Policy Department Citizens' Rights and Constitutional Affairs
  - CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS -

REFUGEE STATUS IN EU MEMBER STATES AND RETURN POLICIES

STUDY

ID. N°: IP/C/LIBE/ST/2004-07
PE 365.969
July 2005
EN
This study was requested by: the European Parliament's committee on Civil Liberties, Justice and Home Affairs.

This paper is published in the following languages:

Original: DE,
Translation: EN

Author: Prof. Dr. Kay Hailbronner, LL.M (Montreal), University of Constance in co-operation with Lukas Gehrke, ICMPD, Vienna and the members of the Odysseus Network (country reports)

Responsible Official: Mr Jean-Louis ANTOINE-GREGOIRE Policy Department C Remand 03 J016 Tel: 42753 Fax: 2832365 E-mail: jantoine@europarl.eu.int

Manuscript completed in July 2005

Paper copies can be obtained through:
- E-mail: poldep-citizens@europarl.eu.int
- Site intranet: http://ipolnet.ep.parl.union.eu/ipolnet/cms/pid/438

Brussels, European Parliament, 2005

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.
The Hague Programme of the European Council on 5 November 2004 determines the establishment of a Common European Asylum System as a major aim of the European Union. The Common European Asylum System envisages after the adoption of a common asylum procedure the establishment of cooperation structures between the national asylum services of the Member States, single procedures for the assessment of applications for international protection, joint compilation and application of relevant information and finally the creation of a European support office for all forms of cooperation between the Member States relating to the Common European Asylum System. The final aim is the establishment of an effective as well as a fair determination procedure in order to find out who is in need of international protection under the Geneva Convention and other relevant instruments and to terminate the residence of those not fulfilling the requirements for a residence right.

The return and readmission policy of the European Union must be seen in this context. Although not necessarily limited to the issue of rejected applicants for international protection, applicants for refugee status make up for a large part of third-country nationals who do not or no longer have a right to stay legally in the EU. The Hague programme states unequivocally that these persons must return on a voluntary, or if necessary, compulsory basis. The European Council, therefore, 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. It is considered as essential to start discussions on minimum standards for return procedures including minimum standards to support effective national removal efforts. A coherent approach between return policy and all other aspects of the external relations of the Community with third states is considered as necessary as well as devoting special emphasis on the problem of nationals of returning such third country nationals who are not in the possession of passports or other identity documents.
Foreword

The European Council calls for

- closer cooperation and mutual technical assistance,
- launching of the preparatory phase of a European return fund,
- common country and region-specific return programmes,
- the establishment of a European return fund by 2007, taking into account the evaluation of the preparatory phase,
- the timely conclusion of Community readmission agreements,
- the prompt appointment by the Commission of a special representative of a common readmission policy.

The Hague programme reflects the development in most Member States. That illegal entry and residence should not lead to the denied stable form of residence\(^1\) has already been recognised in a Communication of the European Commission of 2001. Return policies are therefore recognised as an integral part of any European migration policy. It can be considered as generally acknowledged that efforts to improve and accelerate proceedings for examining a request for international protection are doomed to failure if, following a negative decision, rejected applicants remain in the country either illegally or on the basis of a toleration.

The European Council does not limit its efforts on technical and legal measures for a more effective removal policy. Return policy as an integral part of the national and international migration policy of the Member States\(^2\) and the European Union is inseparably connected with migration and asylum policy in general. Return and readmission therefore has to be seen in a wider context of a common European migration management implying \textit{inter alia} external relations with countries of origin and transit


countries. This reflects an increasing recognition of a multi-faceted approach to return and readmission issues.

Together with the change in the approach to return and readmission toward inclusion in a coherent migration policy concept goes another substantial change in the decision-making process. The European Parliament, until now only incidentally participating at the framing of an EU return and readmission policy, will become an equally entitled decision-maker with the abolition of unanimous decision-making by the adoption of a decision according to Art. 67 para. 2 to apply the procedure for provided for in Art. 51 TEC to all Title IV measures. In the Hague Programme, the European Council set a deadline for the Council, taking into account the assessment by the Commission and the strong views expressed by the European Parliament in their Recommendation, and asked for the adoption of the abovementioned decision no later than 1 April 2005 to apply the co-decision procedure to “all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration”.

A decision in reply to this invitation was adopted by the Council on 22 December 2004 and entered into force on 1 January 2005. The decision extends the co-decision procedure for Title IV of the Amsterdam Treaty to matters relating to absence of control on internal borders, freedom of travel for third country nationals, burden sharing relating to asylum as well as illegal immigration and illegal residence including repatriation.

Decision-making relating to asylum is thus not affected by the 22 December 2004 decision, meaning that decisions should be adopted according to the co-decision procedure…

---

3 Art. 67 para. 2 “…a decision with a view to providing for all or parts of the areas covered by this Title (IV) to be governed by the procedure referred to in Art. 251 and adapting the provisions relating to the powers of the Court of Justice”.

Foreword

procedure only after “common rules and basic principles governing these areas” have been laid down, that is to say when the one remaining piece of legislation in this area has been adopted, the Directive on procedures for granting or withdrawing refugee status.\(^5\) This Directive will, however, probably not be adopted before the end of 2005.

To sum up, except for issues relating to legal migration, and when the last asylum directive is adopted, all migration-related areas would be decided with qualified majority voting in the Council. Except for some measures relating to visa, the Parliament has the role of co-decision-maker together with the Council.

The study undertakes to examine the conditions and prospects of a common EU return and readmission policy. It does so on the basis of two previous studies, one by ICMPD of 2002 and the other by IOM of 2004. Both studies contain a variety of country reports, including such matters as legal and policy bases of return, enforcement, expulsion, detention and voluntary return programmes. The IOM study of 2004 relies heavily on the ICMPD study. It pursues a similar structure of country reports, containing information for voluntary and involuntary return on policy and legislative instruments, administrative and procedural arrangements, statistics and best practices and lessons learned.

This study also contains country reports as well as an analytical examination of the efforts on the European level for a better return and readmission policy. Particular emphasis has been devoted to those aspects which are at the heart of the political and legal debate of the return and readmission policy of Member States and the EU. The country reports attached in the Annex to this study – on the basis of previous studies – provide valuable new information on recent return policies in various countries and related legal and administrative problems and concerns. The purpose of the compara-

Foreword

tive part has not been to ensure a complete survey of all Member States describing all the different legal and administrative aspects of return and readmission policies comprehensively. It has rather been the attempt to get a sufficiently broad picture of different options and techniques of EU Member States to cope with return and readmission issues.

The study tries to analyse this information and to bring it into a context with some more recent efforts on the EU level to establish a coherent EU return and readmission policy. Therefore, as far as possible, information on European aspects and the relationship with European policies has been asked from the rapporteurs. One may not, however, expect too much in terms of awareness of cross-border implications of national return and readmission policies. In spite of a European legislative competence for return and readmission issues and a growing acceptance of European involvement enforcement of national decisions concerning rejected asylum applicants and other third country nationals obliged to leave are very much a national matter in the minds of the actors.

The study also attempts to provide a survey on the different legislative acts and proposals on the EU level for a harmonised return policy in the context of an overall migration management, as suggested by ICMPD in its study of January 2000. The European Commission has taken this up in its European Action Programme, the Communication of 3 June 2003\(^6\) and the Green Paper of 10 April 2002.\(^7\) The study is pursuing a similar approach. By identifying possible options in shaping a common EU return and readmission policy taking into the account the practices and laws of Member States, suggestions of international governmental as well as non-governmental organisations it is attempted to give as objectively as possible a picture of the diverging concepts to better cope with return and readmission issues.

---


Foreword

The author of this study owes particular thanks to Mr. Lukas Gehrke, who through his long experience in return issues as a contributor to the ICMPD study, has provided invaluable help in drafting and preparing this study. The author also would like to express his deep gratitude to those members of the Odysseus Network who have taken the pain to write country reports and thereby provided extremely useful information concerning the more recent practices in the EU Member States. Finally, the author would like to thank particularly those persons who have provided advice or information to the study from the European Commission, various ministries of interior of the EU Member States, the German and Swiss Federal Offices for Refugees and Migration, Nürnberg and Bern, IOM and UNHCR and non-governmental organisations dedicated to refugee issues, and, finally, to any individual person who provided useful criticism and comments to this study.

---

8 Names to be added in the final study.
- Executive Summary -
Executive Summary

I. EU Policies

Talking about EU concepts and proposals on return and repatriation two distinct levels can be distinguished: the internal EU dimension which deals with the on-going harmonisation process and, thus, with practical co-operation between the EU MS and the external dimension which is concerned with relations to countries of transit and origin. Consequently, two parallel strands of policy development in the area of return and repatriation will be looked at in the present report. Providing the EU competence in this area, the starting point will be Article 63 of the Treaty of the European Union. It stipulates the competence to comprehensively regulate repatriation of irregular migrants. Recognising the principle of subsidiarity, the Community may only pursue the common goal of defining an EU return policy if it can be reached more effectively on the Community level. In order to fully grasp the developments in this respect, the political framework will be analysed. This includes on the one hand the 1999 Tampere conclusions setting the stage for the first phase of harmonisation and laying down the major aims and principles for the creation of a Common European Asylum System; and on the other, the 2004 The Hague programme which provides the guiding principles for the second phase.

The situation with regard to asylum and migration has significantly changed since the entering into force of the Treaty of Amsterdam in 1999. New powers have been vested with the Community. As it was decided then, during the phasing-in period of 5 years the Commission and Member States shared the right of initiative. After this period the Commission acquired the exclusive right. The Tampere European Council of October 1999 gave specific directions in regard to the implementation of the Treaty of Amsterdam and was thus dedicated to the gradual establishment of an Area of Freedom, Security and Justice. The Council reaffirmed the absolute importance to respecting the right to seek asylum. In regard to immigration, it was acknowledged at the meeting that the EU needs a comprehensive approach to migration which addresses also political, human rights and development issues in countries and regions of origin and transit. Moreover, the Council stressed the need for more efficient man-
Executive Summary

Agagement of migration flows at all stages. Some of the acts tabled by the Commission during the first phase contain stipulations which indirectly impact upon return and readmission policies and practices while providing for minimum standards relating to asylum. Other measures deal more directly with the issue of return.

In assessing the progress achieved during ‘Tampere’, opinions were somewhat diverging. The European Commission regards the overall record as positive, while in the views of a number of NGOs overall progress has been disappointing.

Taking the 2002 ICMPD report as a basis, the present report is intended to provide an update also on the EU concepts and proposals which have emerged since then.

The starting point for the discussion on EU concepts and proposals is the Green Paper on a Community Return Policy on Illegal Residents. The Green Paper was the first official document comprehensively addressing the issue of return and repatriation on the EU level. In this respect, it aimed at mapping the field of return. It emphasised that a policy on return should consider the need to recognise the possible negative effects for the countries of origin and transit. Furthermore, it identified that the instrument of readmission agreements is in the interest solely of the Community, and therefore the Council should increase the complementarities in this area with other Community policies, and use the existing ‘leverage’, in particular with regard to foreign policy, development aid and technical assistance. In accordance with the Green Paper, in the long run the EU should consider adequate forms of support in the countries of origin to address the root causes of migration. It led to the publication of a Communication on a Community Return Policy, which in detail described the elements of an EU return policy on illegal residents.

The Communication identified that the main problem is “attributable to the unwillingness of third countries to take back their nationals and to ensure sustainable return”. It concluded that co-operation was needed at an administrative level to obtain
return travel documents for illegal residents who are not in possession of valid documents. Reality shows that lacking documents of irregular migrants pose one of the most pressing challenges for effecting returns in almost all EU Member States today.

More concretely, the second part of this Communication defined a Return Action Programme (RAP) and its pertinent elements. It addressed most of the issues identified in the 2002 ICMPD report and several other studies on the topic. The RAP contains short-, medium- and long-term measures aimed at increasing the efficiency of return policies and practices and is made up of the following four components:

- Immediate enhanced practical co-operation, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations,
- Common minimum standards for return to be envisaged in the short, medium or long term,
- Country specific programmes,
- Intensified co-operation with third countries on return.

The Return Action Programme calls for the development of integrated return programmes in order to ensure effective and sustainable return of third-country nationals to their countries of origin. The Return Action Programme placed its emphasis on the need for immediate enhanced operational co-operation of enforcement authorities, and called for the creation of common minimum standards and country specific programmes as well as an intensification of co-operation with third countries on return. Until today, progress in this respect can be observed but it has neither been swift nor comprehensive.

In the Communication on ‘The Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and The
Executive Summary

Return of Illegal Residents’, the Commission reiterated that “in large part … the key obstacle for returns is not the concrete removal operation, but rather the process of getting proper return travel documents for undocumented illegal residents”. To address this situation the Commission emphasised the importance of improving the exchange of information and sharing of best practices.

As first step towards closer operational co-operation, the Directive on the mutual recognition of expulsion decisions provided for the recognition by the authorities of one Member State of an expulsion order of the authorities of another Member State. The Directive is, however, limited to third country nationals who are subject of an expulsion decision based on a serious and present threat to public order or to national security and safety. Illegal presence is consequently not sufficient for the purpose of the Directive. Expulsion orders based on lacking residence permissions fall outside the scope of this Directive.

In order to effectively enhance operational co-operation the Commission calls for a clear legal basis especially concerning mutual recognition of all removal orders and minimum standards for return procedures. Discussions in this regard are, however, still ongoing.

In the creation of the Common European Asylum System (CEAS) return and repatriation policies play a decisive control element. For reasons of credibility and integrity of asylum systems, it is argued, an efficient and effective return policy is essential. It shall be noted, however, that credibility and integrity considerations presuppose fair and effective asylum systems in the first place which are worth being protected against misuse.

In the discussions concerning the CEAS, the concept of a ‘one-single-procedure’ in which all protection related claims are determined in one single procedure by one authority reigns prominently also due to its potential of enhancing efficiency of re-
turn policies. In this context, the difference between asylum determination procedures and procedures in relation to removal of rejected asylum seekers is important to note, especially since an inefficient doubling of procedures could occur. It is emphasised that if all possible protection obligations are included in one single procedure, the chance of further protection-related claims being raised to delay or prevent removal is all but removed. A single procedure, it is emphasised, could significantly reinforce the efficiency of the return process. The relevance and impact of efficient asylum procedures on the effectiveness of a return policy become evident. However, the asylum systems in several Member States have not yet fully been adapted so as to facilitate efficient return operations. At present, all too often procedures tend to be protracted, and in effect, they complicate both effective integration and return.

As the experiences in the EU Member States show, substantial difficulties prevail when it comes to the removal procedure itself. Apart from problems related to the individual returnee, countries of transit and origin - for a variety of reasons – do not accept their own nationals back, despite related obligations under international law. In order to overcome some of these problems the EU MS and the Commission alike resort to the conclusion of readmission agreements with countries of transit and origin; sometimes such agreements are combined with capacity building measures and technical assistance. Especially the European Neighbourhood Policy (ENP) provides the framework for such approaches targeting the new neighbours of the enlarged EU. The financial instrument for supporting the ENP – the Aeneas programme – provides financing for assisting third-countries in enhancing their capacities to combat irregular migration and enabling them to better be able to respect their readmission obligations.

Readmission Agreements establish reciprocal obligations and provide for:

- technical provisions governing the readmission procedure and transit operations, including readmission applications, means of evidence, time limits, means of transit, etc;
Executive Summary

- rules on costs, data protection, and the protection of other international rights and obligations.

Since 2000, when it received the mandate to enter into negotiations to conclude readmission agreements which are binding on the MS, the Commission has signed agreements with Hong Kong, Macao, Sri Lanka and Albania. Progress in this respect is lagging behind expectations of a number of Member States authorities.

In 2004, the five-year transitional period for the implementation of the Tampere work programme on migration and asylum came to an end and intense discussions on the adoption of a new multi-annual work programme took place. The new five-year work programme, the so-called ‘Hague Programme’, deals with all aspects of policies relating to the area of freedom, security and justice, notably asylum and migration, border management and integration. In principle, this second phase can be characterised as the quest for common standards, as opposed to the adoption of minimum standards pursued under the Tampere programme’s first phase.

Promoting measures in the area of return and readmission required and still requires the adoption of some legislative measures and operational cooperation agreements that are currently being negotiated. Already adopted by the Council are instruments for assistance in cases of transit for removal by air and the organisation of joint flights for removals of third country nationals subject to a removal measure. In order to promote a more effective return policy, enhanced co-operation with third countries is inevitable, in particular through the conclusion of readmission agreements.

Following the developments in the area of a European return and readmission policy, the Hague Programme re-emphasises the importance of these policies. It calls for the start of discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts.
Executive Summary

With regard to a European return and readmission policy the Hague Programme calls in particular for: closer cooperation and mutual technical assistance; the launch of the preparatory phase of a European Return Fund and the establishment thereof (see below); common integrated and country and region specific return programmes; the timely conclusion of Community readmission agreements; and the prompt appointment of a Special Representative for a common readmission policy by the Commission. The political circumstances of some new EU neighbours make them appear as ideal candidates for future enhanced co-operation in return and readmission, and in that sense also for integrated and country specific return programmes. Despite all political and human rights related concerns, especially two countries figure prominently in related discussions: Ukraine and Libya.

Arguably, the European Return Fund will occupy an important place in the progressing establishment of a European return policy. It is the first financial instrument targeted directly at furthering a European return policy by making available financial means for activities comprising of statistics, exchange of information, thematic meetings, website projects, computerised administrative and financial management, construction and maintenance of computerised management systems, studies including evaluation and impact assessment, expert meetings, dissemination, as well as publications and information.

II. EU Member States’ Practices and Laws

For most Member States there are no detailed figures available about the number of foreigners obliged to return after rejection of an asylum claim or after a claim for subsidiary protection, simply due to the fact that specific data collections do not always exist. This makes a statistical analysis of the numerical effectiveness of return policies impossible especially in a comparative context. In a political context, the risk of popular criticism is particularly high when statistics seemingly prove the nu-
Executive Summary

merical inefficiency of return policies. Nevertheless, comprehensive statistical in-
formation is necessary for informed policy making.

For illustrative purposes, the following charts show the situation with regard to return in a number of countries which are included in the present overview.


<table>
<thead>
<tr>
<th>Actual departure of asylum seekers in the Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>Expulsion</td>
</tr>
<tr>
<td>Supervised departure</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Administrative departure of asylum seekers in the Netherlands</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address control</td>
<td>11,247</td>
<td>10,871</td>
<td>11,967</td>
<td>16,875</td>
<td>17,557</td>
<td>10,662</td>
</tr>
<tr>
<td>Notice after aliens detention*</td>
<td>585</td>
<td>462</td>
<td>510</td>
<td>483</td>
<td>351</td>
<td>364</td>
</tr>
<tr>
<td>Others</td>
<td>0</td>
<td>41</td>
<td>100</td>
<td>37</td>
<td>37</td>
<td>19</td>
</tr>
<tr>
<td>Total</td>
<td>11,832</td>
<td>11,374</td>
<td>12,577</td>
<td>17,395</td>
<td>17,945</td>
<td>11,045</td>
</tr>
</tbody>
</table>

* The number of 585 (1999) includes both notice after aliens detention and mobile border supervision


The figures show that over the past four years there has been a decline in the number of asylum seekers actually being expelled from the country, whereas the number of aliens that are registered as having left the country ‘under supervision’ has gradually increased during the period 2001-2004. According to investigations carried out by the Aliens Police only 6-8 percent of the persons arrested for residence without the required documents in the period July -September 2004 were rejected asylum seekers.9

Dutch efforts in this area therefore focus primarily on eleven key countries: Afghanistan, Algeria, Angola, China, Democratic Republic Congo (DRC), Guinea, Iran, Ni-

---

Executive Summary

geria, Serbia and Montenegro, Somalia and Syria. Further the government hopes that coherent comprehensive policies developed by the EU on these countries will also increase the impact of Dutch efforts. Departure and return are therefore considered to be integral aspects of Dutch foreign policy.

The number of persons deported from Ireland (2002 – 2004)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>521</td>
</tr>
<tr>
<td>2003</td>
<td>590</td>
</tr>
<tr>
<td>2004</td>
<td>599</td>
</tr>
</tbody>
</table>

Rejections, forcible returns, expulsion orders, residence bans and deportations in Austria (2003 – January 2005)

<table>
<thead>
<tr>
<th></th>
<th>Rejections at the border</th>
<th>Forcible returns</th>
<th>Expulsion orders</th>
<th>Expulsion orders</th>
<th>Residence bans</th>
<th>Deportations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>22,371</td>
<td>3135</td>
<td>7387</td>
<td>144</td>
<td>15,057</td>
<td>8073</td>
</tr>
<tr>
<td>2004</td>
<td>26,270</td>
<td>4132</td>
<td>6104</td>
<td>274</td>
<td>9132</td>
<td>5274</td>
</tr>
<tr>
<td>January 2005</td>
<td>3440</td>
<td>131</td>
<td>297</td>
<td>22</td>
<td>620</td>
<td>327</td>
</tr>
</tbody>
</table>

The following table provides information as to how many persons left Austria voluntarily after a residence ban or an expulsion order had been issued and also cases where the person did not leave the country.

<table>
<thead>
<tr>
<th></th>
<th>Exit confirmed by the border police authorities</th>
<th>No exit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>2,433</td>
<td>1,608</td>
</tr>
<tr>
<td>2004</td>
<td>2,871</td>
<td>1,788</td>
</tr>
<tr>
<td>January 2005</td>
<td>281</td>
<td>106</td>
</tr>
</tbody>
</table>

In the UK, 13,005 principal asylum applicants were removed in 2003. Of these, 2,980 were refused entry at port and subsequently removed; 8,270 were in-country enforcement removals; 1,755 left under the assisted voluntary return programmes run by IOM. Provisional data for 2004 show that removals fell slightly to 12,430 principal applicants, due to a large extent to fewer removals of principal applicants recorded as nationals of the then ten countries which joined the EU on 1 May 2004. The largest nationalities of principal applicants removed or departing voluntarily in 2004 were Serbia and Montenegro, Afghanistan, Iraq and Albania.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications received</td>
<td>80,315</td>
<td>71,025</td>
<td>84,130</td>
<td>49,405</td>
<td>33,930</td>
</tr>
<tr>
<td>of which: Applied at port</td>
<td>25,935</td>
<td>24,865</td>
<td>26,560</td>
<td>13,720</td>
<td>7,590</td>
</tr>
<tr>
<td>Applied in–country</td>
<td>54,380</td>
<td>46,160</td>
<td>57,570</td>
<td>35,685</td>
<td>26,340</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Removals and voluntary departures</th>
<th>8,980</th>
<th>9,285</th>
<th>10,740</th>
<th>13,005</th>
<th>12,430</th>
</tr>
</thead>
<tbody>
<tr>
<td>of which: port removals</td>
<td>5,440</td>
<td>4,175</td>
<td>3,730</td>
<td>2,980</td>
<td>n/a</td>
</tr>
<tr>
<td>in–country removals</td>
<td>2,990</td>
<td>4,130</td>
<td>6,115</td>
<td>8,270</td>
<td>n/a</td>
</tr>
<tr>
<td>IOM assisted returns</td>
<td>550</td>
<td>980</td>
<td>895</td>
<td>1,755</td>
<td>n/a</td>
</tr>
</tbody>
</table>

*Source: Home Office, Asylum Statistics: United Kingdom 2000 to 2004 (data for 2004 are taken from the quarterly bulletins and are provisional).*

In recent years, a number of Member States governments (most notably, the Netherlands and UK) have set numerical targets of removals, which are hardly ever met. As it turns out, such targets are more of political nature and only to a lesser extent feasible operational goals. In such announcements, some may discern symbolic political support to those parts of the administration which are responsible for the execution of removals. Furthermore, as a result of announcing such targets public debates on removals of illegal third-country nationals are triggered, as was seen in the Netherlands and the UK.
Executive Summary

It emerged from recent parliamentary debates, e.g. in the United Kingdom that fewer than one in four rejected asylum seekers is recorded as being removed or departing voluntarily and it is estimated that there are more than 250,000 asylum seekers in the UK with no entitlement to stay.\textsuperscript{11} Arguably, the situation in other EU Member states is similar. The governments argue that the failure to remove large numbers of people whose claims have been refused strikes at the credibility of the asylum system. New legislative measures introduced in recent years further attempt to dispose of barriers to removal and deliver on the governments’ commitment to increase the rate of removals so that it exceeds the number of unfounded asylum applications.

National return trends are, however, different and as stated in the 2004 IOM Report on Return Migration, there is neither a uniform upward nor downward trend to be observed. In some MS the number of persons returned has been increasing such as the UK and decreasing in countries like Germany.\textsuperscript{12} As emerges from the analysis of the country reports it is not possible to draw a clear picture of rejected asylum seekers returning. What can be observed, however, is the disparity between orders to leave and actual expulsions carried out. In some countries the rate of the former and the latter has remained relatively stable in the last years, even though the absolute figures have increased. In other countries both the relative and the absolute figures remained constant. As a general trend, especially in the old EU MS, moreover, the numbers of asylum applications have plummeted to a historic low level. This will in turn result in decreasing absolute numbers of those who due to their rejection fall under return regulations. Given the constant migration pressure, however, decreasing asylum figures should not be misinterpreted in a way that effective return policies have become obsolete. There are reasons to believe that overall immigration figures have not dropped and that the number of third-country nationals present in an irregular situation in the EU MS has remained at a high level.

\textsuperscript{11} House of Commons, Hansard Debates, 7 February 2005, Col. 1184.
National systems for termination of residence and implementation of removal orders and deportations vary substantially. For the sake of integrity and credibility of asylum and other protection regimes on one hand, and on the other to manage and control legal immigration MS resort to similar procedures: fast-track procedures for “manifestly unfounded” asylum claims, and normal procedures for the substantial examination of asylum claims which are *prima facie* well-founded. Once finally concluded in the determination procedure that no valid claim could be established, a removal order is issued, which is to be executed within a varying span of time presupposed there are no other impediments to the enforcement of the return. To secure the physical presence of the alien the authorities resort to means of restricting the freedom of movement, or even detain the person concerned. Even if the means available for securing and implementing are similar throughout Europe, the specific regulations of such means differ significantly. These differences ultimately go back to the legal and administrative traditions of each country. This concerns for example the duration and the limits of detention pending deportation, the appeal rights, the possibilities of review of detention and deportation decisions. The dissimilarities of such regulations cause even greater divergence in practice. Moreover, the concepts of impediments to expulsions, such as safety concerns or lack of medical infrastructure in the country of origin are put into practice in a rather uncoordinated fashion.

Only a relatively small percentage of asylum-seekers are granted full refugee status. A significant number of persons receive some form of humanitarian or subsidiary status. Apart from the rights and benefits normally attached to the different statuses, what is of interest in this context is the duration during which such rights will be granted, i.e. the duration an alien will be permitted to remain on the territory based on the respective protection status. In some states included in this report, a refugee will receive a permanent residence permit in a short time, whereas other states limit the refugee status in duration, after the expiration of which the status may be extended or if the circumstances, which gave rise to the granting of protection, have substantially changed the person concerned shall return to the country of origin. Other statuses than refugee status are generally granted only for a fixed time which means that after a certain period aliens will come under the obligation to return
Executive Summary

home. Hence, the various types of statuses are factors in the evaluation of a system’s emphasis of return obligations. On the other hand, such arrangements increase the numbers of third-country nationals who will fall under the return policies of MS, and as such will increase the pressure on return schemes.

As stated in the country reports, the legal status of rejected asylum seekers and persons under subsidiary protection has not changed over the past few years- as described in the 2002 ICMPD study and the 2004 IOM report. With regard to rejected asylum seekers, they usually become illegals after notification of the final rejection and termination of the period between notification and final order to leave the country on a voluntary basis.

Many countries provide for subsidiary status in their respective laws on aliens and regulations concerning asylum. Subsidiary protection gives third country nationals in need of protection residence in a host country for a certain period of time usually with less rights and less benefits than asylum seekers. This also includes provision for humanitarian protection schemes. Non-refoulement provisions are included according to the Geneva Convention or on the basis of factual reasons- if no country issues a “laissez passer” or return certificate and/or no readmission agreement has been concluded with the respective third country. In such cases the alien receives a deportation deferment which usually can be renewed. It does however, not legalise a person’s sojourn in the host country. It also does not serve as a residence permit. Furthermore, legislation in some countries allows postponing the commencement of the enforcement of an expulsion order or a residence ban up to a certain amount of time. Depending on the country this practice is more commonly referred to as toleration.

