCED RETURN[217]

Chapter I – Voluntary return

Guideline 1. Promotion of voluntary return

The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.

Chapter II – The removal order

Guideline 2. Adoption of the removal order

Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.

1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

2. The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.

3. If the state of return is not the state of origin, the removal order should only be issued if the authorities of the host state are satisfied, as far as can reasonably be expected, that the state to which the person is returned will not expel him or her to a third state where he or she would be exposed to a real risk mentioned in paragraph 1, sub-paragraph a. and b. or other situations mentioned in paragraph 1, sub-paragraph c.

4. In making the above assessment with regard to the situation in the country of return, the authorities of the host state should consult available sources of information, including non-governmental sources of information, and they should consider any information provided by the United Nations High Commissioner for Refugees (UNHCR).

5. Before deciding to issue a removal order in respect of a separated child, assistance—in particular legal assistance—should be granted with due consideration given to the best interest of the child. Before removing such a child

[217] Adopted by the Committee of Ministers of the Council of Europe on 4 May 2005.

from its territory, the authorities of the host state should be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.

6. The removal order should not be enforced if the authorities of the host state have determined that the state of return will refuse to readmit the returnee. If the returnee is not readmitted to the state of return, the host state should take him/her back.

Guideline 3. Prohibition of collective expulsion

A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

– the legal and factual grounds on which it is based;

– the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.

2. Moreover, the authorities of the host state are encouraged to indicate:

– the bodies from whom further information may be obtained concerning the execution of the removal order;

– the consequences of non-compliance with the removal order.

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

– the time-limits for exercising the remedy shall not be unreasonably short;

– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

3. The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in guideline 2.1.

Chapter III – Detention pending removal

Guideline 6. Conditions under which detention may be ordered

1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.

2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

Guideline 7. Obligation to release where the removal arrangements are halted

Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.

Guideline 8. Length of detention

1. Any detention pending removal shall be for as short a period as possible.

2. In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

Guideline 9. Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.

2. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.

Guideline 10. Conditions of detention pending removal

1. Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.

2. Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a "carceral" environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.

3. Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.

4. Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.

5. National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.

6. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.

7. Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.

Guideline 11. Children and families

1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.

3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities

appropriate to their age. The provision of education could be subject to the length of their stay.

4. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.

5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal.

Chapter IV – Readmission

Guideline 12. Cooperation between states

1. The host state and the state of return shall cooperate in order to facilitate the return of foreigners who are found to be staying illegally in the host state.

2. In carrying out such cooperation, the host state and the state of return shall respect the restrictions imposed on the processing of personal data relating to the reasons for which a person is being returned. The state of origin is under the same obligation where its authorities are contacted with a view to establishing the identity, the nationality or place of residence of the returnee.

3. The restrictions imposed on the processing of such personal data are without prejudice to any exchange of information which may take place in the context of judicial or police cooperation, where the necessary safeguards are provided.

4. The host state shall exercise due diligence to ensure that the exchange of information between its authorities and the authorities of the state of return will not put the returnee, or his/her relatives, in danger upon return. In particular, the host state should not share information relating to the asylum application.

Guideline 13. States' obligations

1. The state of origin shall respect its obligation under international law to readmit its own nationals without formalities, delays or obstacles, and cooperate with the host state in determining the nationality of the returnee in order to permit his/her return. The same obligation is imposed on states of return where they are bound by a readmission agreement and are, in application thereof, requested to readmit persons illegally residing on the territory of the host (requesting) state.

2. When requested by the host state to deliver documents to facilitate return, the authorities of the state of origin or of the state of return should not enquire about the reasons for the return or the circumstances which led the authorities of the host state to make such a request and should not require the consent of the returnee to return to the state of origin.

3. The state of origin or the state of return should take into account the principle of family unity, in particular in relation to the admission of family members of the returnees not possessing its nationality.

4. The state of origin or the state of return shall refrain from applying any sanctions against returnees:

– on account of their having filed asylum applications or sought other forms of protection in another country;

– on account of their having committed offences in another country for which they have been finally convicted or acquitted in accordance with the law and penal procedure of each country; or

– on account of their having illegally entered into, or remained in, the host state.

Guideline 14. Statelessness

The state of origin shall not arbitrarily deprive the person concerned of its nationality, in particular where this would lead to a situation of statelessness. Nor shall the state of origin permit the renunciation of nationality when this may lead, for the person possessing this state's nationality, to a situation of statelessness which could then be used to prevent his or her return.

Chapter V – Forced removals

Guideline 15. Cooperation with returnees

1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.

2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be given information in advance about the removal arrangements and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.

Guideline 16. Fitness for travel and medical examination

1. Persons shall not be removed as long as they are medically unfit to travel.

2. Member states are encouraged to perform a medical examination prior to removal on all returnees either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen.

3. A medical examination should be offered to persons who have been the subject of a removal operation which has been interrupted due to their resistance in cases where force had to be used by the escorts.

4. Host states are encouraged to have "fit-to-fly" declarations issued in cases of removal by air.

Guideline 17. Dignity and safety

While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.

Guideline 18. Use of escorts

1. The authorities of the host state are responsible for the actions of escorts acting on their instruction, whether these people are state employees or employed by a private contractor.