The perception of many EU host countries that the widespread use of exceptional leave was acting as a pull factor and increasing the number of unfounded applications led to a change in their subsidiary protection policy. As an example, the United Kingdom changed in 2003 the exceptional leave to remain, and replaced it by hu-
manitarian protection and discretionary leave schemes. As a general rule, humanitar-
ian protection is granted to those who, though not refugees, would, if removed, face
in the country of return a serious risk to life or person arising from the death penalty,
unlawful killing or torture, inhuman or degrading treatment or punishment. Discre-
tionary leave is granted to some people who do not qualify for humanitarian protect-
ion or leave under the rules of immigration. The difference between the two catego-
ries lies in the provision that those who qualify for humanitarian protection will be
granted three years of leave and then, if still in need of protection, will be eligible to
apply for settlement in the host country. Under discretionary leave, periods of three
years or less can be granted, after which a person will only be able to apply for a fur-
ther period of leave, rather than for settlement. 13

Experiences show that the longer and more protracted asylum determination proce-
dures are the more difficult removals will become. There is a direct relation between
the length of asylum procedures and the effectiveness of return policies. One of the
main challenges in the Member States, therefore, is to simplify and consequently to
speed up the asylum procedure and thus to swiftly determine as to whether asylum
seekers will be granted an asylum related residence permit or not. A single procedure
for protection (or “one stop shop”) has been mooted as one possible way for stream-
lining the removal process. This would allow refugee and subsidiary protection needs
and other refoulement related issues to be considered in the same procedure. In the
majority of Member States asylum applications are presently considered under a spe-
cific procedure whilst other claims for protection are addressed later on, sometimes
in the relatively late context of the removal process. It is against this background that
a number of countries have introduced the single asylum procedure. In order to ad-
dress the administrative constraints posed by the abovementioned status differences,
some MS have furthermore introduced the uniform status. Additional procedural
changes include the limitation of appeal rights, suspensive effects of appeals and the
tightening of benefits upon rejection. In general, recent revisions of asylum legisla-

13 For more information see country report of the Netherlands and the United Kingdom in Part 3.
Executive Summary

tions make systems in effect more restrictive. In an effort to restrict access to the asylum system for protection non-deserving claimants administrations place – explicitly or implicitly – higher demands on the efficiency of return policies. As otherwise, the problems in relation to the growing number of third-country nationals physically present on the territory of the EU MS without permit will simply shift from the asylum system to other areas.

Closely related to the question of status differences is the matter of transition from protection to durable solutions. Traditionally, there are three possible ways for durable solutions: integration, resettlement and return. In this regard, a shift in the preference of states can be discerned. While in the first three decades of the existence of the Geneva Refugee Convention the preferred durable solution to refugee situations particularly in Western Europe appeared to be integration, the preference today gradually shifts to return. With regard to aliens with either no, withdrawn or expired legal status, Member States have established regularisation programmes during the past decades as one other way to account for and manage the illegal residents within their territories. Usually, regularisation programmes are not the first option of a country when it comes to dealing with foreigners in irregular situations. Governments are often reluctant to regularise aliens because they fear that more immigrants would come or also that they would have to implicitly acknowledge that existing migration controls are ineffective.\textsuperscript{14} Regularisation is a very controversial subject as can be seen from the ongoing discussion among Member States on the Spanish policy in this regard. As can be seen in the country reports, Member States have different concepts of regularisation programmes. While some countries have permanent regularisation programmes for foreigners who have lived continuously over a long period of time in the country, others like Spain, Belgium and Italy, for example prefer the so-called one-off option, which, like in the case of Spain might occur on a regular basis and can be seen as ongoing.

\textsuperscript{14} http://www.compas.ox.ac.uk/publications/papers/Regularisation%20Report.pdf
In recent years, several countries increasingly made available facilitation measures to promote the return of rejected asylum-seekers. Such measures previously used to be available predominantly for aliens holding residence permits for their respective host countries. Facilitation measures for rejected asylum-seekers are relatively recent tools to increase returns. The great majority of such measures are embedded in so-called voluntary return assistance programmes which are state funded and often implemented by IOM, in some cases in co-operation with NGOs. Support and benefits offered to rejected asylum-seekers willing to return under a programme vary to some extent throughout Europe. Usually, such programmes are comprised of travel costs, some pocket money and transportation of luggage. Sometimes, vocational training and reintegration grants may additionally be made available.

A broad distinction can be made as to the target groups of voluntary return assistance programmes. On one hand, several states offer general return assistance programmes targeting at asylum-seekers who withdraw from the process and rejected asylum-seekers irrespective of the countries of origin. Additionally, there are special programmes which are focused on specific regions or countries of origin, particularly after ending of armed conflicts, often including elements of reconstruction. Such programmes frequently build upon existing general return programmes, but are adapted to the specific situation in the countries of origin.

Great differences exist as to the financial means provided for by national authorities. Consequently, the scope of voluntary return assistance programmes varies accordingly. Moreover, it appears that there are significant differences as to the organisational structures for providing such voluntary return assistance.

Some countries which are included in this report, however, do not provide any voluntary return assistance programmes at all. In these countries, a clear-cut distinction between voluntary and non-voluntary return cannot be made.
Executive Summary

While accepting the need for enforced return, the general return policies in the EU claim preference for voluntary returns. The notion of the concept of ‘voluntariness’ in this context is, however, contested and differs widely. Very often, it merely means that the individual shall comply with the obligation to leave without the respective state administration having to intervene. On the other hand, give the persisting problems and the widespread non-compliance with this policy, the paradigm of voluntariness serves as the conceptual basis for setting incentives in such a way that compliance on the part of the rejectees is increased. In addition, sustainability considerations as regards return come into play. Ultimately, however, providing return assistance may be seen as a more economic way to reduce the caseloads, thus, it serves to pragmatically increase return statistics. Experience showed, moreover, that return assistance programmes tend to have greater impacts when effective non-voluntary return policies are in place.

This so-called assisted voluntary return is generally accepted by EU governments as the preferred option, since it proved to be more cost-effective, humane and conducive to better relations with the countries of origin. The number of assisted voluntary return programmes has increased substantially over the past ten years and all the countries subject to the present study have such programmes available for potential returnees. Experience has also shown that additional support in the reintegration process makes return more sustainable by offering the returnee at least some opportunity to reintegrate in the country of origin.

In many of the countries receiving significant numbers of immigrants (such as France, Germany, the Netherlands and UK) there is increased pressure for return to be undertaken on a compulsory rather than voluntary basis, which raises questions as to how ‘voluntary’ the return programme funded by some governments actually is. Countries recognise that without an effective forced return policy, voluntary repatriation often does not work.

There are many factors which hinder voluntary return. A major problem is the lack of travel documents, and sometimes the unwillingness of the country of origin to provide replacements. The family ties in the host country, political, economic, social, religious situation in the home country are also factors that may hamper the voluntary return. Also other factors, such the economic and social situation of the illegal immigrant, the migrants fear or shame for the failure to succeed in a better life abroad can have negative influence on the willingness to return voluntarily.

In several country reports,\(^{16}\) it is noted that another important reason not to participate in a voluntary return programme can be the prohibition to re-enter the territory of the host country within a certain period of time and the enrolment in the Schengen Information System for purpose of non-admission in any Schengen Country during this period.

There is a large variety of different removal procedures for rejected asylum seekers from a Member States. The formal procedures for removal are triggered by the underlying immigration decision against the individual. As identified previously in the 2002 ICMPD report and reconfirmed by information provided in the present country reports, the actual implementation of return measures appears to be problematic for the majority of the Member States. The reported difficulties seem to be similar to a great extent. As mentioned above, lacking identification and travel documents and uncooperative behaviour on behalf of aliens pose severe problems for responsible authorities to implement removals. It is only after final negative asylum decisions that authorities may resort to the whole range of measures, including presentations at foreign representations, making use of foreign immigration experts or even taking rejectees to the border of the assumed country of origin.

---

\(^{16}\) See country reports of Italy and Portugal for example.
Executive Summary

As a general trend, it can be observed that the capacity to remove individuals from the territory of the EU Member States has in recent years been streamlined by way of enactment of rules which seek to restrict or remove the courts’ jurisdiction against negative asylum decisions made by immigration authorities, and by making greater use of detention of asylum seekers and restricting their ability to work and access support.\[17\]

In the Member States an expulsion decision may be issued if the following premises occur: a) illegal residence; b) illegal employment or illegal self-employment; c) lack of sufficient financial means necessary for maintenance while in the host country; d) an alien’s further sojourn would constitute a threat to national safety or security or the protection of public security and order would be contradictory to national interests; e) illegal entry or an attempt to enter illegally; f) non-compliance with a decision obliging an alien to leave the territory of the host country voluntarily; g) non-compliance with fiscal obligations in the host country; i) completion of an imprisonment sentence for intentional criminal offence or fiscal offence.

According to the administrative structures, the overall responsibility for forced return lies within the Ministry of Interior and/or the Immigration Office in most Member States, whereas the enforcement falls under the competence of the police.

A final negative decision on an asylum application is usually accompanied by a request to leave the country within a certain period of time. After expiry of the time limit, an expulsion/removal order is issued. Expulsion order can be appealed against with suspensive effect. Expulsion orders are enforceable after becoming legally binding and the alien may then be removed.

\[17\] See the country report of Austria and France.

XXX PE 365.969
Here, the practice of the Member States differs very much, as countries like Belgium, the Netherlands and Luxembourg usually removed deportees by chartered flights, whereas deportees from Austria are mostly removed on commercial flights, due to the high costs of chartered flights, nevertheless they may be resorted to as a last resort.

A major obstacle in asylum determination procedures, as well as in return operations is the fact that a number of asylum-seekers, respectively rejected asylum-seekers, are reported to show a lack of co-operation. As mentioned before, lacking co-operation together with missing identification and travel documents represent the core problems authorities are facing. Several states have adopted special provisions which aim at securing the individual’s co-operation during the asylum procedure, i.e. in establishing identity and travel routes, etc. The majority of states, however, use existing regulations which allow some discretion as to their application. Most of states’ regulation in regard to social assistance for asylum-seekers and rejectees allow the reduction of such benefits towards those who are deemed uncooperative. In some countries cash benefits may completely be withdrawn and replaced by in kind contributions. In regard to rejected asylum-seekers some countries do not provide any form of assistance at all once a final decision is handed down. There are in any case significant differences as to authorities’ discretion and available measures to sanction uncooperative behaviour. The impacts of such measures on the effectiveness of return policies remain disputed.

A significant number of rejected asylum seekers abscond before removal can be enforced. Comprehensive evidence as to their whereabouts does not exist. Anecdotal evidence suggests that some remain in the respective country of destination while others move on to another country. Before the entering into force of the Dublin Regulation and the EURODAC system, moving on to another country provided the option to lodge an asylum application anew. Now, this route has been tightened if not closed altogether, leaving illegality as the only option. Regulations in regard to detention as well as the number of detention facilities vary to a considerable degree
Executive Summary

throughout European states. Comparing the duration of detention pending removal, it becomes evident that significant differences prevail as regards the maximum duration of detention. Legislation of a number of states stipulate an absolute maximum duration, after which the alien is to be released. Moreover, even within this group of states, notable time differences exist. According to some, the rather short duration often proves insufficient in regard to the regularly protracted procedures to obtain necessary identification and travel documents. This fact has at times led to the rejectee being released before the authorities had been able to acquire the documents. In a number of countries, however, no time limits in regard to detention exists at all, which means that in practice aliens may be held in detention indefinitely.

As mentioned, an increasingly pressing challenge faced by asylum systems is the arrival of undocumented asylum seekers. During the asylum determination procedure this poses substantial difficulties in view of establishing the facts of the case and assessing the needs for protection. With a view to return it is a precondition that the country of origin can be identified beyond doubt and that replacement documents can be obtained. This requires effective co-operation on the part of the administrations of the country of origin.

III. Basic Suggestions

A credible and transparent European immigration and asylum concept requires a distinction between persons receiving protection or admitted for other reasons and persons unlawful within the European Union. Termination of illegal residence, return and repatriation, therefore, is an indispensable part of any European or national immigration policy. More or less all Member States confirm that without effective enforcement measures immigration and asylum procedures miss their original functions. Member States are facing identical difficulties with regard to enforcement. Lack of identification papers or valid travel documents, the refusal of home countries to take back their nationals and a variety of administrative and legal barriers to deport persons are frequently preventing return and repatriation.
Recently, substantial efforts have been taken to tackle the problem of return, as for instance is indicated by the Directive 2003/110 on assistance in cases of transit for the purposes of removal by air\textsuperscript{18}. The Community has also started to conclude readmission agreements, although it is obviously difficult to come to terms with third states on the conclusion of readmission agreements. The agreement of the government of Macau and the Republic of Albania, however, indicates the willingness of the European Union to establish a network of readmission agreements. It is, however, quite interesting that it is in practice frequently administrative or legal barriers in the enforcement process which create large difficulties. There are also major difficulties with the legal status of armed guards on board of the aircraft, the rights of the aircraft commander and the legal rules in case of transit stops etc., which are frequently in the way of an effective return policy.

An interesting development has been started with the Directive of 2001 on the mutual recognition of decision on the expulsion of third-country nationals\textsuperscript{19}. It seems only logical to recognise expulsion decisions as a basis for enforcement rather than insisting that only national administrative decisions can be enforced. However, the scope of application of the Directive is still very limited. Therefore, a mutual recognition and enforcement of return and removal decisions is required.

A clear and transparent return policy in an EU context requires an examination of the legal and factual impediments for return, either forced or voluntary return. The comparative survey of the reasons why persons ordered to leave have not been returned to their home countries has indicated very similar problems. The Commission has already in its communication on a community immigration policy\textsuperscript{20} indicated that it will bring forward proposals for a harmonization of standards on expulsion, deten-


Executive Summary

A harmonization of these standards is a logical consequence of common standards on immigration. It is obvious that the harmonization of conditions under which third-country nationals are to be granted a residence permit in one of the Member States must result in harmonized rules on termination of such residence rights and execution of such decisions. However, this does not necessarily mean a comprehensive EU-uniform regulation of expulsion and return. An essential term in the context of expulsions is public order and security. There will have to be a scope of action for covering different national concepts of public order.

One essential element of a common EU return and repatriation policy must be the development of a concept to cope with the increasing difficulties to implement return orders. The increasing gap between removal decisions and actual deportations will never be totally closed. The record, however, can be improved only to increase the number of voluntary returns. Some of the legal and factual impediments cannot be solved efficiently by purely national means. This concerns particularly the difficulties arising in relation with home countries. Frequently, established practices and personal contact with authorities responsible in countries of destination are an indispensable requirement for an efficient return policy. Therefore, the traditional connection of some EU Member States with some countries of destination could and should be used to establish a more efficient return procedure. In addition, it should be envisaged to set up specialized institutions for organizing the return of particular categories of persons ordered to leave. There could, for instance, be a specialized agency for dealing with particular categories of persons ordered to leave (e.g. concentration of return procedures with regard to Algerians and Moroccans with a French agency).

It is obvious that such an effort can only be undertaken at this stage on a voluntary inter-state level. The Commission, however, could set up a program encouraging and promoting such efforts.

In addition, there could be specialized institutions responsible to procure surrogate travel documents, establish contacts with return countries and make the necessary preparations for a deportation. In Germany and elsewhere, recently efforts have been
Executive Summary

undertaken to establish within the responsibility of the Länder centers for controlled return. These centers have been set up in order to make the organizational preparations for return. The basic concept is that persons ordered to leave should be psychologically prepared for return rather than giving them a perspective of integration. This could be combined with professional training and other incentives for voluntary return. It could well be imagined that such institutions which require a larger number of persons in order to operate efficiently could be established on a trans-national level.

On the level of legal barriers to deportation it seems important to achieve a uniform interpretation of legal barriers to deportation arising from the concept of inhuman or degrading treatment of punishment under Art. 3 of the European Convention of Human Rights. The jurisprudence of the European Court of Human Rights has established a framework for human rights in return and repatriation policies but also created a substantial amount of uncertainty concerning the concept of inhuman treatment with relation to the general conditions in a deportee’s home country. In addition, the relationship of Art. 3 ECHR to the exclusion clauses under Art. 1 F of the Convention is unclear. It may not be sufficient to refer directives and communications to the existing public international law obligations of the Member States with regard to the non-refoulement principle arising from the Geneva Convention and Art. 3 ECHR. Considering divergent practices of Member States there should be an effort to harmonize the interpretation of these concepts.

With a common EU legal framework for immigration of third-country nationals which includes expulsion and deportation it seems inevitable to establish a common register in which the dates of third-country nationals, as well as measures terminating residence, are collected. The SIS-provisions on blacklisting certain individuals barred from entry cannot be considered as sufficient to meet the requirements of a common EU return and repatriation policy.
Executive Summary

Finally, there is a need for a clear and consistent return policy which must be taken into account as guiding principles in every directive or decision on immigration, asylum and integration. There must be clear and transparent rules under which conditions third-country nationals will in principle be returned if they do not dispose of a valid residence permit. Contradictory signals and policies in different areas of community policy should be avoided.
# Table of Contents

**Foreword** .................................................................................................................. - 3 -  
- *Executive Summary* - ..................................................................................................... IX  
I. EU Policies ....................................................................................................................... XI  
II. EU Member States’ Practices and Laws ........................................................................ XVII  
III. Basic Suggestions ......................................................................................................... XXXII  
Table of Contents ....................................................................................................... XXXVII  
Table of Abbreviations ...................................................................................................... XLI  

**PART 1: STUDY ON REFUGEE STATUS IN EU MEMBER STATES AND RETURN POLICIES** ........................................................................................................... 1  
- **CHAPTER I - INTRODUCTION** .................................................................................. 3  
  1. Aims and Organisation of the Study ................................................................. 5  
  2. Terminology ........................................................................................................... 12  
  3. Problems Related to Comparability and Non-availability of Data ................ 14  
- **CHAPTER II - INTERNATIONAL LEGAL NORMS ON RETURN** ..................... 17  
  1. Obligation of Non-Refoulement under Art. 33 GC – General Remarks ........... 19  
  4. The Content of Non-Refoulement Principles and Related Obstacles to Return and Repatriation Under Public International Law ......................................................... 32  
  5. Additional Legal Obstacles to Return and Repatriation .............................. 37  
  6. Status of Persons Subject to Detention Measures ........................................... 42  
  7. Obligations of Readmission and Right to Return ............................................ 46  
- **CHAPTER III - EU CONCEPTS AND PROPOSALS ON RETURN AND REPATRIATION** .................................................................................................................. 58
1. General Competence of the EU Under Art. 63 ......................... 60
2. The First Phase - Tampere Programme ................................. 62
3. Specific Competences of the EU ............................................. 64
4. Common European Asylum System ...................................... 71
5. Readmission ......................................................................... 77
6. The Second Phase - The Hague Programme ......................... 81

- CHAPTER IV - EU MEMBER STATES – RETURN POLICIES AND PRACTICES

................................................................. 89
1. Introductory Remarks ...................................................... 91
2. General Trends and Statistics ............................................. 93
3. Legal Instruments in Relation to Return and Repatriation . 95
4. Legal and Administrative Schemes for Voluntary Return . 113
5. Administrative Procedures for Enforcement of Return .... 125
6. Costs ................................................................................ 157

- CHAPTER V - CONCLUDING REMARK ........................................ 161
1. Coherent Return and Readmission Policy ......................... 162
2. A Higher Level of Information ............................................. 164
3. A Highly Qualified, Efficient and Fair Asylum Procedure . 165
4. Preference for Voluntary Return Programmes ................. 166
5. Better Cooperation Between Member States ...................... 168
6. From Mutual Recognition of Expulsion Decisions to A System of EU-Wide Enforcement of Return Decisions ... 171
7. Harmonised Standards of Return ...................................... 172
8. Cooperation with Third States .......................................... 176
9. Protection of Human Rights .............................................. 177

PART 2: SYNOPTIC TABLES ....................................................... 179

PART 3: COUNTRY REPORTS ................................................. 199

- CHAPTER I - COUNTRY REPORT AUSTRIA ................................. 201
Table of Contents

- Chapter II - Country Report Belgium .............................................. 249
- Chapter III - Country Report Denmark (no report received due to illness) ......................................................................................................................... 279
- Chapter IV - Country Report Finland ............................................. 283
- Chapter V - Country Report France .................................................. 295
- Chapter VI - Country Report Germany ............................................. 405
- Chapter VII - Country Report Hungary ............................................ 431
- Chapter VIII - Country Report Ireland ............................................. 475
- Chapter IX - Country Report Italy .................................................... 499
- Chapter X - Country Report Luxembourg ......................................... 519
- Chapter XI - Country Report Malta .................................................. 533
- Chapter XII - Country Report The Netherlands ............................... 563
- Chapter XIII - Country Report Poland .............................................. 605
- Chapter XIV - Country Report Portugal .......................................... 633
- Chapter XV - Country Report Slovenia ............................................ 677
- Chapter XVI - Country Report Spain ............................................... 715
- Chapter XVII - Country Report Switzerland .................................... 749
- Chapter XVIII - Country Report United Kingdom ............................ 791

Part 4: Supplementary Materials .......................................................... 833
- Annex I - List of Contributors ......................................................... 835
- Annex II - Bibliography (selection) .................................................... 841
  1. Documents .................................................................................... 843
  2. Books, Articles and Other Studies .................................................. 846
  3. Links: ........................................................................................... 850
- Annex III - Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) ........................................................................................................ 851
Ad hoc Committee of Experts on the Legal Aspects of
Territorial Asylum, Refugees and Stateless Persons

(CAHAR) .................................................................853

Chapter I – Voluntary return ...........................................854
Chapter II – The removal order .........................................855
Chapter III – Detention pending removal ..........................858
Chapter IV – Readmission ...............................................861
Chapter V – Forced removals ..........................................863
Appendix ........................................................................866
# Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>AEL</td>
<td>Academy of European Law</td>
</tr>
<tr>
<td>AFDI</td>
<td>Annuaire Français de Droit International</td>
</tr>
<tr>
<td>AG</td>
<td>Ausführungsgesetz</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>AJPIL</td>
<td>Austrian Journal of Public and International Law</td>
</tr>
<tr>
<td>Ann Eur</td>
<td>Annuaire Eurpéen (European Yearbook)</td>
</tr>
<tr>
<td>APA</td>
<td>Asylum Procedure Act (German AsylVfG)</td>
</tr>
<tr>
<td>APSR</td>
<td>American Political Science Review</td>
</tr>
<tr>
<td>AöR</td>
<td>Archiv des öffentlichen Rechts</td>
</tr>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>ASIL</td>
<td>Proceedings of American Society of International Law</td>
</tr>
<tr>
<td>Asyl</td>
<td>Schweizerische Zeitschrift für Asylrecht und –praxis</td>
</tr>
<tr>
<td>AsylVfG</td>
<td>Asylum Procedure Act</td>
</tr>
<tr>
<td>AuA</td>
<td>Arbeit und Arbeitsrecht (Zeitschrift)</td>
</tr>
<tr>
<td>AuAS</td>
<td>Ausländer- und asylrechtliche Sonderinformationen</td>
</tr>
<tr>
<td>AusIG</td>
<td>Ausländergesetz (German Aliens Act)</td>
</tr>
<tr>
<td>AusIR</td>
<td>Ausländerrecht (Aliens Law)</td>
</tr>
<tr>
<td>AVR</td>
<td>Archiv des Völkerrechts</td>
</tr>
<tr>
<td>AWR-Bulletin</td>
<td>Association for the Study of the World Refugee Problem</td>
</tr>
<tr>
<td>BayVBI</td>
<td>Bayerische Verwaltungsblätter</td>
</tr>
<tr>
<td>BDDC</td>
<td>Boletim de Documentação e Direito Comparado</td>
</tr>
<tr>
<td>BGBI.</td>
<td>Federal Law Gazette (Bundesgesetzblatt)</td>
</tr>
<tr>
<td>BGHE</td>
<td>Decisions of the Federal High Court of Justice</td>
</tr>
<tr>
<td>BGHR</td>
<td>Reports of the Federal High Court of Justice</td>
</tr>
<tr>
<td>BGSG</td>
<td>Federal Border Police Act</td>
</tr>
<tr>
<td>BIA</td>
<td>Board of Immigration Appeals</td>
</tr>
<tr>
<td>BIS</td>
<td>Borders and Immigration Service</td>
</tr>
<tr>
<td>BMI</td>
<td>Bundesministerium des Innern (German Federal Minister of the Interior)</td>
</tr>
<tr>
<td>BPIL</td>
<td>British Practice in International Law</td>
</tr>
<tr>
<td>BT-Drs.</td>
<td>Bundestags-Drucksache (official document of Germany’s Federal Parliament)</td>
</tr>
<tr>
<td>Bull. EC</td>
<td>Bulletin of the European Communities</td>
</tr>
<tr>
<td>Bull. EU</td>
<td>Bulletin of the European Union</td>
</tr>
</tbody>
</table>
### Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BVerfGE</td>
<td>Decisions of the Federal Constitutional Court</td>
</tr>
<tr>
<td>BVerwGE</td>
<td>Decisions of the Federal Administrative Court</td>
</tr>
<tr>
<td>BYIL</td>
<td>British Yearbook of International Law</td>
</tr>
<tr>
<td>CA</td>
<td>Court of Appeal</td>
</tr>
<tr>
<td>CAA</td>
<td>Cour administration d’appel</td>
</tr>
<tr>
<td>CAES/CEAS</td>
<td>Common European Asylum System</td>
</tr>
<tr>
<td>CAHAR</td>
<td>Ad hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons</td>
</tr>
<tr>
<td>CAT</td>
<td>United Nations Convention against Torture</td>
</tr>
<tr>
<td>CDE</td>
<td>Cahiers de Droit Européen</td>
</tr>
<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
</tr>
<tr>
<td>CEPS</td>
<td>Centre for European Policy Studies</td>
</tr>
<tr>
<td>cf.</td>
<td>confer</td>
</tr>
<tr>
<td>CFI</td>
<td>Court of First Instance of the European Communities</td>
</tr>
<tr>
<td>CFSP</td>
<td>Common Foreign and Security Police</td>
</tr>
<tr>
<td>CGRA</td>
<td>Commissariat Général aux Réfugiés et aux Apatrides</td>
</tr>
<tr>
<td>CIAR</td>
<td>Inter-Ministerial Commission on Asylum and Refuge</td>
</tr>
<tr>
<td>CIC</td>
<td>Citizenship and Immigration Canada</td>
</tr>
<tr>
<td>CIR</td>
<td>Italien Council for Refugees</td>
</tr>
<tr>
<td>CIREA</td>
<td>Centre for Information, Discussion and Exchange on Asylum</td>
</tr>
<tr>
<td>CIREFI</td>
<td>Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration</td>
</tr>
<tr>
<td>cit.</td>
<td>Citation</td>
</tr>
<tr>
<td>CJHA</td>
<td>Co-operation in the field of Justice and Home Affairs</td>
</tr>
<tr>
<td>CML Rev.</td>
<td>Common Market Law Review</td>
</tr>
<tr>
<td>Cmd.</td>
<td>Command Paper</td>
</tr>
<tr>
<td>CMR</td>
<td>Common Market Paper</td>
</tr>
<tr>
<td>CoE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>COM</td>
<td>Commission Document</td>
</tr>
<tr>
<td>CONF</td>
<td>Conference of the Representatives of the Governments of the Member States</td>
</tr>
<tr>
<td>COREPER</td>
<td>Committee of Permanent Representatives to the European Communities</td>
</tr>
<tr>
<td>Cornell ILJ</td>
<td>Cornell International Law Journal</td>
</tr>
<tr>
<td>CPRC</td>
<td>Constitution of the Portuguese Republic</td>
</tr>
<tr>
<td>CPRR</td>
<td>Commission permanente de recours des réfugiés</td>
</tr>
<tr>
<td>CR</td>
<td>Computer und Recht</td>
</tr>
<tr>
<td>CRDD</td>
<td>Refugee Determination Division</td>
</tr>
<tr>
<td>CRE</td>
<td>Commission for Racial Equality</td>
</tr>
<tr>
<td>CRHC</td>
<td>Comprehensive Response to the Humanitarian Crisis</td>
</tr>
</tbody>
</table>
Table of Abbreviations

CRR  Commission des recours des réfugiés
CSIS  Central Service Computer on behalf of SIS
DC  Dublin Convention
DLPAJ  Direction des libertés publiques et des affaires juridiques
Doc.  Document
DÖV  Die Öffentliche Verwaltung
DOM-TOM  Departmen d’outre mer/Territoires d’outre mer
DPCM/DPMC  Decree of the President of the Council of Ministers
DVAuslG  Regulation Implementing the Aliens Act
DVBl.  Deutsches Verwaltungsblatt
EA  Europaarchiv
EBC  Convention on External Borders
EC  European Community (-ies)
ECA  European Communities Act
ECHR  European Court of Human Rights
ECJ  European Court of Justice
ECR  European Court Reports
ECRE  European Council on Refugees and Exiles
ECSA  European Community Studies Association
ECT  European Community Treaty
ECT  Treaty establishing the European Community
ed./eds.  Editor/editors
EEA  European Economic Area
EEAA  European Economic Area Agreement
ECC  European Economic Community
Efms  Europäisches Forum für Migrationstudien
EFTA  European Free Trade Association
e.g.  for example
EHRLR  European Human Rights Law Review
EHRR  European Human Rights Reports
EJIL  European Journal of Integration Law
EJML  European Journal of Migration and Law
EL Rev.  European Law Review
ELJ  European Law Journal
EOIR  Justice Department’s Executive office for Immigration Review
EP  European Parliament
EPIIL  Encyclopedia of Public International Law
EPL  European Public Law
ESC  European Social Charter
etc.  et cetera

XLIII
### Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>et seq.</td>
<td>et sequentes</td>
</tr>
<tr>
<td>ETS</td>
<td>European Treaty Series</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EuGRZ</td>
<td>Europäische Grundrechte-Zeitschrift</td>
</tr>
<tr>
<td>EuR</td>
<td>Europarecht</td>
</tr>
<tr>
<td>EURES</td>
<td>European Employment Service</td>
</tr>
<tr>
<td>EuroAS</td>
<td>Europäisches Arbeits- und Sozialrecht</td>
</tr>
<tr>
<td>EuZW</td>
<td>Europäisches Zeitschrift für Wirtschaftsrecht</td>
</tr>
<tr>
<td>EVD</td>
<td>Extended Voluntary Departure</td>
</tr>
<tr>
<td>EWS</td>
<td>Europäisches Wirtschafts- und Steuerrecht</td>
</tr>
<tr>
<td>EZAR</td>
<td>Entscheidungssammlung zum Ausländer- und Asylrecht</td>
</tr>
<tr>
<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
</tr>
<tr>
<td>Fn.</td>
<td>Footnote</td>
</tr>
<tr>
<td>FLG</td>
<td>Federal Law Gazette</td>
</tr>
<tr>
<td>FrG</td>
<td>Fremdengesetz</td>
</tr>
<tr>
<td>FRY</td>
<td>Former Republic of Yugoslavia</td>
</tr>
</tbody>
</table>
| FS           | Festschrift (Essays in Honour of…)
<p>| GATT         | General Agreement on Tariffs and Trade |
| GG           | Basic Law |
| GISTI        | Groupe d’Information et de soutien des immigrés |
| GYIL         | German Yearbook of International Law |
| Harvard Int’l| Harvard International Law Journal |
| LJ           | |
| HCR          | United Nations High Commissioner for Refugees |
| HOPO         | Home Office Presenting Officer |
| HQ           | Head Quarter |
| HR Rev.      | Human Rights Review |
| HRLJ         | Human Rights Law Journal |
| HRQ          | Human Rights Quarterly |
| IA           | Immigration Act |
| IAA          | Immigration Appeal Authority?? |
| Ibid./id.    | In the same place/the same |
| ICAR         | Inter-Ministerial Commission on Asylum and Refugees |
| ICAR         | Interministerial Commission on Asylum and Refugee status |
| ICCPR        | International Covenant on Civil and Political Rights |
| ICLQ         | International and Comparative Law Quarterly |
| ICMPD        | International Center for Migration Policy Development |
| ICCPR        | International Covenant on Civil and Political Rights |
| i.e.         | id est |
| IGC          | Intergovernmental Conference |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>IHRR</td>
<td>International Human Rights Report</td>
</tr>
<tr>
<td>IJRL</td>
<td>International Journal of Refugee Law</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>Imm AR</td>
<td>Immigration Appeal Reports</td>
</tr>
<tr>
<td>I.M.O.</td>
<td>International Migration Organisation</td>
</tr>
<tr>
<td>IND</td>
<td>Immigration and Nationality Directorate</td>
</tr>
<tr>
<td>InfAusIR</td>
<td>Informationsbrief Ausländerrecht</td>
</tr>
<tr>
<td>INS</td>
<td>United States Immigration and Naturalization Service</td>
</tr>
<tr>
<td>Int Lawyer</td>
<td>International Lawyer</td>
</tr>
<tr>
<td>Integration</td>
<td>Beilage zur “Europäischen Zeitung”</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organisation for Migration</td>
</tr>
<tr>
<td>IR</td>
<td>Immigration Regulation</td>
</tr>
<tr>
<td>IRB</td>
<td>Immigration and Refugee Board</td>
</tr>
<tr>
<td>IRIRC</td>
<td>International Refugee Integration Resource Center</td>
</tr>
<tr>
<td>IRO</td>
<td>International Refugee Organisation</td>
</tr>
<tr>
<td>JCMS</td>
<td>Journal of Common Market Studies</td>
</tr>
<tr>
<td>JEPP</td>
<td>Journal of European Public Policy</td>
</tr>
<tr>
<td>JESP</td>
<td>Journal of European Social Policy</td>
</tr>
<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
</tr>
<tr>
<td>JICL</td>
<td>Journal of International and Comparative Law</td>
</tr>
<tr>
<td>JuS</td>
<td>Juristische Schulung</td>
</tr>
<tr>
<td>JZ</td>
<td>Juristanzeitung</td>
</tr>
<tr>
<td>KOM</td>
<td>Kommission</td>
</tr>
<tr>
<td>LIEI</td>
<td>Legal Issues of European Integration</td>
</tr>
<tr>
<td>LIFO</td>
<td>Last In First Out</td>
</tr>
<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>MittAB</td>
<td>Mitteilungen aus der Arbeits- und Berufsforschung</td>
</tr>
<tr>
<td>MJ</td>
<td>Maastricht Journal of European and Comparative Law</td>
</tr>
<tr>
<td>MLR</td>
<td>Modern Law Review</td>
</tr>
<tr>
<td>Mn.</td>
<td>Marginal Note</td>
</tr>
<tr>
<td>MNS</td>
<td>Migration News Sheet</td>
</tr>
<tr>
<td>NCHR</td>
<td>National Commission for Human Rights</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenzeitschrift</td>
</tr>
<tr>
<td>No.</td>
<td>Number</td>
</tr>
<tr>
<td>NVwZ</td>
<td>Neue Zeitschrift für Verwaltungsrecht</td>
</tr>
<tr>
<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
</tr>
<tr>
<td>OAR</td>
<td>Asylum and Refugee Office</td>
</tr>
<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
</tbody>
</table>
# Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>O.J.</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OFPRA</td>
<td>Office Francaise de Protection Réfugiés et Apatrides</td>
</tr>
<tr>
<td>OMCT</td>
<td>World Organisation against Torture</td>
</tr>
<tr>
<td>OIM</td>
<td>Organizzazione Internazionale di Migrazione</td>
</tr>
<tr>
<td>op. cit.</td>
<td>opera citata</td>
</tr>
<tr>
<td>ORAC</td>
<td>Office of the Refugee Applications Commissioner</td>
</tr>
<tr>
<td>ÖZöRV</td>
<td>Österreichische Zeitschrift für öffentliches Recht und Völkerrecht</td>
</tr>
<tr>
<td>p.</td>
<td>Page</td>
</tr>
<tr>
<td>para</td>
<td>Paragraph</td>
</tr>
<tr>
<td>PCDO</td>
<td>Post-Claim Determination Officer</td>
</tr>
<tr>
<td>PD</td>
<td>Presidential Decree</td>
</tr>
<tr>
<td>PDRCC</td>
<td>Post-Determination Refugee Claimants in Canada Class</td>
</tr>
<tr>
<td>PKK</td>
<td>Kurdish Workers Party</td>
</tr>
<tr>
<td>PL</td>
<td>Public Law</td>
</tr>
<tr>
<td>PRCC</td>
<td>Portuguese Refugee Council</td>
</tr>
<tr>
<td>PRRA</td>
<td>pre-removal risk assessment</td>
</tr>
<tr>
<td>RAD</td>
<td>Refugee Appeal Division</td>
</tr>
<tr>
<td>R.A.T.</td>
<td>Refugee Appeals Tribunal</td>
</tr>
<tr>
<td>RBDI</td>
<td>Revue Belge de Droit International</td>
</tr>
<tr>
<td>RCO</td>
<td>Refugee Claims Officers</td>
</tr>
<tr>
<td>Reg.</td>
<td>Regulation</td>
</tr>
<tr>
<td>Res.</td>
<td>Resolution</td>
</tr>
<tr>
<td>RIW</td>
<td>Recht der Internationalen Wirtschaft</td>
</tr>
<tr>
<td>RJD</td>
<td>Report of Judgments and Decisions</td>
</tr>
<tr>
<td>RMC</td>
<td>Revue du Marché Commun</td>
</tr>
<tr>
<td>RMCUE</td>
<td>Revue du Marché Commun et de l’Union Européenne</td>
</tr>
<tr>
<td>RPD</td>
<td>Refugee Protection Division</td>
</tr>
<tr>
<td>RTDE</td>
<td>Revue Trimestrielle de Droit Européen</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>SEA</td>
<td>Single European Act</td>
</tr>
<tr>
<td>SEC</td>
<td>Document of the Secretariat of the Commission of the European Union</td>
</tr>
<tr>
<td>SEF</td>
<td>Statement of Evidence</td>
</tr>
<tr>
<td>SIC</td>
<td>Schengen Implementation Convention</td>
</tr>
<tr>
<td>SIS</td>
<td>Schengen Information System</td>
</tr>
<tr>
<td>SOPEMI</td>
<td>Continuous Reporting System on Migration</td>
</tr>
<tr>
<td>SPD</td>
<td>Social Democratic Party</td>
</tr>
<tr>
<td>SZIER</td>
<td>Schweizerische Zeitschrift für internationales und europäisches Recht</td>
</tr>
</tbody>
</table>

XLVI
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TGI</td>
<td>Tribunal des grande instance</td>
</tr>
<tr>
<td>TPS</td>
<td>Temporary Protected Status</td>
</tr>
<tr>
<td>TPS</td>
<td>Temporary Protection System</td>
</tr>
<tr>
<td>TREVII</td>
<td>Terrorism, Radicalism, Extremism, Violence and Immigration</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UDI</td>
<td>Immigration Directorate</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCAT</td>
<td>United Nations Convention against Torture</td>
</tr>
<tr>
<td>UNE</td>
<td>Immigration Board</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>U.T.</td>
<td>Unified Text</td>
</tr>
<tr>
<td>VBIBW</td>
<td>Verwaltungsblätter Baden-Württemberg</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>VerwArch</td>
<td>Verwaltungsarchiv</td>
</tr>
<tr>
<td>Vol.</td>
<td>Volume</td>
</tr>
<tr>
<td>WEU</td>
<td>Western European Union</td>
</tr>
<tr>
<td>WGI</td>
<td>(Council) Working Group on Immigration</td>
</tr>
<tr>
<td>Yale J Int’l</td>
<td>Yale Journal of International Law</td>
</tr>
<tr>
<td>Law</td>
<td>Yearbook of the European Convention on Human Rights</td>
</tr>
<tr>
<td>YEL</td>
<td>Yearbook of European Law</td>
</tr>
<tr>
<td>YILC</td>
<td>Yearbook of the International Law Commission</td>
</tr>
<tr>
<td>ZaöRV</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
</tr>
<tr>
<td></td>
<td>(Heidelberg Journal of Public International Law)</td>
</tr>
<tr>
<td>ZAR</td>
<td>Zeitschrift für Ausländerrecht und Ausländerpolitik</td>
</tr>
<tr>
<td>ZFIS</td>
<td>Zeitschrift für Innere Sicherheit in Deutschland und Europa</td>
</tr>
<tr>
<td>ZFSH</td>
<td>Zeitschrift für Sozialrecht in Deutschland und Europa</td>
</tr>
<tr>
<td>ZRP</td>
<td>Zeitschrift für Rechtspolitik</td>
</tr>
<tr>
<td>ZVerwWiss</td>
<td>Zeitschrift für Verwaltungswissenschaft</td>
</tr>
<tr>
<td>ZVR</td>
<td>Zeitschrift für Völkerrecht</td>
</tr>
</tbody>
</table>
PART 1:

STUDY ON REFUGEE STATUS IN EU MEMBER STATES AND RETURN POLICIES
- CHAPTER I -

INTRODUCTION
1. Aims and Organisation of the Study

The subject of the study is the management of migration, national and EU policies in the area of return of third country nationals who have no right to remain on the territory. As a result of a rejection of their application for a refugee status or other forms of protection or simply as a result of their irregular status or loss of a residence right in their host state. While a large number of legislative and administrative measures by the European Union has been devoted to border control, fight against illegal entry and a common visa policy since the massive raise in the number of asylum seekers in the early 1990ies, the issue of voluntary or involuntary return of persons who do not or no more have a right of residence in one of the EU Member States has been largely a matter of national policy. The development of a common return policy as a condition for a comprehensive migration management was advocated for the first time by the Commission in its Communication of 22 November 2000. Since then a variety of measures and acts have been adopted or suggested to improve the efficiency of a return and readmission structure.

As a common problem of almost all Member States the increasing gap between the efforts to provide a fair examination procedure and effective judicial protection against negative asylum decisions and the consequences of such proceedings has been identified. The outcome of asylum processes have turned out to be largely irrelevant to the determination whether an applicant will finally succeed to remain in the territory of a Member State. The ICMPD study commissioned by the European Refugee Fund on comprehensive EU return policies of January 2002\(^{21}\) notes as a general problems of all states included in the study the “disparity between orders to leave and actual expulsions carried out”. The study notes that in some countries the rate of the former and the latter has remained relatively stable in the last years, even

\(^{21}\) Study on comprehensive return policies and practices for displaced persons under temporary protection, other persons, whose international protection has ended and rejected asylum seekers, ICMPD, Vienna, January 2002.
Introduction

though the absolute figures have increased. In other countries, the relative and the absolute figures remain constant. The rate on average can cautiously be located between 20-30 per cent.

Likewise the IOM study of 2004 on return migration\(^\text{22}\) states that only a minority of irregular migrants issued orders to leave a European country are actually returned. The general situation obviously did not change substantially according to the figures received by our country reports, although the return rates may vary from state to state, with no constant upward or downward trend.\(^\text{23}\) In Germany, according to the Central Aliens Registry on 31 December 2004, 371 074 persons were registered as obliged to leave, of which 168 145 were subject to expulsion or deportation, while 202 929 had received a toleration due to barriers to deportation. Between 2002 and 2004, 78 875 persons were deported by air or by land transport.

It seems, however, difficult to draw straightforward conclusions relating to better or best administrative or legal practices. The “success” of voluntary or involuntary return programmes may well depend on different sentiments and attachments of particular groups of migrants to their country of origin. Thus, the return of more than 250 000 Bosnian war refugees from Germany who had been temporarily admitted for protection reasons between 1995 and 2002 has been largely voluntary, in contradiction to the general assumption that temporarily admitted refugees are generally not willing to return in their country of origin.

The problem of return and readmission is mostly discussed in the context of the asylum debate. There is an obvious connection since a majority of persons obliged to return are still rejected asylum seekers, although the situation may be changing particularly in the accession countries. In some of the traditional EU reception countries,


\(^{23}\) See also IOM report at p. 11.
it has also been noted that an increasing percentage of persons included in return programmes are generally persons in irregular situations who have not been registered in the asylum system. Therefore, governments have frequently widened the target group for assisted voluntary return programmes.

It follows that return and readmission policies are not limited to rejected asylum seekers. The issue of return policies arises also in the context of termination of protection granted for humanitarian or other purposes or in the case of withdrawal of a refugee status due to a change of political circumstances, establishment of new return possibilities etc. Finally, the question of return does obviously arise also in connection with the termination of residence permits generally, either as a consequence of expiration of a residence permit or as a consequence of illegal entry.

The efforts at the EU-level are directed towards a efficient and fair policy of return of third country nationals illegally staying in one of the EU Member States. The study follows the terminology of the European Commission defining illegal stay as 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.” It should, however, be kept in mind that as the reasons for a lack of a residence right may be very different, so may be the interests at stake. The study does not attempt to inquire into the reasons on which an existing residence right may be terminated by expulsion, withdrawal of a residence permit or cessation of a refugee status etc.

With regard to refugees the question of cessation of a refugee status arises. UNHCR has correctly noted that cessation is not to be equated or viewed as triggering automatic return. At present there is an intensive debate going on about the conditions of withdrawal of refugee status. The UNHCR Executive Committee has stated that

24 IOM report at p. 12.
25 Common Standards on Return, 14th Immigration and Asylum Committee, 27 October 2004, Mi-graPol 90.
Introduction

change in the country of origin needs to be ‘of a fundamental, stable and durable character if the cessation clauses are to be invoked’.

26 The conclusions of UNHCR’s Global Consultations recommend that the assessment examining the application of the general cessation clauses should include considerations of a range of factors including human security, the sustainability of return, and the general human rights situation and “suggest that refugees themselves be involved in procedures and processes to make such an assessment”.27 An analysis of the cessation clauses is beyond the purpose of this study. Only if the conditions for cessation are fulfilled, return issues may basically arise in the same manner as for “illegal persons”. However, there may be particular issues arising from the long duration of stay and the fact of a previous recognition.

UNHCR has limited its recommendations on return policy on the return of persons “found not to be in need of international protection”.28 The definition of persons not in need of protection is understood to mean persons who have sought international protection and who, after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations for national law.

It is particularly this category of persons which raises the legal, technical and administrative problems which are in the minds of decision-makers and officials in charge of devising and implementing return and readmission policies.

Given the basic prescriptions of the tender and the European Union’s primary involvement in a common asylum and migration concept, the focus of this study is on

26 Conclusion No. (69) XXXIII (1992); UNHCR, Refugee Protection in International Law, 2003, at p. 32.
27 Global Consultations on International Protection, Summary Conclusions, Lisbon Expert Round Table, 3-4 May 2001, paras. 10 and 12.
persons whose claim for asylum or international protection has been rejected or who are obliged to leave as a consequence of an irregular situation without applying for asylum or international protection.

The particular problems arising in the context of return to safe third countries or first reception countries as well as return within the framework of the Dublin Regulation will not be dealt with in this study. The issue of safe third countries and of return within the Dublin concept is primarily one of competence, although return problems obviously may arise in a technical sense in the same way as in the case of foreigners unappealably obliged to leave. Since there are particular issues concerning the attribution of responsibility and burden sharing, the issue of “safe third countries” which has been debated extensively in the context of the Asylum Procedure Directive will not be analysed in this study, which is focused upon return and readmission issues.

The category of third country nationals unsuccessfully applying for protection is also the primary target group for common standards on return and readmission procedures. It is also the area where European common action and legislative and administrative cooperation between the EU Member States in their external relations with third states of origin and transit has been intensively discussed in the aim of a sufficient and humane return policy.

Return and readmission issues cannot be completely separated from procedural and status questions. It is fairly obvious that asylum procedures as well as successive procedures on orders to leave and deportation decisions may have a substantial impact upon the return and readmission concept of the EU Member States. Fairness and efficiency of administrative and judicial procedures are an indispensable requirement of a workable, efficient and just return and readmission policy. Particularly, involuntary return policies presuppose asylum and other administrative procedures that have

28 UNHCR EXCOM Conclusion No. 96 (LIV-2003).
Introduction

provided a fair chance to present a claim for international protection or a right of residence on other grounds. Judicial procedures must enable a fast, comprehensive and objective examination of the legal and factual situation of an applicant. In the absence of such proceedings an acceptance of a negative decision cannot be expected.

The link between the duration of administrative and judicial proceedings and an effective return policy is generally acknowledged. The longer asylum and related procedures last, the less inclined are finally rejected applicants for protection to return voluntarily in their country of origin. In countries with asylum procedures extending over many years, the outcome of the proceedings becomes increasingly irrelevant from a practical point of view. Once an unsuccessful asylum seeker and his family has stayed for a long time in a host Member State and become integrated into the social system of the country of reception, departures become increasingly difficult from a humanitarian as well as from a political perspective.

On the other hand, as experience in many EU Member States shows, increasing efficiency, fairness and acceleration of asylum procedures is no guarantee for a facilitation of return. Rejected asylum seekers, who have frequently spent large sums of money to reach the European Union in the search for better living conditions will care little about the consistency of a EU-migration policy if there is a chance to remain in an EU Member State. Therefore, all possibilities will be used to prevent return. This is one of the reasons why asylum procedures have been substituted by a series of successive procedures raising legal issues of return conditions, particularly in the home country. Generally speaking, asylum procedures have become in many Member States only the entrance for a wider range of procedures, in which other issues, including illness, medical situation in the country of destination and other deportation barriers which might call into question the legality of removal orders and enforcement can be raised. One of the problems arising in this context has been taken up in the Commission initiative for a single asylum procedure.
Asylum procedure and related procedures will as such not be examined in this study. The study relies for that matter on existing studies, documents and legislative texts that have been adopted or are in the stage of adoption. Only exceptionally procedural issues will be included where they have a direct link with difficulties and problems arising in the context of return and readmission policies. Thus, some aspects of single asylum procedures as well as the question of procedures in which objections against enforcement measures can be raised, are considered.

It is not intended to analyse extensively in this study all aspects of the legal and social status of rejected asylum seekers and other persons in an irregular situation. The problem of status of illegal persons has been repeatedly examined in connection with regularisation schemes or other techniques to change an illegal residence to a legal status. A comparative study of regularisations has been undertaken in 1999 by the Odysseus Network. It is not intended to explore further the work of this study. The study, however, will be used to serve as a basis to exercise the influence of subsequent changes or developments in terms of numbers, legislative actions and reactions to EU legislation in the EU Member States’ return and readmission policies. In addition, the results of the ICMPD and the IOM study will be used as a basis to receive additional information on the legal situation of persons required to leave.

As far as status questions and receptions conditions have a direct connection with return and readmission issues, they are included in the country reports as well as in the analytical chapter of this study. Some Member States attach substantial importance to the possibility to restrict residence conditions of rejected asylum seekers by detention, geographical restrictions, accommodation in return centres etc. Some of


Introduction

these measures raise serious issues of human rights and are therefore a concern of the European Union. Some others may simply serve as a model for administrative improvement for other EU Member States (better practices).

2. Terminology

The terms and definitions used for the purpose of this report are in correspondence with the definitions proposed in Annex I of the European Commission’s Green Paper on a Community Return Policy on Illegal Residents:

Return Genus of the policy area. Return comprises comprehensively the preparation or implementation aiming at the way back to the country of origin or transit, irrespective of the question, whether the return takes place voluntarily or forced.

Voluntary return The return to the country of origin or transit based on the decision of the returnee and without use of coercive measures.

Forced return The return to the country of origin or transit with the threat with and/or the use of coercive measures.

Readmission Decision by a receiving state on the re-entry of an individual.

Readmission agreement Agreement setting out the practical procedures and modes of transportation for the return and readmission by the contracting parties of per-

**Introduction**

sons illegally residing on the territory of one of the contracting parties.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repatriation</td>
<td>Return to the country of origin, in both voluntary and forced return situations.</td>
</tr>
<tr>
<td>Expulsion</td>
<td>Administrative or judicial act, which terminates the legality of a previous lawful residence e.g. in case of criminal offences.</td>
</tr>
<tr>
<td>Expulsion order</td>
<td>Administrative or judicial decision to lay the legal basis for the expulsion.</td>
</tr>
<tr>
<td>Detention</td>
<td>Act of enforcement, deprivation of personal liberty for law enforcement purposes within a closed facility.</td>
</tr>
<tr>
<td>Detention order</td>
<td>Administrative or judicial decision to lay the legal basis for the detention.</td>
</tr>
<tr>
<td>Removal[^32]</td>
<td>Act of enforcement, which means the physical transportation out of the country.</td>
</tr>
<tr>
<td>Removal order</td>
<td>Administrative or judicial decision to lay the legal basis for the removal.</td>
</tr>
<tr>
<td>Re-entry</td>
<td>New admission to the territory of a state after prior departure.</td>
</tr>
<tr>
<td>Transit</td>
<td>Sojourn in or passage through a third country while travelling from a country of departure to the country of destination.</td>
</tr>
</tbody>
</table>

\[^32\] The word “deportation” is also used in this context.
Introduction

3. Problems Related to Comparability and Non-availability of Data

The issue of return and repatriation of rejected asylum-seekers is highly sensitive and complex. This complexity of various national procedures became evident not only carrying out research for the present report, but most prominently in the context of current EU harmonisation efforts in the field of common return policies. Great conceptual differences as to statuses of protection, duration for which protection is granted and their influence on eventual return measures once asylum applications are being rejected or protection statuses have come to an end exist. They appear as major obstacles for the development of common EU return policies and practices. Prevailing systems to grant protection, procedures and processes to terminate residence are to a large extent shaped by national legal traditions. To the same degree as national legal systems differ in general, the specific area of granting or non-granting of asylum and the consequences thereof vary. It must be borne in mind, consequently, that an international comparison and analysis including a considerable number of states in the area of return and repatriation of rejected asylum-seekers is not feasible without simplifications of the various national concepts. Otherwise it would hardly be possible to reach conclusions which prove to be valuable for an international public.

Problems do also arise in connection with the collection and analysis of data. In most countries there are no specific figures available about the number of foreigners obliged to return after rejection of an asylum claim or a claim for subsidiary protection because no specific data collection exists. The data of expulsion might be collected without any differentiation for what specific reason a person was removed from the country.

Unlike in respect of failed asylum seekers, there is no official estimate of the number of irregular immigrants in the countries and there are no statistics on overstaying. In many countries the entries of visitors are not recorded and as there is no immigration
control on embarkation, there is no way of checking whether someone has left the country. The only figures available that are directly relevant are those of illegal entrants and overstayers who are identified or proceeded against.

Due to the absence of comparable data it is, therefore, difficult to establish the real extent of return and non-return of rejected asylum seekers and other migrants without a legal status.
- CHAPTER II -

INTERNATIONAL LEGAL NORMS ON RETURN
1. **Obligation of Non-Refoulement under Art. 33 GC – General Remarks**

Whether a third country national may be returned or repatriated to a country of origin or to a third state is a matter within the discretionary power of the host state. The discretionary power of states is, however, limited by treaty obligations and principles of customary international law.\(^{33}\) Restrictions of the states of residents’ rights to terminate the residence of a foreign national who does not or no more dispose of a right of residence, follow primarily from the Geneva Convention or on the law of refugees of 1951 and the European Convention of Human Rights.

In addition, the adoption of the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000\(^{34}\) contains provisions which are relevant to a EU common policy on return and readmission. The Charter, however, is as yet not a binding treaty. It is intended to be incorporated in the future European Constitution. Notwithstanding, some of its provisions may be used in order to determine the common understanding of the EU Member States on fundamental rights of the individual. Art. 3 of the Charter grants a right for bodily integrity, Art. 4 contains the prohibition of torture or inhuman or degrading treatment or punishment, Art. 19 guarantees protection against collective deportation and prohibits refoulement or deportation to a state in which there is a serious risk of death penalty, torture or inhuman or degrading treatment or punishment. Art. 24 contains special provisions for the protection of children and Art. 47 provides for certain basic procedural rights guaranteeing the fairness of procedure and an efficient access to courts. It follows that third country nationals obliged to leave the territory of an EU Member State must have adequate possibilities to lodge an appeal before a court against a return or removal order. The focus of international legal norms on return and repatriation, however, is clearly

---


\(^{34}\) O.J., C 364 of 18 December 2000, p. 1.
International Legal Norms on Return

upon the content of non-refoulement principles enshrined in Art. 33 of the Geneva Convention on Refugees (GC) and Art. 3 ECHR.