2. Escort staff should be carefully selected and receive adequate training, including in the proper use of restraint techniques. The escort should be given adequate information about the returnee to enable the removal to be conducted safely, and should be able to communicate with the returnee. Member states are encouraged to ensure that at least one escort should be of the same sex as that of the returnee.

3. Contact should be established between the members of the escort and the returnee before the removal.

4. The members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.

Guideline 19. Means of restraint

1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.

2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.

3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.

4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case

Guideline 20. Monitoring and remedies

1. Member states should implement an effective system for monitoring forced returns.

2. Suitable monitoring devices should also be considered where necessary.

3. The forced return operation should be fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data.

4. If the returnee lodges a complaint against any alleged ill-treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.

Appendix

Definitions

For the purpose of these guidelines, the following definitions apply:

– State of origin: the state of which the returnee is a national, or where he/she permanently resided legally before entering the host state;

– State of return: the state to which a person is returned;

– Host state: the state where a non-national of that state has arrived, and/or has sojourned or resided either legally or illegally, before being served with a removal order;

– Illegal resident: a person who does not fulfil, or no longer fulfils, the conditions for entry, presence in, or residence on the territory of the host state;

– Returnee: any non-national who is subject to a removal order or is willing to return voluntarily;

– Return: the process of going back to one's state of origin, transit or other third state, including preparation and implementation. The return may be voluntary or enforced;

– Voluntary return: the assisted or independent departure to the state of origin, transit or another third state based on the will of the returnee;

– Assisted voluntary return: the return of a non-national with the assistance of the International Organization for Migration (IOM) or other organisations officially entrusted with this mission;

– Supervised voluntary return: any return which is executed under direct supervision and control of the national authorities of the host state, with the consent of the returnee and therefore without coercive measures;

– Forced return: the compulsory return to the state of origin, transit or other third state, on the basis of an administrative or judicial act;

– Removal: act of enforcement of the removal order, which means the physical transfer out of the host country;

– Removal order: administrative or judicial decision providing the legal basis of the removal;

– Readmission: act by a state accepting the re-entry of an individual (own nationals, third country nationals or stateless persons), who has been found illegally entering, being present in or residing in another state;

– Readmission agreement: agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not or no longer fulfil the conditions of entry to, presence in or residence in the requesting state;

– Separated children: children separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.

Note: When adopting this decision, the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.

APPENDIX 7: LIST OF ACRONYMS

ARC	Asylum Registration Card
ADSS	Association of Directors of Social Services
AIT	Asylum and Immigration Tribunal
AITC Act	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
AVR	Assisted Voluntary Return
AVRIM	Assisted Voluntary Return for Irregular Migrants
BID	Bail for Immigration Detainees
CBI	Confederation of British Industry
CEPS	Centre for European Policy Studies
CIPU	Country Information Policy Unit
COI	Country of Origin Information
CRE	Commission for Racial Equality
DCA	Department for Constitutional Affairs
DfES	Department for Education and Skills
DG JLS	Directorate-General Justice, Freedom and Security of the European Commission
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECO	Entry Clearance Officer
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EPP	European People's Party
EU	European Union
Eurodac	A computerised EU database for storing the fingerprints of asylum applicants
FCO	Foreign and Commonwealth Office

FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States
GCSE	General Certificate of Secondary Education
GDP	Gross Domestic Product
GUE	European United Left
HMCIP	Her Majesty's Chief Inspector of Prisons
IAN Bill	Immigration, Asylum and Nationality Bill (which received the Royal Assent on 30 March 2006)
IAS	Immigration Advisory Service
ILPA	Immigration Law Practitioners' Association
ILR	Indefinite leave to remain
IND	Immigration and Nationality Directorate of the Home Office
IOM	International Organization for Migration
IPPR	Institute for Public Policy Research
JCWI	Joint Council for the Welfare of Immigrants
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
NAO	National Audit Office
NASS	National Asylum Support Service
NGO	Non-governmental organisation
NIAA Act	Nationality, Immigration and Asylum Act 2002
NSA	Non-suspensive appeal
ODPM	Office of the Deputy Prime Minister
RCO	Refugee Community Organisations
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum of the EU Council
SIS	Schengen Information System
SIS II	The second generation Schengen Information System
TEC	Treaty Establishing the European Community
UASC	Unaccompanied asylum-seeking children

UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
VARRP	Voluntary Assisted Return and Reintegration Programme

APPENDIX 8: OTHER RELEVANT REPORTS FROM THE SELECT COMMITTEE

Session 2005–06

Annual Report of the EU Select Committee 2005 (25th Report, HL Paper 123)

Relevant Reports prepared by Sub-Committee F

Session 2000–01

A Community Immigration Policy (13th Report, HL Paper 64)

Session 2001–02

The legal status of long-term resident third-country nationals (5th report, HL Paper 33)

A Common Policy on Illegal Immigration (37th Report, HL Paper 187)

Session 2003–04

Handling EU asylum claims: new approaches examined (11th Report, HL Paper 74)

Session 2004–05

The Hague Programme: a five year agenda for EU justice and home affairs (10th Report, HL Paper 84)

Session 2005-06

Economic Migration to the EU (14th Report, HL Paper 58)