Since all EU Member States are contracting parties of both Conventions, they are bound by the provisions of these treaties irrespective of the question to what extent non-refoulement principles have become customary international law. The European Union as well has undertaken in Art. 6 EU to respect fundamental rights, as guaranteed by the European Convention for the protection of human rights and fundamental freedoms of 4 November 1950 (ECHR) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. For the exercise of its legislative competences the European Community has subscribed to the obligation to act in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees “and other relevant treaties”.

It follows that there are no substantial differences between the international legal framework restricting EU Member States’ scope of action and the European Union’s competences. There may be differences in the interpretation of constitutional law requirements of general principles like the rule of law or the principle of proportionality. By and large, however, the reference to the common constitutional traditions does provide a sufficient constitutional framework, binding for the European Union prescribing rules limiting common actions and legislative activities of the European Union in the field of return in accordance with the Member States’ constitutional requirements on fairness of procedure, proportionality and respect for human rights.

Art. 3 ECHR provides that no person shall be rejected, returned or expelled in any manner whatsoever where this would compel him or her to return in a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subject to torture or cruel, inhuman or degrading treatment or punishment. A similar provision is laid down in Art. 33 of the Geneva Convention on the law of
refugees prohibiting the expulsion or return to the frontiers of territories, where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Both provisions can be considered as forming the core of the non-refoulement principle. Although the scope and content of the principle raises some controversial issues, particularly relating to the definition of inhuman treatment in the context of return and repatriation and the territorial scope of applicability, within the European Union some rules which may be relevant for return and repatriation policies can be considered as widely recognised.35

First, the principle of Art. 3 ECHR not to return somebody to a country of persecution is non-derogable. The fundamental character of the principle has frequently been expressed in decisions of the European Court of Human Rights and conclusions of the UNHCR Executive Committee.36

Yet, there are some differences between Art. 33 EC and Art. 3 ECHR. Art. 33 para. 2 EC excludes from the scope of application of the refoulement-prohibition a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, and who, having being convicted by a final judgement of a particularly serious crime, constitutes a danger for the security of that country. Art. 3 ECHR prohibiting torture or inhuman or degrading treatment or punishment, on the other hand, is interpreted by the European Court of human rights as an absolute prohibition of refoulement to a country of persecution, even in case of terrorist activities, provided that there is a real risk of such dangers in the destination country.37 Since the danger of political persecution in the sense of Art. 33 EC is frequently also con-

35 For a recent analysis of the non-refoulement principle see Lauterpacht/Bethlehem, in: UNHCR (ed.), Refugee Protection in International Law 2003, p. 87 f.
36 See Lauterpacht/Bethlehem, at p. 107 and UNHCR Conclusions No. 17 (XXXI), 65 (XXXXII), 79, (XL VII).
37 See Blake/Husain, Immigration, Asylum and Human Rights, 2003, at p. 94.
International Legal Norms on Return

stating a danger of inhuman treatment according to Art. 3 ECHR, the difference may not be of substantial political importance in an individual case.

Even if the concept of political persecution under the Geneva Convention must be distinguished from the concept of torture and inhuman or degrading treatment under the ECHR, the exception to the prohibition of refoulement laid down in Art. 33 para. 2 GC does not seem to have a large practical importance in the return practice of EU Member States. This may be due to two reasons. First, the interpretation and application of the danger to the Community exception in Art. 33 para. 2 GC is usually interpreted restrictively. It is generally recognised that the exception can be applied only on the basis of an assessment of whether there are reasonably grounds for regarding the refugee to be a danger to the country in the future, the material consideration being whether there is a prospective danger to the security of the country. 38 Considering the serious consequences for the individual of refoulement, a high threshold for the application of the exception is usually applied. Individual assessment of the risk taking into account all the circumstances of the case as well as the prospective danger to the security for the country of refugee are required. If there are other reasonable means to alleviate the danger, refoulement is not permissible. In addition, the principle of proportionality has to be observed requiring an examination whether the danger entailed to the refugee by return outweighs the menace to public security that would arise if he were permitted to stay. 39 UNHCR hat pointed out in its note on the principle of non-refoulement that “in view of the serious consequences to a refugee of being returned to a country where he/she is in danger of persecution the exception provided for in Art. 33 para. 2 should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and re-integration within society”.

38 Lauterpacht/Bethlehem, at p. 135.
Secondly, in accordance with the UNHCR statement one may note a “trend against exceptions to the prohibition of refoulement”\(^40\). This is reflected in various conclusions of the UNHCR Executive Committee. Notwithstanding the trend, it would be premature to argue that the exception clause under the Geneva Convention has become obsolete by overriding human rights considerations. States have recently insisted on their right to expel or deport under certain circumstances persons constituting a danger for the Community although under very restrictive terms and only exceptionally if there is no alternative.\(^41\) The fight against terrorism, however, has somewhat brought to the public attention that national security and public safety exceptions indicated in Art. 33 para. 2 GC do still constitute valid exceptions to non-refoulement under the 1951 Convention.\(^42\)

The Qualification Directive in Art. 21 para. 2 has therefore explicitly confirmed that “when not prohibited by the international obligations mentioned in para. 1” Member States may refoule a refugee, whether formally recognised or not, when

- there are reasonable ground for considering him/her as a danger to the security of the Member State in which he/she is present, or
- he/she having been convicted by a final judgement of a particularly serious crime constitutes a danger to the community of that Member State.

Since this provision does apply to Art. 33 para. 2 GC as well as to the subsidiary protection chapter of the Directive, the reservation as to “international obligations” takes account of the European Court of Human Right’s jurisprudence of the non-derogable nature of Art. 3 ECHR. There are some indications that the exception clause has re-

---

\(^{40}\) Lauterpacht/Bethlehem at p. 130.

\(^{41}\) See for instance the deportation of an Islamic extremist advocate to Turkey, German Federal Administrative Court of 7 December 2004 in Kaplan vs. Fed. Republic of Germany, 1 C 14.04.

\(^{42}\) For a different view see Lauterpacht/Bethlehem, at p. 135.
International Legal Norms on Return

cently gained practical importance and has more frequently been used in cases of expulsion or deportation engaged in terrorist activities.

Art. 21 para. 2 of the Qualification Directive refers to the danger to the security “of the Member State of which he/she is present”. The exclusive reference to “national security” is somewhat surprising although it is in accordance with the predominant view in jurisprudence and the literature. Nevertheless, considering the aim to establish a Common European Area of Security, Freedom and Justice, it would seem logical, that a Member State were entitled to take equivalent measures if a third country national poses a serious and imminent threat to other EU Member States or to the European Union as a whole. In any case, national authorities considering refoulement has to take account of the developments in the field of human rights precluding refoulement where a person would be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment.43

Prohibition of refoulement does not only apply to return to a territory where the refugee or asylum seeker would be at risk due to persecution or inhuman treatment by the country of destination. As a rule, non-refoulement in the context of return of rejected applicants for international protection does arise mostly with regard to the country of origin. Considering, however, that certain technical problems of return like determination of the country of origin and personal identity may be solved easier by way of an intermediate stay in safe areas or countries in the neighbourhood or region, the issue of “chain-return” deserves further attention. The prohibition of refoulement also includes refoulement to a territory where a person may not be at risk from the country of destination but from which the person would be in danger of being subsequently removed to a territory where he/she would be at risk.44 Although the principle can be considered as generally recognised, there may be diverse practices and opinions on the question how far the responsibility of the returning state extends to

44 ECHR, T.I. vs. United Kingdom, Appl. No. 43844/98.
ensure that the individual in question is not exposed to such a risk. The contracting states of the Geneva Convention cannot escape their responsibility under Art. 33 para. 1 by transferring a person to a third country. Under the “complicity principle” no country may return a person to another country, knowing that the latter will violate basic human rights which the sending country is itself obliged to respect.

It has been suggested that the degree of certainty encompassed by the word “knowing” should vary inversely with the importance of the right. If a right is fundamental, for example, return perhaps should be barred if the returning country has “substantial grounds” for believing that there is a “danger of violation by the third country”. Since political persecution as well as inhuman or degrading treatment or torture are substantial risks, it seems correct to apply basically the same standard as in the case of a direct danger of persecution by the state of destination. The European Court uses frequently the test of substantial grounds for believing that a person concerned faces a real risk of being subjected to torture or inhuman and degrading treatment in the country of destination.

Particular problems arise in the context of return of asylum seekers to a “first country of asylum” or a “safe third country”. The application of these principles has been extensively discussed in the context of asylum procedure. It is rightly treated as a separate issue of the asylum procedure raising problems of responsibility of states for processing asylum claims. It does, therefore, raise also very particular issues of return. Art. 27 of the amended proposal for a Council Directive on minimum standards on procedures provides, for instance, in addition to the respect for the non-refoulement principle that the possibility exists to request refugee status and, found to be a refugee, to receive protection in accordance with the Geneva Convention. In

---

46 Legomsky, op. cit. at p. 91.
addition, an application of the safe third country concept is made subject to rules laid down in national legislation including

- rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country,

- rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe,

- rules in accordance with international law, allowing an individual examination of whether the safe country concerned is safe for a particular applicant, which, as a minimum, shall permit the applicant to challenge the application of the third safe country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

Thirdly, non-refoulement is not limited to those formally recognised as refugees or persons entitled to international protection. As to the non-refoulement principle of Art. 33 GC it is generally argued that Art. 1 A para. 2 of the 1951 Convention does not require a formal recognition. A person who satisfies the conditions of Art. 1 A para. 2 is a refugee as soon as he/she fulfils the criteria contained in the definition. According to the UNHCR Handbook this would necessarily occur prior to the time at which a refugee status is formerly determined. Recognition of the status, therefore, does not make a person a refugee but declares him to be one.\(^49\) This interpretation

has been repeatedly confirmed by the conclusions of UNHCR Executive Committee. \(^50\)

A similar conclusion can be drawn with regard to non-refoulement principles contained in Art. 3 ECHR and related human rights treaties. The basic approach of these treaties is the exclusion of a risk to the individual as a reflection of the humanitarian character of the principle of non-refoulement. Differences in formulation notwithstanding, there is little doubt that the application of Art. 3 ECHR and similar non-refoulement principles (Art. 3 UN Convention against Torture) do not require any formal recognition of a status. \(^51\)

This does not imply a restriction of the obligation of states to provide for certain procedures in which a claim for protection based upon the application of non-refoulement principles must be examined. There is no right of an individual to choose freely whether a claim for international protection is raised within or outside a formal procedure established for the very purpose of examining protection claims based upon non-refoulement principles. According to Art. 2 lit. g Qualification Directive \(^52\) application for international protection means a request by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately. The Asylum Procedure Directive provisionally agreed upon by the Council \(^53\) contains a number of provisions limiting the right of third country nationals to raise an issue of non-refoulement on the ground of non-fulfilment of

---

\(^{50}\) Conclusion No. 6 (XXXVIII), 1977; No. 81 (XXXXVIII), 1997; No. 79 (XXXXVII) 1996.

\(^{51}\) Lauterpacht/Bethlehem, op. cit. at p. 118.

\(^{52}\) Directive 2004/83 of 29 April 2004 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.

formal conditions to file a claim or on the ground of repetitious applications. Art. 33a of the Directive allows Member States to adopt a procedure applicable in case of subsequent applications in the case of an application for asylum filed at a later date by an applicant, who, either intentionally or owing to gross negligence, fails to go into a reception centre or to appear before the competent authorities at a specified time.

The implicit assumption is that states may, within the limits of fairness of the procedure, prescribe time limits for filing an asylum application and to request an applicant to seek asylum or other forms of international protection at a certain location and to specify his/her reasons for protection or a right of residence within a certain time limit or in a specified manner. The failure to comply with such requirements may result in an accelerated procedure or the assumption of abandonment or withdrawal of an application. Thus, according to Art. 20 of the Procedures Directive Member States may assume that an applicant has implicitly withdrawn an application if he/she has failed to respond to requests to provide information essential to the application or if he/she has absconded or left without authorisation the place where he/she lived or was held. Yet, according to Art. 21 para. 2 Member States shall in any case ensure that such a person is not removed contrary to the principle of non-refoulement. It follows that even in the case of a refusal to grant access to an asylum procedure an examination is to take place concerning the compliance with the principle of non-refoulement.

Providing for preclusion of claims for international protection in the case of a failure to comply with time limits or requirements to substantiate a claim or the obligations to appear at prescribed times at administrative or judicial proceedings is not in conflict with the humanitarian character of the principle of non-refoulement. Provided

---

the Proposal is subject to Parliamentary scrutiny reservations and has therefore been transferred for re-consultation to the European Parliament.
that requirements for a fair procedure are met\textsuperscript{54} and that time limits and other formal requirements for filing a claim are not considered as unreasonably or excessively restrictive one may reasonably conclude that an applicant has lost his/her right of access to a procedure determining the justification of a claim to international protection. As the proposed Procedures Directive indicates, however, preclusion of access to an asylum procedure does not imply necessarily that a person obliged to leave may not raise an issue of non-refoulement in return or deportation proceedings. It seems that a distinction has to be made between successive or multiple applications for protection which may well be restricted and a failure to comply with formal requirements in the first place which may lead to the exclusion from an asylum procedure without, however, precluding the examination of non-refoulement in a return procedure.

In the latter case one could probably argue with some justification that the fundamental character of Art. 3 ECHR excludes return in a situation in which there are substantial grounds for a risk of whether an applicant has failed to take an earlier chance of demonstrating this risk in an asylum or other proceeding. Whether the same conclusion must be drawn with respect to Art. 33 GC may be doubtful from a more traditional international legal perspective due to the restrictions of the concept in of Art. 33 para. 2. If one follows, however, the recent trend to emphasise the humanitarian character of non-refoulement of Art. 33 GC and the trend to interpret restrictively the limitations and exceptions, no distinction will be possible. The proposed Asylum Procedures Directive does not make a distinction, following the practice of Member States to admit at least in cases in which no previous examination has taken place a claim for non-refoulement in return or deportation proceedings.

The legal situation is different with successive, follow-up or multiple claims for international protection. There is no right under international law to raise infinitely

\textsuperscript{54} For time limits for exercising a remedy see ECHR, Judgement of 11 July 2000, Appl. No. 40035/98, \textit{Jabari vs. Turkey}.
issues of non-refoulement in different kinds of administrative and judicial proceedings. In some EU Member States the problem of successive asylum claims has become a particular problem in the context of return and repatriation of applicants not disposing of a right to remain. Successive asylum applications have been filed or asylum claims of different family members raised in a sequence of follow-up procedures based upon a purported danger of persecution or other legal barriers to deportation in order to prevent administrative measures or procedures to arrange the return of persons required to leave as long as possible.

The rule of law recognised by all EU Member States as a fundamental constitutional principle does not oblige states to reopen examination proceedings once a decision has been made in accordance with the procedural requirements unless new facts or new norms can be shown to justify a more favourable decision for the applicant. It seems that in some EU Member States the possibilities to file subsequent applications for protection to defer return proceedings have been used extremely. There are, however, different experiences with regard to applicants using follow-up or multiple applications to escape return orders. Art. 33 of the proposed Asylum Procedures Directive provides that in examining subsequent applications the competent authorities can take into account and consider previous applications. A subsequent application shall be subject to a preliminary examination in which new elements of findings relating to the examination of whether a person qualifies as a refugee or as a person who otherwise needs international protection and the content of the protection granted may be presented by the applicant. If following the preliminary examination new elements or findings arise or are presented by the applicant “which significantly add to the likelihood to the applicant qualifying as a refugee or as a person who otherwise needs international protection” the application shall be further examined.

---

55 See Art. 33 para. 3.
The Asylum Procedures Directive does not deal with the question to what extent rejected asylum seekers may be precluded of raising an issue of non-refoulement in a subsequent administrative or judicial proceeding relating exclusively to the legality of a removal order or a decision enforcing return. The Directive provides for the access to subsequent asylum proceedings. It is largely a question of national law to what extent within an asylum procedure issues of non-refoulement are examined definitively. The Directive applies to all applications for asylum, defined by the Directive as a request for international protection under the Geneva Convention.\textsuperscript{56} It is up to the Member States to employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection as defined by Art. 15 of the Qualification Directive. This means that Member States may well introduce a procedure by which in addition to a claim for refugee status other claims for international protection have to be raised within an asylum procedure.

A majority of Member States have made use of the possibility to include in a partial single asylum procedure provisions for international protection as defined by the Qualification Directive under the heading “subsidiary protection”. To that extent the authorities responsible for processing asylum claims are exclusively responsible to examine such claims. Neither administrative authorities nor judicial authorities in charge of examining the appropriateness and legality of subsequent enforcement decisions are competent to challenge a final decision on the rejection of an asylum claim. By a general principle derived from the rule of law the authorities and courts have to respect a final decision under the principle of \textit{res judicata} or in the case of final administrative decisions which have not been challenged in an appeal procedure by similar principles of certainty and calculability of administrative action. If the conditions under the Asylum Procedures Directive to file a follow-up application for international protection are not met, applicants may be precluded from raising a dan-

\textsuperscript{56} See Art. 2 lit. b.
International Legal Norms on Return

ger of persecution in subsequent administrative or judicial proceedings on the legality of enforcement decisions.

In some EU Member States apparently non-refoulement claims relating to Art. 3 ECHR are admitted irrespective of the conditions laid down in the Asylum Procedures Directives. Thus, the Federal Administrative Court of Germany decided that the administrative authorities are obliged to enter under certain circumstances into a successive application for protection notwithstanding the fact that an applicant cannot show that he has been, through no fault of his/her own incapable of ascertaining new facts or new elements relating to his/her right for international protection.57

However, as far as EU Member States have chosen to separate between different procedures, the asylum procedure being restricted to examining only a claim for refugee status under the Geneva Convention, the Asylum Procedures Directive will not apply with regard to other procedures devoted to an examination of other reasons for protection or barriers to return decisions. Frequently, such additional procedures raise particular difficulties with regard to the duration of the proceedings, the multiplicity of documentation and the difficulties of distinguishing between similar claims. The efficiency of single procedures also for speedy return procedures is one of the issues emphasised by the European Commission in a recent communication.58

4. The Content of Non-Refoulement Principles and Related Obstacles to Return and Repatriation Under Public International Law

The content of the principle of non-refoulement laid down in Art. 33 EC as a legal obstacle to return has been examined extensively in the literature and jurispru-

57 For this requirement see Art. 33 para. 6 of the Asylum Procedures Directive; see also country report Germany.

International Legal Norms on Return
dence. It has been rightly noted that there has been a considerable amount of diver-gent interpretations as to the relevance of non-state persecution and gender-related persecution. Whether the Geneva Convention leaves room for a certain amount of different interpretations of the refugee definition in Art. 1 A as an “umbrella-convention” based upon a compromise to embrace different asylum protection percep-tions of contracting states, or whether there is in any case only one correct interpre-tation of its international meaning, as the House of Lords in the famous Adan-case has assumed, need not be decided in this context. By agreeing on the Council Directive 2004/83 the most important differences in interpretation of the Geneva Convention by the EU Member States have been solved and a common core interpre-tation of the Geneva Convention has been achieved, although Member States may still deviate from the minimum standards of the Directive and apply better standards in favour of applicants for refugee status.

The situation with respect to the non-refoulement principle of Art. 3 ECHR may be somewhat different. Although the Qualification Directive 2004/83 has made a sub-stantial effort to find a common definition for “subsidiary protection”, the practice of states indicates substantial differences in the interpretation of Art. 3 ECHR as well as of other provisions entitling to subsidiary protection under the Qualification Direc-tive. According to Art. 4 of the Qualification Directive a person is eligible for sub-sidiary protection who does not qualify as a refugee but in respect of whom substan-tial grounds have been shown for believing that the person concerned, if returned to his/her country of origin, faces a real risk of suffering serious harm as defined in Art. 15 of the Directive. Art. 15 defines serious harm as

- death penalty or execution,

---

International Legal Norms on Return

- torture or inhuman or degrading treatment of punishment of an applicant in the country of origin,
- serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Although these provisions constitute a significant step forward in achieving a common legal framework for an entitlement to protection, a good deal of divergent practice as to the meaning of the term “inhuman or degrading treatment” particularly relating to return and repatriation proceedings can be observed. While the determination of political persecution in the sense of the Geneva Convention is usually based upon a general pattern of persecution arising from the political and/or social situation in the country of origin, the issue of inhuman or degrading treatment may arise more easily in connection with a specific return or repatriation situation. The European Court of Human Rights has applied Art. 3 ECHR frequently in the context of expulsion and criminal proceedings. In the Söring-case the Court has decided that the particular conditions under which persons facing a death penalty and the death row phenomenon in the state of Virginia did constitute inhuman treatment.\(^62\) The question whether a person may be returned to a state where he/she faces a death penalty has been solved in the meantime by a subscription of all EU Member States to the Protocol to the ECHR abolishing the death penalty in peacetime. Art. 15 of the Qualification Directive includes death penalty or execution in the definition of subsidiary protection.

Of much greater practical importance in return proceedings is the Court’s jurisprudence in *D. vs. United Kingdom*.\(^63\) *D.*, a national of St. Kitts, who had been arrested in the United Kingdom on drug offences was subject to deportation back to St. Kitts. He argued that medical services would be unable to provide treatment for his condi-


tion since he was in an advanced stage of AIDS. In the “very exceptional circumstances” of the case the Court concluded that deportation would be a violation of Art. 3 amounting to inhuman treatment. In subsequent judgements the Court tried to somewhat mitigate the practical implications of its judgement by emphasising the particular circumstances of the case, which consisted in an imminent risk of a serious deprivation of the health condition of the applicant resulting in a likelihood of death as a consequence of insufficient medication. The striking innovation of this judgement is that the concept of inhuman treatment has been detached of responsibility of either a state or private organisations for living or health conditions in which a person is facing death or intolerable living conditions. The responsibility lies with the returning state which is prohibited from returning a person to extremely adverse general social and economic conditions constituting a serious risk for the life or personal integrity of the returnee. Although the Court has taken pains to limit its concept to exceptional cases, the implications in the EU Member States for return and repatriation policies have been substantial.

Particularly, the question of insufficient medical treatment of serious diseases in the country of origin has come up in some Member States in a large number of cases. Generally speaking, it is not sufficient that the country of origin does not provide the same high standard of medical supply for treating a serious disease as is common in EU Member States. The assumption of inhuman treatment requires that in comparison to the level of treatment in the host state a returnee would face serious dangers with regard to a drastic deprivation of his health condition. It is obvious that large uncertainties exist in the application of such criteria.

The question of inhuman treatment may also arise in connection with transportation conditions and enforcement of removal orders. If, as a result of enforcement of a removal order, a person would suffer a serious deprivation of his/her health condition, the removal may constitute an inhuman treatment. Suicide threats have become

---

64 C.F. Bensaid vs. United Kingdom, Judgement of 6 February (2001) 33 EHRR 205.
International Legal Norms on Return

increasingly a problem of enforced return. It is, however, difficult to provide general applicable guidelines on what conditions an enforcement of a return decision might be in violation of international legal standards relating to the use of force by escorting personnel and the general psychological and physical condition of a returnee, required to implement a “safe” return to the returnee’s state of origin.

Concerning forced return it is generally agreed upon that enforcement measures must be in accordance with human rights of returnees and particularly complying with standards set out in the European Convention on Human Rights. The Recommendation on the return of rejected asylum seekers of the Council of Europe’s Committee of Ministers\(^\text{65}\) has provided a set of rules which have received general acceptance and may therefore be considered as guidelines in determining the standards arising from the European Convention of Human Rights concerning the declaration to assure humane treatment (Art. 3 ECHR) as well as safeguard of life and personal integrity (Art. 2 ECHR). The principle of proportionality in the use of enforcement measures as well requires that any use of physical restraints must be the last resort and must be justified by the person’s violent behaviour.\(^\text{66}\) States are responsible for compliance with such standards and may not get released from their public international law obligations by transferring the transportation tasks to private organisations. It is a fairly established principle of public international law that states remain responsible for the fulfilment of their obligations under customary international law or international treaties irrespective of whether a state chooses to use private organisations for the fulfilment of its duties.\(^\text{67}\)

\(^{65}\) Recommendation No. (99) 12.

\(^{66}\) Tomasi vs. France (1992) 15 EHRR 1; for standard refusals by air see also IATA/CAWG, Guidelines for Deportation and Escort.

\(^{67}\) See also ECRE, Position on Return, October 2003, paras. 18 and 76-83.
5. **Additional Legal Obstacles to Return and Repatriation**

In addition to the non-refoulement principles of Art. 3 ECHR and Art. 33 EC there are other international legal norms which might restrict the freedom of states to terminate the residence of third country nationals. Under Art. 8 ECHR family life is protected as well as by Art. 7 of the Charter of Fundamental Rights. Both provisions as such do not provide for a right of residence. The European Court of Human Rights has repeatedly decided that the protection of private and family life does not imply a right to reside in a particular country. A different case under Art. 8 ECHR may, however, arise if return or repatriation destroys a existing family unity and if on balance between the public interest to terminate the residence of a third country national and the private interest to maintain a family unity, the protection of family unity must be attributed priority. Most cases in which the European Court had to decide on Art. 8 ECHR in the context of expulsion or deportation concerns migrants who had, following a long residence, become integrated and were later expelled as a result of criminal offences. Under what circumstances the removal of rejected asylum seekers or other applicants asking for international protection or persons in an irregular status is restricted by Art. 8 ECHR has not yet been explored.

The Court has been cautious in applying Art. 8 ECHR to issues of residence rights. In *Gül vs. Switzerland* the Court decided that the essential purpose of Art. 8 was to protect the individual against arbitrary action by public authorities. It refused to oblige Switzerland to grant a residence right to a child of a Turkish national, who had been granted a humanitarian residence permit in Switzerland and according to the Court was not able to return to Turkey. The Court stated that Art. 8 cannot be considered to impose on a state a general obligation to respect the choice of a family or a

---

68 Jacobs/White, European Convention on Human Rights, 3rd, at p. 233 with further references to the Court’s jurisprudence.

69 For a general survey of the jurisprudence of the ECHR see Jacobs/White at p. 233.

70 Judgement of 19 February (1996) 22 EHRR 93.
married couple of the country of their matrimonial residence and to authorise family reunion in its territory. Thus, it would seem to follow under Art. 8 that, e.g. a returnee entering into marriage with a permanent resident does not necessarily imply a right of residence. However, the question of Art. 8 ECHR may well arise if a returnee has established already an existing and lasting family relationship in the host country which would be destroyed by return or repatriation. In particular, the return of rejected asylum seekers after ten or more years of a tolerated status, with children having been born or brought up in a EU Member State may well raise issues of Art. 8 ECHR, if the return implies family separation of members who cannot reasonably be expected to return as well. Although no fixed time limit can probably be determined, it seems that the acceptance of establishment of family relations may under certain circumstances lead to an obligation, to grant a humanitarian residence permit if the connections to the previous country of origin have been broken and the third country national cannot reasonably be expected to force family members to return with him to the country of origin.

Similarly, Art. 8 ECHR becomes relevant when the modalities of enforcement of removal orders result as such in a disruption of family unity. Whether a separate deportation of family members may be in conflict with Art. 8 or 9 ECHR is a matter of the individual circumstances of the case. Small children, as a rule, cannot be separated for a substantial amount of time from their parents, depending on the age and the physical condition.

Art. 4 of the 4th Protocol to the ECHR prohibits collective expulsion of aliens. The provision has been interpreted by the European Commission for Human Rights as prohibition of expulsion of a large number of persons without their cases having received individual treatment.\(^{71}\) Recently in the *Conka*-decision of the European Court of Human Rights\(^ {72}\) the Court has decided that the expulsion and removal of Slova-

\(^{71}\) See Becker *vs. Denmark*, Decision of 30 October 1975 (1976) 19 Yearbook, 416.

kian gypsies who were refused asylum in Belgium on the basis of a fairly standardised examination would constitute a prohibited collective expulsion since there was no examination of each individual case taking into account the particularities of every individual. It follows from this decision that return and repatriation of a group of persons must not be based on a standardised examination procedure. Even if individual return decisions are made on the basis of generalised examination procedures, the standards of Art. 4 of the 4th Protocol are not fulfilled if the individual decision does not show a consideration of the individual circumstances of the case.

Art. 2 ECHR protecting life and bodily integrity may also apply as restrictions for the states’ power to return third country nationals. The obligation to protect life and bodily integrity under Art. 3 ECHR is generally recognised. A state, therefore, must provide individual measures of protection by taking reasonable measures to guard against a foreseeable threat to life or bodily integrity. In the Osman-case\textsuperscript{73} the Court argued that the right protected by Art. 2 requires an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. The implications to return or repatriation are obvious although, so far, the Court has mostly discussed deportation cases in connection with Art. 3 ECHR.

Considering the jurisprudence of the Court in \textit{D vs. United Kingdom} a difficulty consists in drawing a precise line between Art. 2 and Art. 3 ECHR. Immediate and serious risk to life or bodily integrity as a foreseeable result of return or repatriation must be considered as an obstacle under Art. 2 ECHR. The Qualification Directive has included an individual and serious threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Generally speaking, an individual risk for life or bodily integrity by private action in the country of origin will not entail in every circumstance the responsibility of a returning state. There must be particular conditions like a situation of conflict and the as-

\textsuperscript{73} Osman vs. United Kingdom (2002) 29 EHRR 245.
sumption that no adequate protection could or would be granted, leading to serious and imminent risks for life and personal integrity. One may argue that there are other situations of generalised violence in which there are substantial grounds for anyone returned to be at risk. In case of a particular risk of a person by reason of ethnic identity or past individual experience, one may have to examine whether a person is being deprived of the protection of a system of law to protect life.74

Finally, there are particular provisions in international treaties on vulnerable persons. The UN Convention on the Rights of a Child contains a number of provisions which might have implications for return and repatriation policies. Art. 22 of the Convention obliging states to take appropriate measure to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his/her parents receive appropriate protection and humanitarian assistance. Under Art. 9 state parties shall ensure that a child shall not be separated from his/her parents against their will except if competent authorities determine that such separation is necessary for the best interest of the child.

It has occasionally been argued that the policy of some European governments to enable the return of unaccompanied asylum-seeking children is in violation of the UN Convention on the Rights of the Child.75 It should be noted, however, that from the text and wording of the Convention no direct conclusions can be drawn concerning a limitation of the right of states to return unaccompanied minors following an unsuccessful application for asylum or international protection provided the interests of a child are taken into consideration. The United Kingdom as well as Germany have filed reservations or interpretative declarations that the Convention does not lead to an obligation to grant residence to minors in deviation from the general appli-

74 Blake/Husain, Immigration, Asylum and Human Rights, 2003, at p. 94.
cable rules on immigration and residence. It is a matter of dispute whether such reservations are in accordance with the main purpose of the Convention and particularly the basic principle to respect to best interests of the child (Art. 3). UNHCR in particular has insisted that voluntary return options for children should be explored to a much greater extent than is current practice. As a matter of legal policy there is no doubt that precautions for return of vulnerable persons, particularly minor children, have to be taken. The state practice seems to take into account the basic rule that unaccompanied minors can be returned only if they can be handed over at the time of departure or upon arrival to a family member, an equivalent representative, a guardian of the child or a competent official of the country of return. In addition, the need to take into account the particular situation of children in the examination procedure is recognised; there must be reception and care arrangements adequate for the circumstances of minor children. However, there is no obligatory rule that the process of return can only start before the ability and willingness of the family or other persons taking care of the child have been properly secured.

Whether the principles and practices just mentioned can be summarised as principle of “return in safety and dignity” is primarily a matter of legal policy rather than public international law. The principle of return in dignity and safety has primarily been used as a description of a political commitment to ensure that certain basic social and economic conditions in the country of origin have to be met before assisted voluntary return programmes are executed.\(^{76}\) Such conditions include conditions ensuring that a returnee is in principle able to make a living in the country or region of destination, that the political conditions are sufficiently stable to enable a political life without fear of being persecuted or threatened or discriminated against, and finally social conditions providing for a minimum of decent living conditions including housing.

Recommendable as these principles are in the interest of a sustainable repatriation policy, they cannot as such be considered as obligatory rules of public international law binding for the EU Member States in individual cases of enforced return. Beyond the standards to be derived from Art. 2 and Art. 3 ECHR and other international treaties like Art. 7 para. 1 and Art. 9 para. 1 of the UN Covenant on Civil and Political Rights, there is no general obligation to provide for a specified set of economic, social and political conditions before a removal order can be enforced. Hathaway rightly pointed out that particularly the “indignity prong” of the UNHCR repatriation standard is particularly unwieldy since two of the concerns said to define whether repatriation can be conducted in dignity – the existence of an unconditional right to return and acceptance of the returnee by authorities with restoration of rights – are more appropriately canvassed in the context of the protection prong of the cessation inquiry itself. The risk of “men-handling” on the other hand can be taken care of by Art. 3 and 2 ECHR (resp. Art. 7 and 9 UN Covenant on Civil and Political Rights). As Hathaway’s note shows, the concept of dignity and safety is limited to the particular issue of former refugees in context with the cessation clauses of the Geneva Convention, which are outside the scope of this study. However, since sometimes the concept is also used in connection with return policies, it should be mentioned that there are no international legal rules on the return of persons concerning the social and political situation in the country of origin once it has been established that their residence right has been terminated.

6. Status of Persons Subject to Detention Measures

EU Member States have increasingly resorted to detention measures for persons whose asylum claims have been rejected or who have been ordered by a final decision to return to their country of origin. Under Art. 5 ECHR liberty is a fundamen-
tional right which may only be restricted under the conditions provided for in Art. 5, to be deprived of their liberty safe in accordance with the procedure established and for a purpose recognised by the ECHR. Anybody deprived of the liberty has the right to apply to a court for a speedy review of the legality of the detention and to be released from detention if the detention is not lawful.

Case law provides a lower level of protection to persons detained with a view to deportation than to persons detained under the other sub-paragraphs of Art. 5 para. 1. In the Jahal-case the European Court for Human Rights held that the examination of the lawfulness of detention under this provision required only proof that action was taken with a view to deportation; it was immaterial for the purposes of Art. 5 para. 1 whether or not the underlying decision to expel was justified or whether there was any evidence that the detention was necessary to prevent the proposed deportee from absconding or committing a crime for example.\(^79\) Whether the principle of proportionality provides additional restrictions, is not readily apparent from the Court’s jurisprudence. The Court, in general, has been reluctant to propose standards restricting the detention of aliens subject to deportation. In Amuur vs. France\(^80\) the Court has recognised that holding asylum seekers in an airport for 20 days amounted to a deprivation of liberty in circumstances where they were placed under constant police surveillance, provided with no legal or social assistance, in particular as to the processing of their claims, and there was no review by a court of the length or the necessity for their confinement.

It is not very clear under this jurisprudence, however, on what reasons detention of unsuccessful asylum seekers or other persons ordered to leave may be lawful and for what period of time such detention can be held as lawful. Applying the general principle of proportionality requires that detention is based upon an assessment of the legitimate aim of the enforced return either by preventing the risk of absconding or a

\(^{79}\) Jahal vs. United Kingdom, Judgement of 15 November 1996 (1997) 23 EHRR 413; Jacobs/White, op. cit. at p. 133.
risk of frustrating otherwise an enforcement of a removal order. In addition, deprivation of liberty should only be used as a last resort. If 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 certain place or other measure can be deemed to be sufficient to prevent the risk of absconding, such measures must be chosen. Finally, the principle of proportionality implies that detention is only admissible as long as the responsible authorities have a reasonable chance of removal and for the time necessary to effect such removal. If removal proceedings are not being conducted with due diligence, continuation of detention may become disproportionate.

Member States also increasingly take resort to the withdrawal of social benefits to asylum seekers whose claims have been rejected. The denial of support is strongly opposed by human rights organisations as a means of leveraging asylum seekers towards cooperating with forced return or compelling them to leave of their own accord.

Whether withdrawal or denial of social benefits amounts to a violation of international obligations, however, may be questionable, since there are no international treaty obligations or customary law provisions to grant social support to persons without a residence right. The limit may be the prohibition of inhuman treatment laid down in Art. 3 ECHR. It seems difficult, however, to draw precise conclusions from international and national jurisprudence on the principle to respect the dignity of persons with regard to the social standard of persons subject to removal. Some nationals courts have decided that the principle of dignity requires the state to provide for sufficient social conditions enabling the person to live in a dignified manner in spite of

---

80 1996, 22 EHRR 533.
81 See also the proposal of the European Commission concerning common standards on return of 27 October 2004; for an extensive, critical debate of detention see JRS, Detention in Europe, Jesuit Refugee Service, October 2004.
his/her incapability to earn one’s own living. The Federal Court of Switzerland has most recently decided that denial of social assistance to uncooperative persons ordered to leave is in violation of the Swiss constitutional guarantee of human dignity.

Whether this jurisprudence can be induced to support the need for a minimum social standard under general principles of international law to persons obliged to leave may be questionable since no uniform state practice is apparent. It may be argued that the principle of dignity does only provide for an obligation to ensure a minimum of social conditions for those entitled to remain on the territory. Unless there is no reasonable alternative of return, access to social benefits cannot be considered as such as inhuman treatment.

---

82 For a detailed analysis see Hailbronner, Ausländerrecht, Aliens Act, Art. 57, October 2003, No. 1 f.
7. **Obligations of Readmission and Right to Return**

In a traditional perspective, public international law issues of return of rejected asylum seekers do arise generally in an interstate context. Individual human rights were, if taken into consideration at all, limited to certain basic minimum standards which a state had to comply with when dealing with its own and foreign nationals on its territory. Return, enforced or voluntary did, as a general rule, not fall into the framework of the human rights instruments which came into being after World War II. Only exceptionally did human rights treaties make reference to the issue of return of foreigners. An alien lawfully in the territory of a state under Article 13 of the 1966 Covenant on Civil and Political Rights\(^\text{83}\) is entitled to certain minimum procedural standards in case of expulsion in addition to a right to leave any country, including his own (Article 12 para. 2).

In principle, return and readmission was considered as an issue of determining interstate rights and obligations arising of the exercise of territorial and personal sovereignty. The prerogative of a state to return foreign nationals in the exercise of its territorial sovereignty did not seem substantially limited by human rights concerns; as a corollary personal sovereignty of a state over its own nationals meant international responsibility for a state to readmit its own nationals returned by a foreign state.

The emergence of international refugee protection brought about a change of this perspective. It was recognized that trans-frontier movements of persons whether voluntarily or involuntarily did raise human rights concerns and had to be taken into consideration in interstate relation. The right of everyone to leave and to return to his

country laid down in Article 13 para. 2 of the Universal Human Rights Declaration however did only modestly change the traditional perspective of return as an inter-state affair. That every state was free to reject or return foreigners has always been maintained as a fundamental principle of territorial sovereignty. The right to leave therefore has never been considered as an individual right to be granted admission on foreign territory or to remain there once entry and admission had been granted.

This is even true for the right to seek and to enjoy asylum, laid down in Article 14 of the Universal Human Rights Declaration. The Geneva Convention of 1951 did not establish individual rights to be granted asylum. Its original focus was upon the right to grant political asylum as a sovereign right vis-à-vis any other state. Even the principle of non-refoulement was originally not destined to establish individual rights; only by its domestic application and subsequent state practice did non-refoulement gradually develop into a human rights concept although it has never been explicitly included into any of the successive human rights treaties on a regional or universal level.

A basic change in the traditional perspective of return as an exclusively interstate affair however occurred as a consequence of international and national jurisprudence relating to the non-refoulement principle derived from Article 3 of the European Convention of Human Rights. The concept of territorial sovereignty has undergone a major change, the dimension of which it is yet by no means clear. The development of a right not to be returned in a situation of inhuman treatment can well be considered as one of the major human rights' developments in the area of international refugee law.

---

86 See Kälin, Asyl 1997, p. 3 at seq.
The emergence of human rights' concerns in the process of returning rejected asylum seekers and other persons whose status has ceased to exist however cannot disguise the fact that return regularly affects interstate relations. The overlapping of international readmission obligations with individual rights did not overturn the attribution of responsibilities based on territorial and personal sovereignty. The competence of a state to decide whether or not to admit foreign nationals and the responsibility of a state for its own nationals still determine the fundamental distribution of rights and duties in the process of return. Therefore, states may not take advantage of human rights' developments in order to escape their basic obligations under public international law to readmit their own nationals and under certain conditions their former nationals or permanently resident third country nationals who have no other right of residence.

Individual rights not to be returned established by customary international law or human rights treaties may nevertheless take precedence in case of a conflict over readmission obligations under Article 53 of the Vienna Convention on the Law of Treaties. It can be assumed that at least the non-refoulement principles laid down in Article 33 of the Geneva Convention of 1951 and Article 3 of the European Convention on Human Rights must be considered as *ius cogens* in the sense of this provision.

The individual right to return, although equally a modest concept, was from its very beginning conceived as an instrument to check a state's powers to deal with unwanted parts of its population. As an individual right based on nationality, the right to return has in principle been recognised since the beginning of modern public international law.

87 UNTS, Vol. 1155, p. 931.
In spite of the general recognition of the right of return, there are unsolved questions and problems. One question is whether a right of return is really limited to a state's own nationals. Nationality may be doubtful and, in any case, states may be tempted to get rid of unwanted parts of their population by depriving them of their citizenship. Under public international law states may be restricted by an individual right of nationality and the prohibition of arbitrary renunciation of nationality. In addition, one may ask whether public international law does support a right of return of foreigners legally resident for a long time in the country. It is prohibited under public international law to organise mass deportations of people legally resident regardless of their nationality. A corresponding right of return seems to be a logical consequence. This is at least recognised in the case of forcibly displaced populations. The Dayton Agreement therefore does not distinguish between nationals and resident foreigners but gives all refugees and displaced persons the right freely to return to their homes of origin.

Another issue arises in the context of administrative and procedural difficulties which may in fact prevent the return of a state's own nationals. The practical operation of return agreements has frequently been impeded by bureaucratic obstacles and excessive requests concerning the proof of nationality. States, regardless of specific provisions of return agreements, are however obliged to co-operate in the solution of problems arising from the return of a state's own nationals.

The recognition of a right to return provokes the question whether return must be voluntarily. State practice clearly indicates that a right to return does not imply a right to remain. There is nevertheless a close connection between the individual right to return and interstate obligations arising in case of involuntary or voluntary return. The existence of an individual right clearly supports a corresponding interstate obligation of readmission. Since in a historical perspective, individual rights to return have evolved out of interstate obligations, it can be safely assumed that as far as an individual right to return does in principle exist, regardless of whether it is being
made use of, there is also an interstate obligation to readmit. This follows from the principle that a state is primarily responsible for its own nationals, while the state of residence has a right to decide on the admission of foreign nationals. It follows that on the level of interstate obligations voluntary return cannot be required.

One may of course question this assumption and ask whether nationality in a changing international legal environment is not given too much weight as a decisive factor in attributing responsibility between different states. The question to remain in a state of actual residence with which a foreigner has established close links may indeed arise under certain circumstances in a human rights concept, particularly if there are close family relations which are to be protected under Article 8 of the European Convention on Human Rights. Beyond Article 8 ECHR however, state practice clearly does not support a right to remain which could be opposed to return. Under national law there may be regulations which rule out return for foreigners having established close links with the state of residence, even for temporarily admitted persons. As an international legal concept however, a right to remain has only been recognised under very special conditions, as e.g. within the framework of the single European market.

Another conflict between interstate obligations and individual rights may arise if an individual is excluded from return under national law for having committed certain crimes or acting contrary to the interest of a state. Even if such limitations may be found in rare cases in modern national laws, they cannot be used as arguments in return proceedings. On the interstate level the distribution of responsibilities between states does not permit a recourse to such interests.

The question whether there is an obligation of States under customary international law to readmit their own nationals who have been rejected or expelled or wish to return voluntarily in their country of origin, has to be answered by reference to prin-
principles established by the international jurisprudence. The International Court of Justice requires a virtually uniform State practice accompanied by a corresponding legal conviction. These requirements however cannot be applied too rigorously. State practice does not support the assumption that there is in fact a need to show a virtually uniform practice. More recent developments in public international law attach primary importance to the emergence of a common legal consensus rather than requiring a uniform or even constant State practice. The development of customary international law must rather be seen as a pragmatic flexible process in the solution of conflicting interests. Rules of customary international law reflect common basic convictions how to solve such conflicts. Practical and administrative difficulties in the operation of return agreements and ad hoc return arrangements, refusal to readmit certain unwanted categories of persons or making return dependent upon excessive formal requirements or any other conditions (financial attributions) not related to the return procedure, do not challenge the basic principle that a State is obliged to readmit its own nationals. The principle is not only reflected in numerous return agreements of the 19th and 20th century; it has received general recognition in international literature and jurisprudence. One of the more recent explicit acknowledgements has been by the European Court of Justice in the famous case of van Duyn:

"Furthermore it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between member States, that a State is precluded from refusing its own nationals the right of entry or residence."  

Recent State practice confirms the thesis that there is a general obligation of States to readmit their own nationals. The EU-model bilateral readmission agreement, the more recent EU Readmission Agreements as well as numerous subsequent bilateral


90 Hailbronner, Readmission Agreements, p. 6 ff.

91 See Case No. 41/74 van Duyn vs. Home Office, 1974 ECR 1337, 1351.

agreements, resolutions and recommendations by international organs are based on a general principle of readmission of a State's own nationals. The UNHCR Executive Committee in two conclusions in 1995\(^{93}\) and 1996\(^{94}\) has explicitly recognised the obligation of all States to accept the return of their nationals, respectively the responsibility of all States to accept and facilitate the return and reintegration of their nationals. The fact that these recommendations are focused upon international protection and the exercise of a right of (voluntary) repatriation, does not limit their value as precedent for a confirmation of the basic principle that every State is obliged to readmit its own nationals. While it is true that repatriation in the context of these resolutions is primarily seen from the perspective of voluntary repatriation, there can be no doubt that State participation in the UNHCR Executive Committee deliberations did not exclude involuntary repatriation as an alternative to voluntary return.

This interpretation is confirmed by a recent UNHCR EX COM Conclusion and a note of UNHCR of May 2001.\(^{95}\) Conclusion No. 85 (1998) confirms the fundamental right of all people to leave and the return to their own countries as well as the obligation of states to receive back their own nationals. The UNHCR note of May 2001 provides for the responsibility of countries of origin vis-à-vis the return of their nationals who are not refugees.\(^{96}\) The Conclusion No. 96 (54) of 2003 refers to this Agreement recalling the obligation of states to receive back their own nationals as well as the rights of states under international law, to expel aliens while respecting obligations arising from international refugee and human rights law. The Executive Committee therefore remains seriously concerned as regards the return of persons found not to be in need of international protection, that some countries continue to restrict the return of their own nationals, either outright or through law and practices which effectively block expeditious return and emphasises that the credibility of in-

---

\(^{93}\) No. LXXVII XL VI(-1995); No. LXXIX XL VII(-1996).

\(^{94}\) Resolution No. LXXVII.


dividual asylum systems is seriously affected by the lack of prompt return of those who are found not to be in need of international protection.

Finally, it should be mentioned that the return of smuggled migrants is also regulated in Art. 18 of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air. According to the Protocol each state party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been smuggled and who is a national or who has the right of permanent residence in its territory at the time of return.

The real issue therefore seems to be whether a duty of readmission under public international law can be made dependent on formal and administrative requirements which have to be met in executing a return obligation. Bilateral readmission agreements do state a number of conditions concerning proof of nationality and additional requirements as to the procedure and time limits of readmission requests. It is obviously not possible to derive detailed rules of customary international law from these agreements. Administrative practices and provisions differ widely. This does not mean however that States have unlimited discretion concerning procedural and administrative regulations. A general obligation to readmit must not be frustrated through unjustified formalities and burdens of proof. Criteria as to what requirements are unjustified can be found in the more recent State practice concerning readmission agreements. It follows that, as a rule, full proof of nationality cannot be required while substitution by documents or other evidence of the individual's nationality is generally held to be sufficient. Purely formal reasons are generally not considered as sufficient to refuse admission if the nationality is sufficiently substantiated. In principle, States may require travel documents; there must however be a procedure to issue substitutive documents if the individual in question does not dispose of any valid travel document. Unproportionally long delays and excessive administrative procedures for the issue of travel documents may constitute an abuse of the exercise of rights.
International Legal Norms on Return

The international legal situation as to readmission of former nationals seems to be less clear. Bilateral readmission agreements of the 19th century have included former nationals. Whether a similar duty can be found in the modern State practice of the 19th century, may appear somewhat doubtful. There is however a sufficient number of precedents in the more recent State practice indicating at least a basic obligation of States to readmit those nationals who have lost their nationality while being temporarily abroad. Recently certain States have developed a practice of releasing nationals at short notice in order to frustrate the return to their State of origin. Under public international law this may constitute an abuse of rights and an unlawful exercise of a State's sovereign rights to regulate its nationality. The EU-Model Agreement states that the readmission obligation shall also apply to persons who have been deprived of their nationality of the requested party since entering the territory of the requesting party without having at least been promised naturalisation. In the international doctrine, there is a wide recognition that under the conditions described a renunciation of citizenship, whether voluntarily or involuntarily, violates the right of the State of residence by unilaterally shifting the responsibility of a now stateless person to the receiving State. The loss of nationality under these conditions is considered as irrelevant since otherwise the State of residence would be deceived in its expectation that the State whose nationality the individual possessed is obliged to receive the individual.

There is clearly no obligation under public international law to readmit foreign nationals having been resident, lawfully or unlawfully on the territory of a requested State. Readmission obligations therefore can only be derived from an agreement providing for readmission in case of illegal entry. There are many problems concerning the term "illegal entry" and the proof required as to the time and place of entry under bilateral agreements concluded in the fifties and sixties. More recent agreements try


98 For a compilation of agreements on readmission concluded by Germany see Lehnguth/Maassen/Schieffer, Rückführung und Rückübernahme, Starnberg, 1998.
to avoid these problems by not tying readmission to a proved illegal entry. The Schengen-Countries Agreement with Poland as well as the EU-Model Agreement and the recently concluded Readmission Agreements of the EU as well as of its Member States with Third States, therefore, have based the obligation to readmit on the fact that the requested State has allowed the entry of nationals of third States onto its territory who then have moved onto the territory of the requesting State without the necessary entry or residence permit. The basic idea is that irregular migration movements can no longer be encouraged by tolerating transit or insufficient border controls. States are obliged under the principles of good neighbourliness and international solidarity to prevent their territory from being used as a transit area for irregular migration movements. If until now precise legal rules are yet to be developed, this does not mean however that the principles of an emerging customary international law of international co-operation and good neighbourliness are meaningless when it comes to the easiest way to get rid of unwanted migrants.

Notwithstanding the absence of clearly defined customary international law rules, there are clear signs for an emerging international law of cooperation regarding the efficient and expeditious return of persons found not to be in need of international protection to the country of origin or other countries obliged to receive them back.

UNHCR Conclusion No. 96 calls on states in this respect to

- cooperating actively, including through their diplomatic and consular offices, in establishing the identity of persons presumed to have a right to return, as well as determining their nationality, where there is not evidence of nationality in the form of genuine travel or other relevant identity documents for the persons concerned,
- finding practical solutions for the issuance of appropriate documentation to persons who are not or no longer in possession of a genuine travel document.
The conclusion recommends as well that UNHCR complements the efforts of states in the return of persons by

- promoting with states those principles which bear on their responsibility to accept back their nationals, as well as principles on the reduction of statelessness,
- taking clear public positions on the acceptability of return of persons found not to be in need of international protection,
- continuing its dialogue with states to review their citizenship legislation, particularly if it allows renunciation of nationality without at the same time ensuring that the person in question has acquired another nationality and could be used to stop or delay the return of a person to a country of nationality.

Within Europe, the legal framework established by the Council of Europe and other international instruments, like the Treaty on the European Union, do provide a sufficient legal basis for developing customary rules on a common European responsibility for unlawful migration. Whether this responsibility result finally in concrete detailed rules on return, remains to be seen. There are a number of legislative acts providing for cooperation of EU Member States in mutual assistance of their return and repatriation policies. The decisive test will be whether the legal interest in the implementation of a system of return of foreign nationals continuing their journey uncontrolled will be so strong that a violation of the rules on readmission will be considered offensive behaviour and a contravention of European standards. It is at least arguable that European States are already at the present stage of European law obliged to permit their territory being used for irregular migration movements into a neighbouring State irrespective of the obligations contained in the directions and resolutions on assistance of states in implementing removal orders.
On May 4, 2005, the ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) has adopted twenty guidelines on forced return. The CAHAR guidelines intend to identify best practices and prepare a tool for governments in the drafting of nationals laws and regulations on the subject and all those directly or indirectly involved in forced return operations. The guidelines may serve as a reference for the existing state of European customary law on return. However, the guidelines do not intend to imply new obligations for Council of Europe Member States. This is also made clear by using the verb “shall” and “should” in a distinctive manner, indicating that by using the verb “shall” it is indicated that the obligatory character of the norms corresponds to already existing obligations of Member States, while the use of the verb “should” indicates non-binding recommendations addressed to the Member States. The guidelines contain five chapters, one chapter dealing with voluntary return, chapter II with the removal order including the procedure for adoption of a removal order, prohibition of collective expulsion, notification and remedy against the removal order. The third chapter describes the conditions under which detention may be ordered, the obligation to release and the length of detention as well as judicial remedies and conditions of detention pending removal. Chapter IV contains a framework for cooperation between states concerning readmission. The final chapter V on forced removal contains provisions on cooperation with returnees, fitness for travel and medical examination, return in dignity and safety, the use of escorts and the means of a restraint. The guidelines are laid down in an annex to this study.

99 Council of Europe, CM (2005), 40 final of 9 May 2005; see also comments of the CAHAR on the 20 guidelines on forced return, CAHAR/PE (2004), 23 rev. 5.
- Chapter III -

EU Concepts and Proposals on Return and Repatriation
Talking about EU concepts and proposals on return and repatriation various aspects need to be taken into account. Broadly speaking, two distinct levels can be distinguished: the intra EU level which deals on the one hand with the on-going harmonisation process and on the other hand with practical co-operation between the EU Member States themselves and includes to a varying degree also the different national administrative systems and procedures. The second level is concerned with the external dimension of return and repatriation policies, i.e. with relations to countries of transit and origin. Long-standing experiences have shown that inclusion of the countries along the migration routes is of overriding importance in finding effective and durable solutions of situations of irregular migration. The external dimension of migration policies has as its central element the effective co-operation with all countries affected by the flows of both regular and irregular migration. The increasing inclusion of the migration agenda into the external relations of EU Member States and the EC as a whole is reflecting this consideration.

Consequently, two parallel strands of policy development in the area of return and repatriation will be discussed in the following chapter: the agenda internal to the EU and its external dimension. The starting point for the discussion of EU concepts and proposals on return and repatriation matters is Article 63 of the Treaty of the European Community as amended by the Treaty of Amsterdam. In order to fully grasp the developments in this respect, the political framework within which these developments take place will be analysed. To this end, the present chapter will take a closer look at the 1999 Tampere conclusions which laid down the major aims and principles for the creation of a Common European Asylum System by 2004. The consequences of the concrete measures of this first phase will be described as they impact upon the policy for return and repatriation. In a concluding section, the possible future developments set forth by The Hague programme will be highlighted. The effects on the individual Member States and their related practices in the area of return and repatriation will consequently be discussed in chapter 5.
1. **General Competence of the EU Under Art. 63**

The legal foundation for a common return policy is laid down under title IV of the Treaty of the European Community. Article 63 provides the framework within which the developments of EU minimum standards are taking place in the following areas:

- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum;
- the reception of asylum seekers;
- the qualification of nationals of third countries as refugees;
- procedures for granting or withdrawing refugee status;
- temporary protection to displaced persons and for persons who otherwise need international protection;
- promotion of a balance of efforts in receiving displaced persons between Member States.

The notion of "repatriation" by definition comprises voluntary as well as non-voluntary repatriation. Article 63(3), sub-paragraph (b) refers to “illegal residents”, taking into account the systematic context of this Article, the provision includes rejected asylum-seekers and other persons who do not have a valid claim for international protection. Moreover, it also includes, with certain implications stipulated in the Temporary Protection Directive (see below), persons whose temporary protection has ended and who do not have a legally valid need for protection.\(^\text{100}\) Hence, Article 63(3), sub-paragraph (b) provides for a competence to comprehensively regulate repatriation of all illegal immigrants.

---

\(^{100}\) See Article 20 of the Council Directive: “When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply [...]”, O.J. L21 2/12.
However, Community competence in this field is not exclusive. Sentence 2 of paragraph 4 of Article 63 stipulates that “measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements”. Member States may have national provisions as long as they are compatible with the respective European provisions. As a consequence of the requirement of compatibility the Treaty derogates contradicting national provisions.101 Accordingly, Member States and the Community share responsibility for both adoption and implementation of immigration policy, including comprehensive repatriation policies of illegal residents.

1.1 The Principle of Subsidiarity

Furthermore, due to this shared competence of the EU and its Member States an EU return policy must also be guided by the principles of subsidiarity, proportionality and effectiveness of European law making. The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. Specifically, the subsidiarity principle requires the Union not to take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.102

The Treaty of Amsterdam has taken up the overall approach in a protocol on the application of the principles of subsidiarity and proportionality annexed to the EC


102 The Edinburgh European Council of December 1992 defined the basic principles underlying subsidiarity and laid down guidelines for interpreting Article 5 (former Article 3b), which enshrines subsidiarity in the EU Treaty.
EU Concepts and Proposals on Return and Repatriation

Treaty. Two issues this Protocol introduces are the systematic analysis of the impact of the principle of subsidiarity on legislative proposals and the use, where possible, of less binding Community measures. From this follows, inter alia, that a common goal is pursued on the European level only if it can be reached more effectively than on the Member States’ level. Given the ongoing harmonisation processes in asylum and migration matters, EU return and repatriation policies are undergoing the harmonisation process as well; for a negative decision in the areas of asylum as well as immigration eventually leads to the same consequence: return.

2. The First Phase - Tampere Programme

As mentioned, the situation with regard to asylum and migration has significantly changed since the entering into force of the Treaty of Amsterdam in 1999. New powers have been vested with the Community. Title IV of the Treaty establishing the European Community provided for measures upon which the Council had to act unanimously. As it was decided then, during the phasing-in period of 5 years the Commission and Member States shared the right of initiative. After this period the Commission avails of an exclusive right. 103 According to the Treaty visa, asylum, migration and other policies relating to the freedom of movement have become full Community responsibility. 104 Additionally, the provisions defined specific voting rules in such matters and regulations regarding jurisdiction of the European Court of Justice, which will have practical influence on common asylum and migration regulations.

The special meeting of the European Council held in Tampere in October 1999 gave specific directions in regard to the implementation of the Treaty of Amsterdam. This

103 Title IV of the EC Treaty is not applicable to the United Kingdom and Ireland unless the two countries decide otherwise. Furthermore, the Treaty is also not applicable to Denmark by virtue of the Protocol on the position of Denmark annexed to the Treaties.
Council meeting was dedicated to the gradual establishment of an Area of Freedom, Security and Justice. The political guidelines for the first phase were elaborated, including asylum and immigration and finally laid down in the “Tampere Milestones”. The Council reaffirmed the absolute importance to respecting the right to seek asylum. It was agreed to work towards establishing a Common European Asylum System (CEAS) which is to be based on the full and inclusive application of the Geneva Convention in order to specifically maintain the principle of non-refoulement. In the first phase, the CEAS should be comprised of a workable mechanism to determine which Member State is responsible for considering an asylum application, common standards as regards procedures and reception conditions, an approximation of rules on eligibility to refugee status and measures relating to subsidiary forms of protection. In a second phase, the CEAS should eventually include a common asylum procedure and a uniform status, valid throughout the Union, for persons who are granted asylum.

In regard to immigration, it was acknowledged at the meeting that the EU needs a comprehensive approach to migration which addresses political, human rights and development issues in countries and region of origin and transit. Moreover, the Council stressed the need for more efficient management of migration flows at all stages. It furthermore called for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States.

In short, the Tampere programme provided the political framework within which the Commission together with the Member States carried out the first phase of harmonisation in asylum and migration matters.

104 Articles 61, 62 and 63 of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam, define the objectives to be achieved by the Union.
Some of the acts tabled by the Commission since then contain stipulations which indirectly impact upon return and readmission policies and practices while providing for minimum standards relating to asylum. Other proposals directly deal with the issue of return and thus provide the shape of an evolving EU return and repatriation policy. As will be shown below, however, a common European return policy is far from being comprehensively formulated.

The first phase as outlined by the Tampere programme has produced a number of measures dealing with asylum and migration, those impacting upon return and readmission will be discussed in further detail below. In assessing the progress achieved, respective opinions were somewhat diverging. The European Commission regards the overall record as positive, although it pointed out that a great deal remains to be done. The position towards the results of the first phase taken by ECRE, however, may be taken to describe the views of a number of NGOs: ‘Overall progress has been disappointing, hampered by a distinct lack of solidarity between Member States as well as their lack of political will to translate the commitments made at Tampere into binding obligations and thus collectively address the forced migration challenges facing the world today’.

3. Specific Competences of the EU

The present report is intended as an update of previous reports dealing with return and repatriation policies. In the EU context, especially the 2002 ICMPD report is of relevance. The present report consequently will not in detail repeat the discussions of the ICMPD report but will provide a brief overview of EU measures and will then

---

elaborate on more recent EU developments, in particular upon those brought about by the recently adopted Hague Programme.

### 3.1 Green Paper on a Community Return Policy on Illegal Residents

The starting point for the discussion on EU concepts and proposals is the Green Paper on a Community Return Policy on Illegal Residents.107 Adopted on 10 April 2002, it explored various issues related to the return of third-country nationals. One of the many aspects was the development of a readmission policy of the EU, together with third countries. A policy on return should consider the need to recognise the possible negative effects for the countries of origin and transit. Since readmission agreements are in the interest solely of the Community, the GP states, the Council should increase the complementarities in the area of readmission with other Community policies, and use the existing “leverage” at its disposal, in particular with regard to the foreign policy of the Union, development aid and technical assistance. In order to ensure that returns are sustainable, the EU should consider adequate forms of support in the respective countries of origin and, in the long run, address the root causes of migration. The Green Paper was the first official document comprehensively addressing the issue of return and repatriation policies on the EU level. It aimed at comprehensively mapping the field of return. Furthermore, another intention was to initiate a broad public debate on the need for a European return policy for illegal residents and rejected asylum seekers. The Green Paper contributed to the discussion to a considerable extent and lead to the publication of a Communication on a Community Return Policy, which in further details flashed out the elements of an EU return policy on illegal residents.

---

3.2 Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents

In October 2002 the Commission prepared the Communication on a Community Return Policy on Illegal Residents\(^\text{108}\). The Commission set out the working premises on and the framework within which to progress towards a Community return policy. Essentially, the Commission re-emphasised that in order to preserve integrity of immigration and asylum systems illegal residents must be returned. Such returns, however, must be respectful to international human rights and obligations. In particular, in compliance with Article 6 of the EU Treaty the Commission states: “... the full respect of human rights and fundamental freedoms is the natural and basic prerequisite for a European return policy...”. The Communication, moreover, recalled what has already been discussed at the Seville summit, namely that according to Member States’ Justice and Interior Ministers “...the main problem does not lie in strengthening the co-operation between Member States, but is rather attributable to the unwillingness of third countries to take back their nationals and to ensure sustainable return”. Consequently, recalling the phased measures as agreed in Seville in 2002 to secure the co-operation of countries of transit and origin:

“[C]o-operation is needed at an administrative level to obtain return travel documents for illegal residents who are not in possession of valid travel documents. In addition, when arriving in the country of return, the readmission process at the points of entry, often at airports, requires support. In certain cases it might be helpful to negotiate a readmission agreement at political level, which goes further than establishing the principles of readmission and sets out the practical procedures and modes of transportation for return and readmission.”

3.3 Return Action Programme

The second part of the Communication defined a Return Action Programme and set out in detail its elements. It addresses most of the issues identified in the 2002 ICMPD report and several other studies on the topic since then. It contains short-,
EU Concepts and Proposals on Return and Repatriation

medium- and long-term measures aimed at increasing the efficiency of return policies and practices. It mentions the need for country specific programmes. This concept has been integrated into the notion of integrated return programmes which are described further below. The Return Action Programme is made up of the following four components:

- Immediate enhanced practical co-operation, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations,
- Common minimum standards for return to be envisaged in the short, medium or long term,
- Country specific programmes,
- Intensified co-operation with third countries on return.

The Return Action Programme provides for the Union to develop integrated return programmes aimed at ensuring effective and sustainable return of third-country nationals to their countries of origin. In this conceptualisation, integrated return programmes should cover all stages of the return procedure: the phase before departure, return itself, reception and reintegration in the destination country.

On 8 June 2004, the Council adopted conclusions setting out guidelines for future return plans. Such plans:

- shall be annual,
- shall include both types of returns, voluntary and forced,
- shall be developed country by country, so as to take due account of the specific situation of each.

The Commission shall be responsible for the development and implementation of return plans.
Summing up, the Return Action Programme laid emphasis on the need for immediate enhanced operational co-operation of Member States’ enforcement authorities, but called also for the creation of common minimum standards and country specific programmes as well as an intensification of co-operation with third countries on return. The Commission underlined the need that all measures as set out in the Return Action Programme are swiftly implemented.

The return action programme elaborated the central elements of enhancing return and repatriation policies. Until today, progress has, however, been neither swift nor comprehensive.

In its Communication on ‘The Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and The Return of Illegal Residents’¹⁰⁹ the Commission highlighted the developments achieved in tabling the Green Paper, the related Communication and the Return Action Programme and outlined the steps to be taken in order to create a more efficient return policy on illegal residents.

With a view to the practical difficulties faced by the Member States, as will be shown in chapter 5, the Commission rightly identified that ‘in large part, however, the key obstacle for returns is not the concrete removal operation, but rather the process of getting proper return travel documents for undocumented illegal residents’. In order to improve this situation the Commission emphasised the importance of improving the exchange of information and sharing of best practices with a common handbook.

Pertaining to enhancing operational co-operation the Commission identified the need of assistance of the transit Member State. However, the Commission emphasised that in order to enhance such operation co-operation a clear legal basis is required especially concerning situations in which the use of coercive force seems to be unavoidable: ‘consequently, a binding regime of mutual recognition and common standards needs to be established in order to facilitate the work of the services involved and to allow enhanced co-operation among Member States’.

The Commission stated its intention to prepare a proposal for a Council Directive on minimum standards for return procedures as well as on mutual recognition of return decisions. The latter proposal is to take the existing Directive on mutual recognition of expulsion decisions as a basis and improve its identified shortcomings. As will be mentioned below, the Directive on mutual recognition of expulsion decisions failed to establish a binding framework for the mutual recognition of all return decisions.

Integrated country-specific return programmes should be designed to ensure effective, timely and – above all – sustainable return. Such programmes should, therefore, provide reasonable assistance to returnees and also to the country of origin concerned to allow adequate capacity building. Moreover, the model of trilateral agreements, tailored to the needs of destination countries, involving at a much earlier stage the authorities of the said countries as well as operators should be further explored, according to the Commission.

A further concrete proposal with regard to enhancing operational co-operation among Member States was put forward in the German initiative relating to assistance in cases of transit for the purposes of removal by air. A Council Directive in this respect was adopted consequently.\(^{110}\)

3.4 Mutual Recognition of Expulsion Decisions

The Council Directive on the mutual recognition of decisions on the expulsion of third country nationals\(^{111}\) provides for the recognition by the authorities of one Member State of an expulsion order of the authorities of another Member State. This Directive presents a principle according to which an expulsion decision made by a Member State may be executed without rendering another expulsion decision, but it does not impose any obligations. The communication on a Community Return Policy on Illegal Residents went a step further by suggesting the creation of a legally binding framework. To complement this, the Council went on to adopt on 23 February 2004 a Decision laying down the criteria and practical arrangements for the compensation of the financial imbalances resulting from application of this Directive. The goal of the decision is to better ensure refunds for expenses incurred by the executing State having assumed the costs of expulsion.

The application of the Directive on mutual recognition of expulsion decisions is limited to those third country nationals who are the subject of an expulsion decision based on a serious and present threat to public order or to national security and safety. The mere fact of illegal presence of a third-country national is consequently not sufficient for the purpose of the directive. Expulsion orders based on lacking residence permission fall outside the scope of this directive.

4. Common European Asylum System

It seems obvious in the context of the present report that in the creation of the CEAS return and repatriation policies play a decisive control element. For reasons of credibility and integrity, it is argued, an efficient and effective return policy is essential. Credibility and integrity considerations, however, presuppose credible and effective asylum systems in the first place which are worth being protected against misuse. Against this background the following section deals with those aspects of asylum-related EU measures which have a bearing on the creation of an effective EU return policy.

Already in November 2000 the Commission published a Communication “Towards a common asylum procedure and a uniform status valid throughout the Union for persons granted asylum”\(^{112}\) which pointed to the move towards a ‘one-stop shop’ type of procedure\(^{113}\) and its potential of enhancing efficiency of return policies.

In a more recent Communication on “A More Efficient Common European Asylum System: The Single Procedure as the Next Step”\(^{114}\) the Commission further assessed the benefits of such a procedure with a view to return and repatriation. In this context, it is important to note the difference between asylum determination procedures and procedures in relation to removal of rejected asylum seekers. In the former, claims relating to the need of international protection in accordance with the Geneva Refugee Convention are being assessed; while in the latter other obstacles to return may be evaluated. In such circumstances an inefficient doubling of procedural as-

---


EU Concepts and Proposals on Return and Repatriation

pects could occur. This is the reason why the Commission stated that “a single procedure adds value to the asylum systems of the Member States of the EU in their efforts to return those who do not qualify for international protection. Where all possible protection obligations are included in one procedure, the chance of further protection-related obstacles being raised to delay or prevent removal is all but removed. The authorities responsible for return then act in the knowledge that there are no outstanding considerations to be dealt with. Cooperation between asylum authorities and return authorities is obviously key to smoother procedures here.”

Reflecting the inter-connection between asylum and return procedures and acknowledging the importance of effective asylum determination procedures for both integration and return measures the Commission reiterated in this Communication that “a single procedure on applications for international protection as defined in the Qualification Directive will reinforce the potential for an effective return process…”. To maximise the effectiveness of an EU single procedure in relation to returns, Member States need to agree that a ‘final decision’ (e.g. an unfounded appeal against a negative decision on the grounds in the Qualification Directive) was also the decision which triggered return. To further enhance the possibilities for effective return, the single procedure could be extended to grounds outside the Qualification Directive or include an early warning and cooperation mechanism with return authorities. A possible end goal could be to ensure parallel decision making processes in the single asylum procedure and the return procedure. In this respect, particular attention should be paid to appropriate treatment of repeat applications preventing effective return/removal action.”

In the previous passages the relevance and impact of efficient asylum procedures on the effectiveness of a return policy becomes evident. As will be shown in chapter 5, however, the asylum systems in several Member States have not yet fully been adapted so as to facilitate efficient return operations. In this respect it is not so much about a balancing act of asylum and return considerations but about understanding
the inter-relatedness of the two and about creating systems which allow both to function efficiently.

4.1 Temporary Protection

Against the background of the wars in Croatia, Bosnia and Herzegovina and Kosovo the first concrete element of the CEAS took shape in the Temporary Protection Directive of 2001.\footnote{This directive is of interest in the present context primarily because of its regulations regarding to the termination of temporary protection. In this respect, chapter V of the Council Directive is of particular relevance. Articles 20 to 23 provide for measures after temporary protection has ended and for certain regulations for return. Article 21 stipulates an obligation on behalf of the States to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended. It further states that the Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity. It furthermore lies down that the decision to return is taken in full knowledge of the facts. In this regard Member States may provide for exploratory visits so that potential returnees are enabled to visit their country of origin to see for themselves the security situation and the options for reintegration, before voluntary return is chosen. The individuals covered by the scope of this provision have the opportunity to receive the full pre-departure assistance, as foreseen in a return programme under a solid legal right to remain on the territory of Member States. A similar provision stipulates that families with children attending schools should be able to benefit from residence conditions which allow the children to complete the current school period. At present there is no situation of mass influx and thus the TP regime is inactive.}

At the Justice and Home Affairs Council in Luxembourg on 29 April 2004, the Council formally adopted the Council Directive on Minimum Standards for the
EU Concepts and Proposals on Return and Repatriation

Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection (the Qualification Directive) and reached political agreement on the amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. These two measures concluded the first phase as defined by the Tampere programme. If not fully enacted they nevertheless give further shape to the CEAS. Both are of relevance to the discussion on EU return and repatriation policies, as they impact upon the status of future asylum seekers in the EU Member States. Especially in this area, as chapter 5 will show, significant differences prevail in the individual EU Member States creating obstacles for an efficient and effective return policy.

4.2 Minimum Standards for Qualification and Status

The Directive aims at a common definition of refugee and at a common set of rights to be enjoyed by refugees, guaranteeing a minimum level of protection for those who are genuinely in need of international protection, whilst preventing abuses of asylum applications which undermine the credibility of the system. The Qualification Directive contains in its Art. 11 and 14 and, more specifically, in Art. 3.4 provisions of particular relevance for the present study. Article 11 (cessation of refugee status) provides for the conditions under which refugee status ceases to exist: in the case of voluntary re-availment of national protection and voluntary re-establishment in the country of origin. Another quite relevant provision in this regard is contained in paragraph e) of the same article. It provides for a clarification of change in circumstances. These standards may be of importance in a broader perspective in regard to standards which allow for voluntary return in “safety and dignity”. As it has been specified in the comments provided by the Commission, a change of circumstances

---

115 Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

must be profound and durable, eliminating the refugee’s well-founded fear of being persecuted. However, profound change is not the same as an improvement in conditions; and moreover, the relevant inquiry is whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced. In this regard a complete political change is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of oppressive laws, or dismantling of former services may also be evidence of such a transition. A situation which has changed, but which also continues to show signs of volatility, is by definition not durable. There must be objective and verifiable evidence that human rights are generally respected in that country, and in particular that the factors which gave rise to the refugee’s well-founded fear of being persecuted are durably suppressed or eliminated. Practical developments such as organised repatriation and the experience of returnees, as well as the reports of independent observers should be given considerable weight.\footnote{17}

Of great importance is, furthermore, Article 3.4 on voluntary return: “Member States shall grant persons enjoying international protection access to voluntary return programmes for those who wish to return on a voluntary basis to their country of origin.” Further explanation is given in the relevant explanatory notes. They clarify that Member States shall give access to voluntary repatriation programmes for those who wish to avail themselves of this option. In this regard Member States are encouraged to facilitate such returns, under the specific conditions that candidates are fully informed of the conditions which prevail in the country of return. For facilitation of voluntary returns Member States may use exploratory visits to the countries of origin to provide for the option to assess the situation to potential returnees. As a financial incentive for the development, such programmes may be eligible for financing under European Refugee Fund.

\footnote{17} Art. 16 (cessation of subsidiary protection status) introduces these standards to the specific situation of subsidiary protection.
EU Concepts and Proposals on Return and Repatriation


The European Commission presented its first proposal for a Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status already in September 2000. Following considerable debate on this draft, the European Council in Laeken, in December 2001, requested the Commission to bring forward an amended proposal. This was presented by the Commission in June 2002. In April 2004, following further extended negotiations, the Council agreed on a general approach to the proposal subject to agreement among Member States on a legally binding EU list of safe countries of origin. However, unanimous agreement on this issue could not be reached and, therefore, an amended approach was agreed by the Council on 19 November 2004. The adoption of a minimum list of safe countries of origin is postponed until the adoption of the Proposal (in accordance with the new voting rules).

The proposal on which political agreement has been reached has been submitted to the Parliament. The provisions of the amended proposal which are of interest in the present context are listed below. They are of relevance due to their procedural consequences and impact upon the position of the future asylum seeker and his or her respective status:

- application of safe third country concept,
- application of the safe country of origin concept,
- effective remedy/suspensive appeal,
- accelerated procedures.

A detailed discussion of the abovementioned concepts and their consequences on future asylum seekers would go beyond the scope of the present report. As will be shown in chapter 5, however, the prevailing differences in domestic administrative systems and procedures of granting and withdrawing refugee status pose significant challenges to the creation of an effective EU policy relating to return and repatriation.

5. **Readmission**

As the experiences of the EU Member States show, substantial difficulties prevail when it comes to the removal procedure itself. Apart from problems related to the individual returnee, countries of transit and origin - for a variety of reasons – do not accept their own nationals back, despite the obligation under international law to do so.

The migration management tool which is most commonly used to regulate readmission of own nationals and third-country nationals is to conclude readmission agreements. Such agreements stipulate the practical and technical details of readmission. In general, such agreements involve reciprocal undertakings by countries to cooperate in the return of illegal residents to their country of origin. Traditionally, readmission agreements are concluded between two states. Since 2000, however, the Commission avails of the mandate to conclude such agreements on behalf of the EU Member States. These agreements form part of the European Union's broader aim of developing a balanced, coherent and common approach towards immigration and asylum. Furthermore, readmission clauses can be found also in other agreements with third-countries; most prominently in this regard, the Cotonou Partnership Agreement between EU Member States and 77 ACP States includes such a clause.

---

120 14203/04 ASILE 64, 9 November 2004.
5.1 Readmission Agreements

Readmission Agreements are a relatively new tool, but they build on standard readmission clauses which have featured for some years in Association and Co-operation Agreements. Since 1996, readmission clauses have been included in agreements with Algeria, Armenia, Azerbaijan, Croatia, Egypt, Georgia, Lebanon, Uzbekistan, and others. These clauses do not constitute Readmission Agreements in themselves, but establish a framework for negotiating such agreements in the future. Article 13 of the Cotonou Partnership Agreement between the EU and 77 ACP countries, for instance, addresses the question of migration. It calls for the negotiation of Readmission Agreements between the EU and ACP states.

Until the entry into force of the Amsterdam Treaty, readmission agreements were dealt with in the inter-governmental process of the third pillar of the Union. In this context, two Council Recommendations have been introduced regarding readmission agreements. In negotiating bilateral readmission agreements states should as a rule have flexible recourse to these specimen agreement provided for in the first Recommendation. The second Recommendation concerns the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements. 121

Paragraphs 26 and 27 of the Tampere conclusions promoted the conclusion of readmission agreements or the inclusion of standard readmission clauses in other agreements between the European Community and relevant third countries or groups of countries. The Council also recognised the need to provide assistance to countries of origin in order for them to meet their readmission obligations.

121 Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third party; Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements.
As part of the process of strengthening the Commission’s competences, on 18 September 2000 the Council adopted a decision, which authorises the Commission to begin negotiations to conclude readmission agreements with the following countries: Albania, Algeria, Hong Kong, Morocco, Pakistan, Russia, Sri Lanka, Turkey, Ukraine and the Chinese Special Administrative Regions of Macao. Following the Laeken Council of December 2001, the EU has resolved to pursue Readmission Agreements with other relevant third countries and groups of countries. Such agreements are, as mentioned before, one important part of the strategy to integrate migratory issues into the Union's overall relations with third countries.

In the best case, Readmission Agreements establish unambiguous and reciprocal obligations. They provide, for example:

- technical provisions governing the readmission procedure and transit operations, including readmission applications, means of evidence, time limits, means of transit, etc;
- rules on costs, data protection, and the protection of other international rights and obligations.

In addition to obligations to readmit nationals of the country with which the EU has signed a Readmission Agreement, these agreements may also contain commitments to readmit stateless persons or persons of another jurisdiction who entered the EU illegally from the country in question, or vice versa. These might include, for example illegal immigrants into the EU who were also illegal in the country from which they entered, or who had temporary residence permits in that country that have subsequently expired.

Many EU Member States have established bilateral Readmission Agreements with third countries. As already mentioned, since the entry into force of the Treaty of Amsterdam the Commission has gained further powers to enter into readmission agree-
EU Concepts and Proposals on Return and Repatriation

ments on behalf of the Community. The Member States are not contracting parties but they are bound by the agreement. Nevertheless, the Community’s powers are not exclusive. Member States may still enter into readmission agreements as long as there is no EU readmission agreement with that country. Moreover, if an EU agreement is in place, Member States may still enter into bilateral agreements if need be for more detailed arrangements and procedures. Already existing agreements will continue to apply. EC Readmission Agreements are expected to, as part of comprehensive European policy on immigration, improve the effectiveness of return procedures through, for example:

- establishing Common Standards relating to all phases of return,
- mutual recognition of definitions and decisions,
- establishing a Technical Support Facility to improve operational co-operation,
- building stronger networks of immigration liaison officers in third countries,
- co-ordinating statistical information,
- training staff with responsibilities in the returns sector.

The Community has already signed agreements with Hong Kong, Macao, Sri Lanka and Albania. The Commission is currently negotiating agreements with Algeria, China, Morocco, Pakistan, Russia, Turkey, and Ukraine. The European Community and China signed an agreement on 12 February 2004 setting out simplified procedures for the issue of visas for tourist groups. The agreement makes provision for the readmission by China of tourists who overstay their authorised limit. The Council Conclusions of 2 November 2004 state that the most important criteria for determining whether an agreement should be concluded with a country are the migratory pressures exercised on a Member State and the third country's geographical position in relation to the EU.
5.2 Readmission Clauses

On 3 December 1999, the Council also adopted standard readmission clauses. Such clauses were introduced in cooperation or association agreements. Consequently, association, co-operation and mixed agreements, as well as other agreements will have model readmission clauses. For example, the Cotonou Partnership Agreement between EU Member States and 77 ACP States includes an Article on readmission and an obligation to further negotiate bilateral readmission agreements. Additionally, return and readmission clauses have also been included in an agreement with Egypt.

6. The Second Phase - The Hague Programme

In 2004, the five-year transitional period foreseen for the implementation of the Tampere work programme on migration and asylum came to an end and intense discussions on the adoption of a new multi-annual work programme took place between the Commission, the Council and the Member States. The new five-year work programme, the so-called „Hague Programme“, was adopted at the Brussels European Council on 4/5 November 2004 and deals with all aspects of policies relating to the area of freedom, security and justice, notably fundamental rights and citizenship, asylum and migration, border management and integration. The new programme, which is in itself not legally binding, reflects the ambitions of the (yet to be ratified) Constitution for Europe and contains a political commitment to abolish the requirement of unanimous voting in the Council on all EU immigration and asylum law ‘except for legal immigration’ already by 1 April 2005.122 To implement the Hague Programme, the Council has asked the Commission to present an Action Plan in 2005, detailing a timetable for the adoption and implementation of all the actions foreseen, as well as a yearly ‘scoreboard’ on the progress achieved.

122 This change in the decision-making procedure would require the adoption of a Council decision by unanimous vote following consultation of the European Parliament. See: Vetoes, Opt-outs,
EU Concepts and Proposals on Return and Repatriation

Besides greater coordination and harmonisation in asylum and migration matters already pursued by existing EU policies on migration, the Hague Programme proposes several key steps for the further communitarisation of asylum and migration policy. *Inter alia* on:

- the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, including the establishment of the new European Refugee Fund for the period 2005-2010 and designated Community funds for assisting Member States in the reception and processing of asylum-seekers,
- the integration of migration in the EU’s existing and future relations with third countries, encompassing issues such as refugee protection, combating of illegal migration, return and readmission, and including the establishment of a European Return Fund by 2007,
- the strengthening of controls and surveillance of the external borders of the EU, including the establishment of a Community border management fund.

In conclusion of this chapter, the following sections examine in further detail the policy areas relating to return, repatriation and readmission and their recent evolution.

### 6.1 The Second Phase of the Creation of a Common European Asylum System

The Hague Programme calls for the implementation of the second phase measures towards a common European Asylum System, namely the “establishment of a common asylum procedure” and “a uniform status for those who are granted asylum or subsidiary protection” in the coming years. In principle, this second phase in European asylum policies can be characterised as the quest for “common” standards, as

---

and EU Immigration and Asylum Law, briefing paper prepared by Professor *Steve Peers*, University of Essex, November 2004.
opposed to the adoption of “minimum” standards pursued under the Tampere programme’s first phase. The necessary second-phase instruments and measures to this end shall be submitted to the Council and the European Parliament with a view to their adoption before the end of 2010. As the complete implementation of the first-phase instruments is still pending, as outlined above, the Hague Programme strongly emphasises the necessity of the formal adoption of the Asylum Procedures Directive as soon as possible. It is mainly the unresolved question of a list of “safe countries of origin” that turned out to be a restraint to the formal adoption of the Directive. Though the Hague Programme does not directly refer to a deadline for adoption, the envisaged evaluation of first-phase legal instruments to be concluded in 2007 underlines the urgency and importance it attaches to a swift adoption of the Directive.

Based on the submission of second-phase instruments, the appropriateness as well as the legal and practical implications of joint processing of asylum applications within the Union shall be examined. The Hague Programme does not contain any further comments on what exactly is meant by the term “joint processing” and in which form it should take place. In addition, the issue of the appropriateness and feasibility of the joint processing of asylum applications outside EU territory shall be examined in the framework of a separate study. Already the above-mentioned 2000 Communication “Towards a common asylum procedure” suggested the processing of requests for protection outside the European Union, and the facilitation of arrival of protection seekers on the territory of the Member States by a resettlement scheme. Such an approach shall provide for a more orderly channelling of flows of protection seekers and for a more effective tackling of commercial human smuggling. Following the Communication, a feasibility study on processing the request for protection outside the territory of the Union was launched.\textsuperscript{123} Moreover, in March 2003 the British government presented a draft proposal on “external processing” of asylum claims and on “protection in the region” (the so-called “safe havens” plan) at the occasion of an

informal meeting of the Justice and Home Affairs (JHA) Council. Nevertheless, no agreement on the joint processing of asylum applications outside the territory of the Union has been reached so far. In this respect, it is fair to say that the persistence of problems attached to the creation of an effective and efficient EU return policy is contributing to the further development of processing in the region concepts. It seems obvious that in the absence of consistent return concepts proposals for external processing will not provide an effective solution to the problem as long as they appear to third countries only as an attempt to shift a problem, which the EU is unable to resolve, outside the EU territory.

In 2005 appropriate structures involving the national asylum services of the Member States shall be established with a view to facilitating practical cooperation. This measure contains two new objectives: assisting Member States in achieving a single procedure for the assessment of applications for international protection and assisting Member States in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting from their geographical location. After the establishment of a common asylum procedure in 2010 these structures shall serve as the basis for the establishment of a European office to assist all forms of co-operation between Member States relating to the Common European Asylum System. At present there are already institutionalised forms of cooperation between competent authorities in Member States in existence, such as EURASIL (the EU network for asylum practitioners, established in July 2002 by the Commission) with the aim to cease the activities of CIREA and to improve convergence in asylum policies, decisions and practices through enhanced exchange of information and best practices among EU Member States’ asylum adjudicators and the European Commission. The Hague Programme does not contain any further specifications of what is meant by the term “to


125 Center for Information, Research and Exchange on Asylum.
assist all forms of cooperation” and on how such cooperation should differ from existing arrangements.

In June 2004, the Council reached political agreement on a Commission proposal\(^{127}\) for a second phase of the European Refugee Fund (ERF) to run from 2005 until 2010.\(^{128}\) The “new” European Refugee Fund (hereinafter referred to as “ERF II”) shall be more closely tied in with legislative harmonisation and European asylum policy; contribute to an improved management and a more strategic role of the Commission; and should put more emphasis on European policy dimensions. The Hague Programme refers to and explicitly welcomes the establishment of the ERF II for the period 2005 – 2010. Furthermore, it invites the Commission to additionally designate existing Community funds to assist Member States in asylum matters and calls for the submission of a corresponding proposal. The Commission recently submitted a corresponding proposal in its Communication on a “Framework programme on Solidarity and the Management of Migration Flows” with a total budget of 5,866 million Euro.\(^{129}\) The Communication proposes the establishment of a “European Refugee Fund” for the period 2007 – 2013. 1,184 million Euro are foreseen for asylum and 759 million for the Return Fund. Funding shall be earmarked for technical and administrative assistance in general as well as for technical and administrative assistance in connection with emergency measures. Activities to be covered comprise asylum statistics, exchange of information, thematic meetings, website projects, computerised administrative and financial management, construction and maintenance of computerised management systems, studies, expert meetings, as well as publications and information. How does the ERF II, becoming operational in 2005 and scheduled to run until 2010, relate to the European Refugee Fund, proposed by


the above-mentioned Communication and scheduled to run from 2007 to 2013? From 1 January 2008 on, after completion of its first strategic multi-annual programme by the end of 2007, the ERF II shall function as “European Refugee Fund” along with the proposed financial instruments in the areas of external borders, return and integration, forming one part of the “Framework Programme on Solidarity and the Management of Migration Flows”. The substance of the ERF shall be revised and the scope of eligible actions shall be refined accordingly, in order to avoid any overlap with the proposed Return Fund.

6.2 Further Proposals Relating to Return and Repatriation

Promoting measures in the area of return and readmission required and still requires the adoption of some legislative measures and operational cooperation agreements that are currently being implemented or negotiated. Already adopted by the Council are instruments for assistance in cases of transit for removal by air and the organisation of joint flights for removals of third country nationals subject to a removal measure.130 In order to promote a more effective return policy, enhanced cooperation with third countries is inevitable, in particular through the conclusion of readmission agreements.131 As mentioned above, so far, readmission agreements have been concluded with several countries (Hong Kong, Macao, Sri Lanka and Albania) for nationals from those countries whose individuals are residing illegally within the territory of a Member State. Additional readmission agreements are being drawn up or are under negotiation with Morocco, Algeria, China, Russia, Ukraine, Turkey and Pakistan.132

131 Council of the European Union (No 15896/03), Multi-annual strategic programme of 8 December 2003.
Following the developments in the area of a European return and readmission policy, the Hague Programme stresses again the importance of this policy area. It calls for the start of discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts. This is not a novelty, as the Directive on such minimum standards has been on the European agenda for quite some time, but is still under discussion. In the Operational Programme of the Council for 2005, the Luxembourg and United Kingdom Presidencies refer to the “examination” of a related proposal.\textsuperscript{133}

With regard to a European return and readmission policy the Hague Programme calls in particular for: closer cooperation and mutual technical assistance; the launch of the preparatory phase of a European Return Fund and the establishment thereof (see below); common integrated and country and region specific return programmes; the timely conclusion of Community readmission agreements; and the prompt appointment of a Special Representative for a common readmission policy by the Commission.

### 6.3 The Action Plan

In June 2005, in response to the request from the European Council, the Council and the Commission have adopted the Action Plan which aims at translating the Hague Programme into specific measures. The Action Plan is intended to be the frame of reference for the work of the Council and the Commission over the next five years.

With a view to the problems attached to the return of rejected asylum seekers the ‘Study on the implications, appropriateness and feasibility of joint processing of asylum applications’ will be of particular relevance, especially when it comes to studying ‘joint processing of asylum applications outside EU territory’ until 2006.

\textsuperscript{133} Council of the European Union (No 16299/04), Operational Programme of the Council for 2005 submitted by the incoming Luxembourg and United Kingdom Presidencies of 22 December 2004.
In the area of fighting illegal immigration, the Action Plan reiterated the ‘establishment of an effective removal and repatriation policy based on common standards and closer cooperation and mutual technical assistance’. Looking at the dates specified in the Plan the importance attached to the continued development of a common European return policy becomes clear. Apart from readmission agreements, which are to be concluded in a ‘timely’ way, all measures shall be taken already during 2005: the proposal on return procedures, the preparatory phase of the Return Fund and the appointment of a Special Representative at the Commission for a common readmission policy.

Consequently, the second half of 2005 will most likely see a leap forward in the creation of a common European return policy.
- CHAPTER IV -

EU MEMBER STATES – RETURN POLICIES AND PRACTICES
1. **Introductory Remarks**

An asylum procedure with long decision making procedures and numerous appeal-opportunities in general leads to the creation of an additional pull-factor and to difficulties with regard to the return of rejected asylum seekers. Many of them might form families or become in other ways more integrated in the host society. Apart from legal and factual barriers hindering the removal of the persons in question, also social pressure from local communities might create an additional (political) obstacle to effective removal. Furthermore, in recent years, return and repatriation have become an important element of many governments’ migration policies, due to the broadly accepted view that the return of migrants not availing of a valid residence title – such as rejected asylum seekers, illegal migrants and persons in irregular situations - is as a key pre-condition to guarantee the integrity and credibility of asylum systems and immigration policies.

Obviously, the historical and present patterns of migration to the individual MS are not homogenous, but show a wide variety. Several MS which were emigration countries before their entry into the EU have experienced rather severe changes in terms of migratory movements. Some moved from being emigration to immigration countries not primarily attracting asylum seekers, but economic migrants (both regular and irregular) and family members of migrants already residing in a particular country. Spain for example has traditionally been a country of emigration but in recent years the trend has reversed and 8.4 percent of the 44 million population are non-Spaniards according to provisional figures dating from January 2004. Such changes in migration patterns require policy adjustments addressing the new realities. Arguably, the lack of experience these countries have with implementing effective return and removal policies has lead to large regularisation programmes, especially in Southern parts of Europe. Other MS with a relatively long history of immigration from ex-colonies, via guest worker programmes and large inflows of asylum seekers up to the beginning of the new millennium, theoretically should be well experienced in handling migration issues. However, they still face many difficulties in their mi-
EU Member States – Return Policies and Practices

gration management, especially with regard to return and repatriation. Some of the
new EU Member states have only recently been confronted with an increasing num-
ber of migrants and are still working on adjusting their policies to a new reality,
while at the same time trying to absorb the developing EU standards in their legal
systems, policies and operations.

While developing the basics of the EU’s common asylum and migration policy, the
EU has put great effort in the establishment of common standards on return and repa-
triation of third country nationals in recent years. These were described above in the
previous chapter. The present chapter aims at providing an overview of the present
situation with regard to return within several MS. Still, a variety of different ap-
proaches and standards can be found among the EU Member States when it comes to
return. While using country specific examples as illustration, the chapter will not list
a country-per-country overview, but will concentrate on the variety in policies and
practices themselves. The country reports produced for the present report are at-
tached, as additional source of information on the individual countries. In providing
this overview, individual country reports produced by the Odysseus Network were
used to update the 2002 ICMPD and 2004 IOM reports on this topic and are the
source of information used in this chapter.
2. **General Trends and Statistics**

It can be observed in a number of “old” EU Member States that the numbers of asylum seekers dropped sharply in the recent past. While there are several reasons for this development, one major cause is without doubt the increasingly restrictive asylum procedures, tight border control regimes, highly selective visa systems coupled with flanking measures, such as carrier sanctions. In the Netherlands, for instance this development has led to a reversal in the granting-rejection ratio in asylum claims from an approx. 15%-85% to a 90%-10% approval rate.

The factual developments of return and repatriation management efforts undertaken by states do not lend themselves to an easy description, let alone comparison. The risk of comparing concepts which are not comparable is particularly high when it comes to statistics. States themselves sometimes lack accurate data regarding persons not in need of international protection who are still within their territory despite them being under an expulsion order. In some cases persons who have simply evaded their deportation are counted as persons who have “left”. In other cases, specific data distinguishing between the different groups subject to expulsion orders do not exist; instead statistics are gathered only for the various groups as a whole. In these instances a clear statistical statement regarding those persons relevant to the present study cannot be made.

Those countries, however, which do have data at their disposal in most of the cases, use substantially divergent concepts of return and repatriation. Not least because of lacking exit controls the difficulties of making straightforward statements regarding numbers of persons who follow their order to leave the countries on their own account increase. Moreover, there is no clear information as to the destination of persons who have left the country.
Generally, it can be said that in most of the MS there are no detailed figures available about the number of foreigners obliged to return after rejection of an asylum claim or after a claim for subsidiary protection because no specific data collection exists. The data of expulsion might be collected without any differentiation of the specific reason a person was removed from the country.

Unlike in respect of failed asylum seekers, there is no official estimate of the number of irregular immigrants in the countries and there are no statistics on overstaying. In many countries the entries of visitors are not recorded and as there is no immigration control on embarkation, there is no way of checking whether someone has left the country. The only figures available that are directly relevant are those of illegal entrants and overstayers who are identified or proceeded against.

Due to the absence of comparable data it is very difficult to establish the real extent of return and non-return of rejected asylum seekers and other migrants without a legal status.

National return trends are quite different and as stated in the 2004 IOM Report on Return Migration, there is neither a uniform upward nor downward trend to be observed. In some Member States the number of persons returned has been increasing such as the UK and decreasing in countries like Germany.\textsuperscript{134} As stated in the attached country reports, governments in general do not have a clear picture of people returning. What has been observed as striking in the Member States as expressed in the country reports, is the disparity between orders to leave and actual expulsions carried out. In some countries the rate of the former and the latter has remained relatively stable in the last years, even though the absolute figures have increased. In other countries both the relative and the absolute figures remained constant.

Generally, the lack of comparable data in the area of return hampers the establishing of reliable and comparable statistics. The statistics and figures in this study are provided for in the country reports which are reproduced in the annex to this report.

For planning reasons, it is obvious, that a Community policy on migration and asylum requires proper and especially comparable data. Migration data needs to be harmonised in order to be reliable and comparable. Therefore, the Commission has put forward an action plan for the collection of statistics on asylum and migration, set out in a Communication of May 2003. Eurostat publishes monthly reports giving migration rates and figures for asylum applications. The aim is to produce an annual report to be used for future EU policy-making. Additional effort is put on the improvement of the exchange, analysis and dissemination of the data and on the further development of co-operation among all the European and international bodies concerned, as has been described above.

3. **Legal Instruments in Relation to Return and Repatriation**

Almost all EU Member States introduced new immigration laws or amended existing laws between the years 2000 and 2004. Often, recent legislative measures in the Member States contain provisions considerably tightening up the asylum process, with the intention to discourage those with no valid claim for protection and to speed up the procedure in order to avoid backlogs. This general trend can be seen as one way to deal with an increasing number of (illegal) migrants seeking protection or economic prosperity within EU territory. New and restrictive asylum policies in which a short and swift status determination is a central element is characteristic for the latest developments in EU Member States in line with EU migration and asylum policy.

As already shown in the previous ICMPD study on comprehensive EU Return Policies, 2002, the national systems for termination of residence and implementation of
expulsion orders and deportations vary to some degree. For the sake of integrity and credibility of asylum and other protection regimes on one hand, and on the other to manage and control legal immigration Member States resort to similar procedures: fast-track procedures for “manifestly unfounded” asylum claims, and normal procedures for the substantial examination of asylum claims which are prima facie well-founded. Once finally concluded in the determination procedure that no valid claim could be established, a removal order is issued, which is to be executed within a varying span of time presupposed there are no other impediments to the enforcement of the return. To secure the physical presence of the alien the authorities resort to means of restricting the freedom of movement, or even detain the person concerned. Even if the means available for securing and implementing are similar throughout Europe, the specific regulations of such means differ significantly. These differences ultimately go back to the legal and political traditions of each country. This concerns for example the duration and the limits of detention pending deportation, the appeal rights, the possibilities of review of detention and deportation decisions. The dissimilarities of such regulations cause even greater divergence in practice. Moreover, the concepts of impediments to expulsions, such as safety concerns or lack of medical infrastructure in the country of origin which allows for return are put into practice in a rather uncoordinated fashion.

Due to new laws and provisions and administrative measures concerning migration and asylum, some countries have achieved a significant reduction in the number of arrivals, emphasis in public policy has more recently shifted to the issue of removals. It emerged from recent parliamentary debates, e.g. in the United Kingdom that fewer than one in four failed asylum seekers is recorded as being removed or departing voluntarily and it is estimated that there are more than 250,000 asylum seekers in the UK with no entitlement to stay,\footnote{House of Commons, Hansard Debates, 7 February 2005, Col. 1184.} a situation which is similar in many EU Member States. The governments argue that the failure to remove large numbers of people whose claims have been refused strikes at the credibility of the asylum system. New
EU Member States – Return Policies and Practices

legislative measures introduced in recent years further attempt to dispose of barriers to removal and deliver on the governments’ commitment to increase the rate of removals so that it exceeds the number of unfounded asylum applications. In many countries the official return policy in practice is applied to only a small number of asylum seekers. Only a small percentage leaves the host country in a controlled way, many of those assisted and on a “voluntary basis”. Others receive a residence permit and many abscond or disappear altogether. For additional information, please refer to the country reports of Belgium and the Netherlands in the annex. In the following section below, examples of legal instruments used to determine the status of rejected asylum seekers and persons claiming subsidiary protection are discussed. As previously highlighted, the responsiveness of asylum systems to the ensuing integration process or as the case may be, removal procedure is decisive.

3.1. Legal Status of Rejected Asylum Seekers and Persons Claiming Subsidiary Protection

Only a relatively small percentage of asylum-seekers are granted full refugee status. A significant number of persons receive some form of humanitarian or subsidiary status. Apart from the rights and benefits normally attached to the different statuses, what is of interest in this context is the duration during which such rights will be granted, i.e. the duration an alien will be permitted to remain on the territory based on the respective protection status. In some states included in this report, a person granted refugee status will receive a permanent residence permit in a short time, whereas other states limit the refugee status in duration, after the expiration of which the status may be extended or if the circumstances, which gave rise to the granting of protection, have substantially changed the person concerned has to return to the country of origin.

Other statuses than refugee status are generally granted only for a fixed time which means that after a certain period aliens will come under the obligation to return home. Hence, the various types of statuses are factors in the evaluation of a system’s emphasis of return obligations.
As stated in the country reports, the legal status of rejected asylum seekers and persons under subsidiary protection has not changed over the past few years - as described in the 2002 ICMPD Study and the 2004 IOM Report. With regard to rejected asylum seekers, they usually become illegal residents after notification of the final rejection and termination of the period between notification and final order to leave the country on a voluntary basis.

The Netherlands, for example have introduced in 2001 a uniform status, with the same fixed duration and the same level of rights and benefits attached to it, which is granted to all those who are found to be in need of protection. No other status exists aside from this. This policy was implemented and based, *inter alia*, on the argument that a uniform status avoids further procedures in cases where an asylum seeker, after having been granted a subsidiary status, still lodges an appeal in order to be granted a “stronger” status with a higher level of rights and benefits.

In Finland the asylum applicant is informed during the interview about the different types of decisions that may be made. S/he is informed that if an asylum claim is refused a decision on refusal of entry will also made. Consequently, in conjunction with a refusal of asylum or residence permit, the Directorate of Immigration makes a decision on refusal of entry. The asylum applicant is notified of the decision by the local police with help of an interpreter. An alien whose residence permit is not renewed will be notified of that decision by the local police. In case an alien does not leave Finland voluntarily the Directorate of Immigration makes a decision on deportation from Finland upon the proposal by the police. Temporary protected persons as defined in the EU Council directive 2001/55/EC concerning protection can be given temporary protection up to three years. Temporary protection status is intended to be short term and the persons concerned are informed from the outset to leave when protection comes to an end.
In Austria, recognised refugees are granted a permanent residence permit. In cases where deportation is not possible due to legal or objective reasons, a special tolerated status in form of a renewable temporary residence permit for one year is granted to the individual. In case these reasons cease, the status is lifted.

In this context, Belgian law differs from the other Member States, as it does not, until today, regulate a protection regime other than the procedure granting refugee status under the Geneva Convention. There is no subsidiary protection provided for, but Belgium is currently working on the establishment of such forms of protection as it has to put domestic law in conformity with European law. Recognised refugees are given unlimited leave to remain must renew their residence permit annually. The authorities may also issue residence permits to rejected asylum seekers on humanitarian grounds.

In Portugal, for example, there are two stages in the asylum procedure, which is applicable to subsidiary protection (single procedure): a preliminary stage for assessing the admissibility of the application, and if admissible, the stage for establishing refugee status (granting asylum) or granting subsidiary protection e.g. residence permit on humanitarian grounds.

In the UK, the 2004 Act radically changed the system for immigration and asylum appeals by replacing the two–tier appellate authority (consisting of adjudicators and the Immigration Appeal Tribunal) with a single–tier body called the Asylum and Immigration Tribunal (AIT) and placing restrictions upon access to the courts.136

This has been accompanied by cuts to legal aid for immigration and asylum work and the introduction of a new conditional fee regime in applications for High Court review and actual reconsideration by the AIT. The effect of changes in the legal aid system has been to create increasing shortage of specialist legal advice and represen-

EU Member States – Return Policies and Practices

tation. The problem is acute throughout the country and is affecting people at all stages of the asylum process, not least because of the increasing speed at which applications and appeals are being processed.

One of the main challenges in the Member States is to simplify and consequently to speed up the asylum procedure and to inform asylum seekers as soon as possible whether they could stay or would have to return. A single procedure for protection (or “one stop shop”) has been mooted as one possible way for streamlining the removal process. This would allow refugee and subsidiary protection needs and other refoulement related issues to be considered earlier on in the process. In the majority of MS asylum applications are presently considered under a specific procedure whilst other claims for protection are addressed in a different procedure, sometimes in the relatively late context of the removal process. In this context some MS introduced one single asylum status which is aimed at stopping asylum seekers who had been granted one status from appealing for a more secure status. Occasionally, new temporary residence permits allowing for the application of a permanent status after a certain period of time, were introduced. Procedural changes include the possibility of a limited higher appeal and the introduction of a more comprehensive rejection of the application that next to the rejection of the asylum request also stipulated that all reception facilities will end and that the rejected asylum seeker must leave the host country or will be expelled. The fact that appeals against the first instance determination will not have suspensive effect should also result in a speedier process. Asylum applicants who fail to cooperate with the authorities and furnish relevant information may find their applications deemed withdrawn or lacking in credibility. Withdrawal will result in termination of the application and an order to leave the host country.

In effect, the asylum claim is a ground for appealing against removal in circumstances where the applicant is not otherwise entitled to remain in the host country. This is because an asylum claim is, in legal terms, a claim that removal would be contrary to the protection laid down in the 1951 Convention. In the case of asylum seekers whose claims were rejected, the obligation to leave a Member State in gen-
eral arises with the final rejection of an asylum claim with no remedy or - in case of accelerated procedures - if an application for asylum has been rejected as manifestly unfounded with the administrative decision unless an administrative court has granted within a period of seven days suspensive effect to the appeal.\textsuperscript{137}

In some countries rejected asylum seekers are left in a limbo situation as for example when they do not fulfil the conditions for obtaining a residence permit on exceptional reasons but cannot be removed or deported, usually because their countries of origin refuse to re-admit them or because the country is in a state of conflict or unrest. They will stay in the host country without a temporary residence permit or any legal status, and are therefore in a situation of legal uncertainty and insecurity. This is described, for example, in the Belgian country report.

3.2 Persons Whose Residence Title or Humanitarian Residence Permit or Temporary Protection has been Terminated (Cessation Clause, Directive on Temporary Protection)

For the development of a concise return policy concerning temporary protection systems specific regard has been laid on the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, which is described at some length in the previous chapter.\textsuperscript{138}.

Many countries provide for subsidiary status in their respective laws on aliens and regulations concerning asylum. Subsidiary protection gives third country nationals in need of protection residence in a host country for a certain period of time usually with less rights and less benefits than asylum seekers. This also includes provision

\textsuperscript{137} See for example Country Report Austria.

for humanitarian protection schemes. Non-refoulement provisions are included according to the Geneva Convention or on the basis of factual reasons- if no country issues a “laissez passer” or return certificate and/or no readmission agreement has been concluded with the respective third country. In such cases the alien receives a deportation deferment which usually can be renewed. It does however, not legalise a person’s sojourn in the host country. It also does not serve as a residence permit. Furthermore, legislation in some countries allows postponing the commencement of the enforcement of an expulsion order or a residence ban up to a certain amount of time upon application. Depending on the country this practice is more commonly referred to as toleration.

The perception of many EU host countries that the widespread use of exceptional leave was acting as a pull factor and increasing the number of unfounded applications led to a change in their subsidiary protection policy. As an example, the United Kingdom changed in 2003 the exceptional leave to remain, and replaced it by humanitarian protection and discretionary leave schemes. As a general rule, humanitarian protection is granted to those who, though not refugees, would, if removed, face in the country of return a serious risk to life or person arising from the death penalty, unlawful killing or torture, inhuman or degrading treatment or punishment. Discretionary leave is granted to some people who do not qualify for humanitarian protection or leave under the rules of immigration. The difference between the two categories lies in the provision that those who qualify for humanitarian protection will be granted three years of leave and then, if still in need of protection, will be eligible to apply for settlement in the host country. Under discretionary leave, periods of three years or less can be granted, after which a person will only be able to apply for a further period of leave, rather than for settlement.\(^{139}\)

\(^{139}\) For more information see Country Report of the Netherlands and the United Kingdom in the Annex.
Third country nationals who have no entitlement to enter or stay under the above categories of leave are liable to removal. They are or become irregular immigrants, and may become potential targets of regularisation. (See below in the section on regularisation schemes). Other than rejected asylum seekers, individuals in this situation can be those who have fallen into irregularity after their leave to remain in the host country expired (overstayers); people who have permission to be in the country but are in breach of their conditions of stay (such as visitors working illegally); and clandestine entrants or those who obtained leave to enter by deception.

In Austria, for example, during the procedure for the imposition of an expulsion order or residence ban also a petition may be filed claiming that the person fears these risks. In these cases a “humanitarian residence permit” can be issued. It is the right to residence for a certain time. If the humanitarian residence permit is not prolonged the person has to leave the country and may, thus, be removed from the national territory.

At present only few humanitarian residence permits are issued throughout the European Union, especially in comparison to the situation following the arrival of hundreds of thousands of refugees from former Yugoslavia. In order to cope with the large influx of new arrivals, EU Member States introduced a temporary protection status on humanitarian grounds. The temporary protection system has led to a re-evaluation of return activities, as it became increasingly clear that the pivotal point for successful implementation of this system lies in the effectiveness of return after the grounds for the temporary status ceased to exist.

In 2004, Germany widened the possible grounds for humanitarian residence permits so that it now can be issued if incontestably established that the conditions for a “barrier to deportation” are met. This signified a substantial change in the legal status of persons who previously received only a toleration status. Under the new Immigration Act they will receive a residence permit even if the reasons for leaving Germany are
based “only” upon factual conditions like the absence of valid documents for travel or the refusal of the country of origin to take back its own nationals. This provision is of course subject to exceptions in cases where the foreigner represents a risk to the general public or to security of the Federal Republic of Germany or if serious grounds warrant the assumption that the foreigner has committed a crime against peace, a war-crime or a crime against humanity or an offence of considerable severity, for example.\(^\text{140}\)

As stated in the country report of Portugal, a displaced person whose temporary protection has ended can always apply for asylum or subsidiary protection in Portugal, under the terms of the Asylum Act. According to Article 1 of the Asylum Act refugees have the subjective right to asylum, protected in the Constitution as a fundamental right. Furthermore, a foreign national who does not meet the criteria for recognising refugee status and that is prevented or feels unable to return to the country of his nationality or habitual residence, for reasons of serious insecurity as a result of armed conflicts or from repeated outrage of human rights that occurs therein, have a subjective right to a residence permit on humanitarian grounds (subsidiary protection), guaranteed by Article 8 of the Asylum Act.

Interestingly, there is no special regime that provides for a residence permit on humanitarian grounds under French law, as “humanitarian grounds” are included in the conditions required to receive a temporary residence permit. Such a temporary permit may be issued in case of existing family ties, in case of health problems when the returnee could not benefit from adequate treatment in the country of origin. A temporary residence permit is also issued when the alien was employed and receives a "rente d’accident de travail".\(^\text{141}\)

\(^{140}\) For further details see the Country Report Germany in the Annex.

\(^{141}\) For additional information see Country Report France in the Annex.
In some Member States, such as France and Belgium, for example, a humanitarian residence permit might be issued depending on the discretion of the authorities. As recipients of this status do not have any kind of status and rights attached to that status, they are simply “tolerated”, which causes serious problems for the persons concerned, especially if the situation continues for a longer time. This is described e.g. in the country reports of Belgium, Luxembourg and the United Kingdom.

In several Member States, such as Austria, Germany, Luxembourg to name a few, the law provides specifically for situations of war and civil war and foresees ad hoc mechanisms. In times of armed conflict the governments may, by ministerial order, grant a temporary right of residence to directly affected groups of aliens who cannot find protection elsewhere as for example the case in Austria concerning the right of persons from Bosnia and Herzegovina and Kosovo was regulated by a number of such ministerial orders. Refugees from Bosnia received temporary residence permits, which were prolonged several times. They also received social aid and other benefits. For Bosnians integrated in Austria a possibility of permanent residence has been provided for under the so-called Bosnians’ Act (see country report of Austria in the annex). Austria also received a certain quota of refugees from Kosovo in an international joint programme. These persons got a limited residence permit by a general order of the government. The right of residence was prolonged several times.

In Luxembourg no subsidiary form of protection currently exists, there is only a regulation for “toleration” in place. The attached country report states that presently the availability of alternative procedures to obtain a humanitarian toleration is slim. The law of 3 April 1996, as modified by the law of 18 March 2000, allows for the government to grant a toleration document to turned-down asylum seekers. Such a document will be handed over in case the repatriation is impossible due to factual circumstances. In practice, such a toleration document will be given mostly when a person is ill. The document is valid for several months only and it may or may not be prolonged.
The draft bill on asylum procedures of 2 December 2004 will introduce the concept of subsidiary protection in Luxembourg law, in case there are real and serious reasons to believe that, if the applicant was sent back to his country, there would be a real risk for his life.

### 3.3 Regularisation Schemes - Alternative Possibilities to Obtain Toleration or Leave to Remain

Closely related to the question of status differences is the matter of transition from protection to durable solutions. Traditionally, there are three possible ways for durable solutions: integration, resettlement and return. In this regard, a shift in the preference of states can be discerned. While in the first three decades of the existence of the Geneva Refugee Convention the preferred durable solution to refugee situations particularly in Western Europe appeared to be integration, the preference today gradually shifts to return. With regard to aliens with either no, withdrawn or expired legal status, Member States have established regularisation programmes during the past decades as one other way to account for and manage the illegal residents within their territories. Usually, regularisation programmes are not the first option of a country when it comes to dealing with foreigners in irregular situations. Governments are often reluctant to regularise aliens because they fear that more immigrants would come or also that they would have to implicitly acknowledge that existing migration controls are ineffective. Regularisation is a very controversial subject as can be seen from the ongoing discussion among Member States on the Spanish policy in this regard. As can be seen in the country reports, MS have different concepts of regularisation programmes. While some countries have permanent regularisation programmes for foreigners who have lived continuously over a long period of time in the country, others like Spain, Belgium and Italy, for example prefer the so-called one-off option, which, like in the case of Spain might occur on a regular basis and

---

EU Member States – Return Policies and Practices

can be seen as ongoing. Permanent programmes offer the very good conditions in terms of economic and social integration but usually have very long waiting periods.

In order to respond to massive protest or sustained pressure by the municipal authorities and/or immigrant organisations, some MS, such as France, Luxembourg, Belgium and the United Kingdom decided during the last decennium to adopt one-shot regulation measures concerning illegal migrants who were able to prove either long residence or valid working contracts in order to improve the social situation of migrants. A different policy measure aimed at increasing labour market transparency was used by Italy, Portugal, France and Spain in order not to loose their ability to regulate the labour market and to be able to collect tax revenue. This is an important regularization measure since the social integration of migrants largely depends on their successful economic integration.

One way or the other, in all Member States still a significant number of persons every year receive a status through regularisation, including in form of a humanitarian residence permit as is the case in Austria, where no general regularization schemes are included, but only the tool of humanitarian residence status.

Regularisation of illegal immigrants in the European Union is subject to national legislation, and several Member States have used this instrument to regularise large numbers of migrants in an irregular situation. As mentioned above, regularization concepts vary to a great extent throughout the EU and each regularization implemented in one MS may have consequences in other Member States. Comparing regulations, the period of time necessary to have stayed in the host country in order to be eligible for regularization is also very different, between 2-3 years and 14 years of proven residency. While holding the European Union presidency in 2004, the Dutch Government launched, a proposal on a mutual information exchange and early warning system on regularization schemes, but did not succeed in implementing such a
In Belgium the following categories are applied for irregulars to qualify for regularisation:

- aliens who have filed an application to be recognised according to the Geneva Convention without having been granted a final decision after several years (less time if they have children attending school age),
- aliens who are, for reasons independent of their will, unable to return to their country of origin,
- aliens who are seriously ill and thus unable to return to their country of origin,
- aliens who may invoke humanitarian circumstances and who have family ties in the host country.

Belgium ran a regularisation campaign of the stay of four categories of aliens from 2000 until 2002. This was a one-shot-operation allowing aliens in illegal situation to lodge their application for regularisation during a short and limited period of time (three weeks in January 2000). Since the end of 2004, after negotiations with the Minister of Interior, the Aliens Office decides on the regularisation of asylum seekers whose application is still pending since before the 1st of January 2001. The aliens receive a permit of stay for an unlimited period of time. This regularisation does not prevent them from continuing the asylum procedure. Asylum seekers having filed their application after this date might also receive an unlimited permit of stay if the length of the procedure exceeds three years if they have children at school age or after four years in others cases. In the latter case, they have to prove their integration into the Belgium society.
In the United Kingdom, among others, the so-called long residence rule operates on a case–by–case basis and by no means represents a blanket approach or a rolling regularisation. Group regularisations (or amnesties) are believed to act as a powerful pull factor and are therefore resisted. There have been three or four such amnesties in the past following changes to the law either by Parliament or important decisions by the courts but they have never involved substantial numbers.\(^{143}\) Generally, regularisation measures in the United Kingdom are aimed at reducing the asylum application backlog resulting from the long duration of asylum procedures.\(^{144}\)

Another form of regularisation which has been applied in the Netherlands is a so-called “time policy” allowing for regularisation of aliens who have been staying in the host country for three years or more while awaiting the final outcome of their immigration procedure. The central element of this policy is that a residence permit was granted, once the immigration procedure lasted more than three years since the application for a residence permit was submitted, provided that the migrant stayed in the host country with consent of the administration, did not unduly delay the procedure and had no criminal record. This policy was applied in the Netherlands both to asylum cases and other (regular) immigration cases. In order that this arrangement would not attract new immigrants or entail new procedures, the residence permit was granted ex officio.

Moreover, families with young children living in the Netherlands for approximately seven years are permitted to gain indefinite leave to remain. This concession is commonly called the “long residence rule” which, in effect, is a rolling regularisation programme.

\(^{143}\) One took place between 1974-78 and led to 1,809 grants of settlement. The second amnesty took place in 1978 and resulted in 462 grants of settlement. See Elspeth Guild, ‘The regularisation of illegal immigrants in the United Kingdom’, in Regularisations of Illegal Immigrants in the European Union, Collection de la Faculté de Droit de L’Université Libre de Bruxelles, 2000.
EU Member States – Return Policies and Practices

In Finland there is presently no policy of regularisation of clandestine immigrants. As the number of clandestine immigrants is estimated to be rather low, there is no political or social pressure to regularise. Those who don’t have a right to stay in the country under the Aliens Act are removed. If removing is not possible, the person concerned is issued with a temporary residence permit.

Portugal has introduced the so-called “stay-permit”, created for the purpose of solving the irregular situation of thousands of foreign citizens, who over the past few years have entered Portugal to take up paid employment. The stay permit was issued to all foreign citizens working in Portugal whether they have entered Portugal legally (for example, on a tourist or short stay visa, which does not allow the holder to take up a professional activity) or illegally (for example, without a visa or those who have stayed beyond the expiry date).145


The most significant amendment had to do with the restriction of economic immigration. Firstly, this new regulation repealed the right to a stay permit with the intention of preventing the legalization of immigrant workers in Portugal. Secondly, it implemented the obligation of an annual limit of concessions to work visas, defined by the Government (quota system).

---


The repeal of the stay permit did not take into consideration the existence of thousands of immigrant workers in Portugal and as a consequence, prevented the possible regulation of their situation. With the existing elevated number of illegal immigrants of Brazilian nationality and the diplomatic pressure exerted by the Brazilian Government, in July 2003 an Agreement was established with Brazil which allowed the regularisation of Brazilians who had entered Portugal until 11 July 2003. However, this exceptional regulation was viewed critically by other immigrant associations, which claimed it discriminated against illegal immigrants of other nationalities than Brazilian. Hence, another regulation was approved in 2004 which established an exceptional regularisation process for all immigrants working without a residence permit, or work visa.

The policy of the Spanish Government to regularise large numbers of foreigners living in an irregular situation in the country has been heavily criticised by other MS as being yet another pull factor for potential new migrants. According to provisional government figures, some 600,000 immigrants have taken advantage of the recent three-month programme to regularise their status. Under the terms of the programme, immigrants could only benefit if they have work contracts and had been living in the country six months before the program took effect. They must provide proof of their registration with a local council dated August 7 2004 or earlier, have no criminal record and possess at least a six-month work contract. However, the conservative opposition party has criticised the scheme and EU Member States have expressed concern that some of those who legalise their status could go on to seek work in another EU country.

In Italy the Bossi-Fini law of 2002, amended the 1998 Aliens Law and established a regularisation programme for unauthorized migrants. The most important changes were the introduction of immigrant quotas, immigrant-employment contracts and increased deportations. Most political parties were opposed to another regularisation (Italy has implemented a series of regularisation programmes more or less success-
fully prior to this one), yet the implementation of this programme succeeded as it was framed “humanitarian”. It provided for the regularisation of two types of irregular immigrants, domestic workers and those employed as dependent workers.

In Luxembourg, in the past years, there has been one regularization procedure as such (March-June 2001). By exception, work permits and residence permits outside the normal scope of the modified law on foreigners of 28 March 1972 on the entry and sojourn of foreigners and the employment of foreign workforce were granted.

The criteria were decided and announced by the government, and printed in a brochure. 7 categories of foreigners were eligible.\textsuperscript{146} Additionally, nationals from Kosovo were entitled to regularisation if they had arrived before 1 January 2000. Foreigners who fulfilled one of these conditions were given 6 months to find a job. At the end of the campaign, 2,850 people had been regularised, 2,007 of whom came from former Yugoslavia, and practically all of whom were asylum-seekers: the total amounted to 1,554 applicants, 64% of which got a work and a residence permit. After this “one-shot” regularization, no other such procedure was used.

In 2004, the new government announced a “more humane attitude” towards asylum seekers, whose applications were rejected. Residence permits to families, especially originating from the former Yugoslavia, who have been living in Luxembourg since August 2001 and whose children were school, were granted a residence permit. However no regularisation procedure, whether legal or administrative, was set up. Instead, the new Ministry of Foreign Affairs and Immigration, selected potential families by granting residence permits issued on an “exceptional basis”.

\textsuperscript{146} For details please refer to the Country report Luxembourg in Part 3.
4. Legal and Administrative Schemes for Voluntary Return

In recent years, several countries increasingly made available facilitation measures to promote the return of rejected asylum-seekers. Such measures previously used to be available predominantly for aliens holding residence permits for their respective host countries. Facilitation measures for rejected asylum-seekers are relatively recent tools to increase returns. The great majority of such measures are embedded in so-called voluntary return assistance programmes which are state funded and often implemented by IOM, in some cases in co-operation with national NGOs. Support and benefits offered to rejected asylum-seekers willing to return under a programme vary to some extent throughout Europe. Usually, such programmes are comprised of travel costs, some pocket money and transportation of luggage. Sometimes, vocational training and reintegration grants may additionally be made available.

A broad distinction can be made as to the target groups of voluntary return assistance programmes. On one hand, several states offer general return assistance programmes targeting at asylum-seekers who withdraw from the process and rejected asylum-seekers irrespective of the countries of origin. Additionally, there are special programmes which are focused on specific regions or countries of origin, particularly after ending of armed conflicts, often including elements of reconstruction. Such programmes frequently build upon existing general return programmes, but are adapted to the specific situation in the countries of origin.

Great differences exist as to the financial means provided for by national authorities. Consequently, the scope of voluntary return assistance programmes varies accordingly. Moreover, it appears that there are significant differences as to the organisational structures for providing such voluntary return assistance.

Some countries which are included in this report, however, do not provide any voluntary return assistance programmes at all. In these countries, a clear-cut distinction
between voluntary and non-voluntary return cannot be made. Nevertheless, assistance for rejected asylum-seekers wishing to return voluntarily is available, although not in form of programmes.

4.1 Interdependence and Interplay of Voluntary and Forced Return, Measures and Implementation

Voluntary return assistance programmes for aliens not holding any form of residence permit, i.e. rejected asylum-seekers, do not always show the expected results. There are evidences that voluntary return measures do need some enforcement elements. Experiences have shown that only those voluntary return assistance programmes yielded numerical success which were accompanied by functioning enforcement regimes. Consequently, voluntary and forced return appear to be part of the same concept, based on the policy which emphasizes that persons, who have been examined in a full and fair procedure not to be in need of international protection, have to leave the territory of the host state. It has been acknowledged that voluntary and non-voluntary returns are placed in a complex relationship of interdependence. A number of voluntary return assistance programmes have proven unsuccessful, as there was a lack of enforcement in case rejected asylum seekers did not opt for participation in such programmes. Governmental authorities therefore take a twofold “carrot and stick” approach: providing for return assistance for rejected asylum-seekers willing to return and emphasizing enforcement if this option is not taken.

While accepting the need for enforced return under specific circumstances, the general return policies in the EU give preference to voluntary returns. This so-called assisted voluntary return is generally accepted by EU governments as the preferred option, since it proved to be more cost-effective, humane and conducive to better relations with the countries of origin. The number of assisted voluntary return programmes has increased substantially over the past ten years and all the countries sub-
ject to the present study have such programmes available for potential returnees. \(^{147}\)

Experience has also shown that additional support in the reintegration process makes return more sustainable by offering the returnee at least some opportunity to reintegrate in the country of origin.

In many of the traditional immigration countries (NL, UK, France and Germany) with a strong public debate on migration there is increased pressure for return to be undertaken on a compulsory rather than voluntary basis, which raises questions as to how ‘voluntary’ the return programme funded by some governments actually is. The availability of a voluntary return route has been accompanied by a tougher stance on the granting of humanitarian status or extensions to exceptional leave. Countries recognise that without an effective forced return policy, voluntary repatriation often does not work.

In most countries, voluntary return programmes are open to those applicants with pending or failed asylum claims, and those granted exceptional leave to remain such as humanitarian or discretionary leave. These return programmes often have an individual approach and vary significantly between the Member States. The programmes may provide basic assistance only, in the form of advice and information, pre–departure, transit and post–arrival assistance. Regularly, returnees are offered personal compensation of costs to organise their life or start a small business. In some countries the main incentive for voluntary return is financial assistance (Luxemburg, Poland), whereas other Member States offer a wide range of return incentives, occasionally even divided up in different stages thereby offering the possibility of voluntary assisted return even after rather long reflection periods as is the case in the Netherlands. In some countries provisions to expand assisted voluntary return programmes were made under the new legislative acts, which provide for arrangements to assist people to return voluntarily or help them decide about returning. This could include financial and practical support on and after arrival to help successful reinteg-

EU Member States – Return Policies and Practices

gration, and to explore and prepare visits for those considering returning. In Finland, the assisted voluntary return programme is included in the Ministry of the Interior’s guidelines on expulsion and forced return orders, to ensure there is an alternative to enforced returns.

The needs of the local community or region are mostly not taken into account and only few return projects include development related criteria. Experience in smaller scale projects has shown that broad reintegration programmes would make return more sustainable. Therefore, the most sophisticated return programmes also include reintegration assistance that benefits the overall community where returnees settle.

In Italy, the International Organisation for Migrations (IOM) manages a comprehensive programme of assisted voluntary return in the framework of the Central Protection System for asylum seekers and refugees. The programme started in 2001 with the support of the Ministry of the Interior, UNHCR and the Italian Association of Municipalities. According to the figures compiled by ECRE, around 100 immigrants and asylum seekers participated in an assisted voluntary return programme carried out by IOM in 2003. In April 2003, IOM together with the Ministry of the Interior presented the first guide on “informed migration, with a special focus on the Mediterranean area (Italy, Greece, Malta, Spain, Portugal) with a view to raise awareness among asylum seekers and migrants about the existence of such voluntary return programmes.

The country report of the Netherlands states that the return of refugees and displaced persons has successfully been linked to the reconstruction of the region in several return programmes, for example implemented in Bosnia-Herzegovina and Kosovo. Supplementary to return programmes focusing exclusively on reintegration, local development activities were implemented to create an economic and income oriented
dimension of the reintegration. Other models of development cooperation have been implemented in which returnees were trained on the spot in order to play a substantial role in the execution and evaluation of projects. The model of job placement for returnees into private small and medium-sized enterprises has been developed further, including various elements of support for employment. The results of these projects indicate that breaking the barrier between voluntary return and development opens a dimension, which should gain entry into the discussion of the common return policy within the European Union. The focus lies on the revitalisation of the economy in the countries of origin by means of the creation of new jobs and of employment possibilities. By these projects, chances of the returning refugees are increased for a long-term securing of their existence within the country of return.

In Austria the main organisations in charge of voluntary return programmes are Caritas, Volkshilfe and the IOM. The general programme for assisted return (Rückkehrhilfe) has been in operation since November 1998. From 1 December 1998 to 31 December 2004, 7,467 persons from about 60 countries have received counselling regarding the voluntary return programmes carried out by Caritas. During this period, 4,479 aliens have voluntarily returned with the assistance of Caritas. The programme is aimed at supporting aliens who want to return to their home country and lack the necessary means to do so on their own. But the programme does not only provide financial support. The clients also receive help in finding a decision and developing plans for a restart in their home countries. Another important part is the support in organisational matters, especially to obtain necessary documents and organise the journey.

In general, the counselling of a client includes the following steps:

- Clarification of voluntariness: In a first step it must be clarified if the client really wishes to return to his home country.

148 www.migratie.nl
149 See section on voluntary return in the Country Report of the Netherlands.
EU Member States – Return Policies and Practices

- Development of prospects in the home country: Concrete options for re-integration are to be developed.
- Application for financial support at the Ministry of the Interior: If the alien cannot pay the travel costs by himself, Caritas supports him in filling a request for financial support to the Ministry of the Interior.
- Booking of flights via IOM: In organising the journey itself, Caritas cooperates with IOM. In 2004 92,8 % of the returnees travelled air route. IOM books the flights and takes care of the client during stopovers.
- Financial support for reintegration: Usually financial support for reintegration is provided for in form of a remittance to the home country.

In 2004, 1.016 new clients received counselling about voluntary return by the Caritas. Together with the 169 persons who had already been advised in the preceding years, a total of 1.185 persons have been advised in 2004. In 2004, 664 aliens returned to 47 different countries, that’s 65,4 % of the advised persons. Nine of the 664 returning aliens did not go back to their home country, but travelled to a third country. Most of the returning aliens went back to Georgia (16 %), Turkey (14 %) and Kosovo (11 %). 79 % of the returnees were man. 80 % of the returnees were asylum seekers in different stages of the proceedings, 15 % were aliens obliged to leave Austria under the Aliens Act. The remaining 5 % were refugees who had obtained asylum (0,3 %), aliens under subsidiary protection (0,6 %) and other groups of aliens.

521 persons (78,5 %) have been granted financial support for their reintegration in the amount of an average € 233,- per person. The amount depends on the facts of every individual case. If the alien has stayed in Austria for up to one year, the maximum is fixed at € 365,-. Has he or she already stayed in Austria for more than one year, the amount can reach up to € 1.500,-. The amount actually granted depends on the country of origin, the length of the stay in Austria, possible incomes in the home country, state of health, family ties and other personal factors.
The total costs of the project amounted to €658,400.- in 2004. The Ministry of the Interior provided €217,881,32 to this sum, the European Refugee Fund provided €302,118,68.

Additionally, the programme “mobile evaluation of prospects” (Mobile Perspektivenabklärung) is also run by Caritas Austria. The project has been in operation since 1 March 2003. The aim is to help asylum seekers to clarify their prospects in Austria as soon as possible and to evaluate if a voluntary return might be an option, in the case they have got no chances to be granted asylum. The staff members of Caritas visit asylum seekers in their accommodations. The counselling focuses on a clarification of the chances to be granted asylum in Austria. If the client decides to return to his home country voluntarily, a concrete advice is carried out that correlates to the procedure described above.

From 1 March 2003 to 30 April 2004 94 clients returned to their home countries, from 1 May 2004 to 15 March 2005 another 90 persons made use of the opportunity to return via this project of Caritas Austria.

The total costs of the project amounted to €261,599.- in 2004. The Ministry of the Interior provided €111,201.- to this sum, the European Refugee Fund provided €130,799.-.

In Belgium the main programme designed to assist and support the return of asylum seekers both during determination and after rejection is the IOM-run Return and Emigration of Asylum seekers ex-Belgium (REAB). Worth noting is the fact that since 1999 the programme is accessible also to individuals detained pending their removal if they explicitly express the wish to return under the auspices of the IOM. Even if the programme is generally open to foreign nationals of any nationality, some exceptions apply concerning inter alia nationals of Romania, Bulgaria, Poland and Albania. Belgian Immigration Service have special operational arrangements in
place for these countries. Furthermore, individuals posing a threat to public order or security are not eligible to partake.

Support varies according to the time spent in the country. The applicant cannot receive any financial grant if present in Belgium for less than 3 months. If the alien was present in Belgium between 3 and 6 months, s/he may receive the full amount, again. Other foreign nationals, however, present for more than 6 months may profit from the full contribution. According to the Belgian authorities, 10 to 12 detainees avail themselves of voluntary return assistance every month.

Finland has been actively supporting return by offering assistance programmes. Since RAFIN III (Information, Counselling, Return and Reinsertion Assistance for Asylum Seekers Currently Residing in Finland) and DRITA III (Return and Occupational Reintegration of Kosovo Albanian Refugees from Finland) have ended, the Return of Qualified Afghans (RQA) is the only on-going voluntary return programme implemented in co-operation with IOM in Finland. Within the framework of the general Return of Qualified Afghans programme (IOM-RQA), this programme will provide an opportunity for 30 qualified and skilled Afghans residing in Finland to be placed in identified professional positions or assist them in starting up small businesses in Afghanistan. The project started in July 2002 lasted until the end of 2004.

In France the Office des Migrations Internationales (OMI), which is an autonomous body under control of the Ministry of Social Affairs, is charged with the design and implementation of support programmes to facilitate return. Each programme is specific and targets an individual group of foreign nationals. In order to be eligible, persons under temporary protection, persons whose international protection has

---

150 Except nationals from India and Congo.
151 OMI has a network of two offices in Paris, 8 in “provinces” and several abroad.
ended and rejected asylum seekers (i.e. “sans papier”) must have been subject to an “invitation à quitter le territoire” (IQF). Therefore, asylum-seekers are eligible only at the end of the procedures and upon exhaustion of appeal rights. It has, moreover, been indicated by the OMI that it does not actively and directly seek to contact rejected asylum seekers but waits for them to approach the Offices. Furthermore, as indicated above OMI is categorically kept out of the asylum process and is accordingly only called in upon issuing of an IQF.

OMI has the responsibility to ensure that the support provided by the programmes is only available once. Consequently, OMI has to verify whether the individual has already received benefits from other programmes. Further criteria stipulate that the candidate must have lived in France upon application, as well as not having been issued an expulsion order (APRF). Though, programmes can differ with regard to conditions set regarding health care, voluntary return programmes are general in character.

In Germany and elsewhere, recently efforts have been undertaken to establish within the responsibility of the Länder centers for controlled return. These centers have been set up in order to make the organizational preparations for return. The basic concept is that persons ordered to leave should be psychologically prepared for return rather than giving them a perspective of integration. This could be combined with professional training and other incentives for voluntary return. It could well be imagined that such institutions which require a larger number of persons in order to operate efficiently could be established on a trans-national level.

---

152 Once a final negative decision has been issued the rejected asylum-seeker falls within the group of aliens in irregular situation. The Préfecture delivers an “invitation à quitter le territoire” (IQF) to the foreign national. The alien has to leave by his/her own means and is informed about subsequent judicial proceedings in case of non-compliance. If the rejected asylum-seeker does not leave within the territory 30 days, the Minister of Interior or the Préfet may issue the “arrêté préfectorale de reconduite à la frontière” (APRF). An expulsion order can be enforced as soon as it is issued.
EU Member States – Return Policies and Practices

In this regard the establishment of the European Refugee Fund\textsuperscript{153} had great impact on the development of voluntary return programmes as many assisted voluntary return programmes throughout the European Union are financed through the Fund and the respective host country governments. Many of these projects are implemented by international organisations and NGO’s ideally working in partnership with the Member States and the countries of origin.

4.2 Factors Hindering Voluntary Return

There are many factors which hinder voluntary return. A major problem is the lack of travel documents, and sometimes the unwillingness of the country of origin to provide replacements. The family ties in the host country, political, economic, social, religious situation in the home country are also factors that may hamper the voluntary return. Also other factors, such the economic and social situation of the illegal immigrant, the migrants fear or shame for the failure to succeed in a better life abroad can have negative influence on the willingness to return voluntarily. Additionally, – and easier to solve, it is the lack of information about the possibility of financial and other support for the return and/or the low level of financial support granted can be factors impeding the voluntary return.

In several country reports, it is noted that another important reason not to participate in a voluntary return programme can be the prohibition to re-enter the territory of the host country within a certain period of time and the enrolment in the Schengen Information System for purpose of non-admission in any Schengen Country during this period.

In continuation a selection of voluntary return programmes run in EU MS as described in the country reports is presented.\textsuperscript{154}


\textsuperscript{154} For more detailed information on voluntary return programmes see the country reports in Part 3.
The Dutch government is of the position that “return is the primary responsibility of the alien, not of the government”. However, in some cases return assistance may be made available to rejected asylum seekers who wish to return voluntarily. A general voluntary return programme, the “Return and Emigration of Aliens from the Netherlands” (REAN), has been set up targeting rejected asylum seekers as well as asylum-seekers still in the determination procedure and illegal migrants. After receiving a negative asylum decision, the rejectee is invited to an interview with COA officers where he is informed about return assistance programmes. The availability of departure assistance by the IOM is specifically mentioned during these interviews.\(^{155}\) It aims at facilitating the voluntary departure of aliens not entitled to stay in the Netherlands, including those who are prepared to withdraw from pending proceedings.

Currently, IOM carries out three country specific REAN-plus projects to stimulate the reintegration of persons returning to their country of origin (Afghanistan, Angola and Iraq). Worth mentioning here is the Angolan REAN-plus programme merely concentrates on returning (ex-) unaccompanied minors. The IOM can assist an unaccompanied minor in tracing family members in his country of return. The programme started as from January 2003. From January 2003 until December 2004 in total 508 people returned to Angola with a reintegration contribution.

In addition to the above-mentioned return assistance programmes that focus on asylum seekers at any stage of the procedure, there are special provisions for aliens enjoying a legal status. In April 2000, the Repatriation Act entered into force, aiming at “individuals drawn from integration policy target groups, who wish to settle in their countries of origin, but do not have the financial means to do so”.\(^{156}\) The establish-

---

\(^{155}\) For the purpose of offering return assistance IOM has 4 specific offices in the Netherlands.

\(^{156}\) The Repatriation Act provides a one-time compensation for the expenses of travelling and moving, plus an allowance benefit, under certain conditions, for the first 2 months following the return (€ 2.850,-/adult, € 5.700,-/family), and a monthly remigration allowance for persons over 45 years old, i.e. a monthly pension to be paid in the country of destination until decease of the beneficiary.
ment of the return programme is an element of the Dutch government’s integrated policy on aliens, ‘integrated’ in the meaning that there is proper co-ordination in the admission, supervision and return of aliens.

In the United Kingdom an independent evaluation of the voluntary returns programme, commissioned by the Home Office, found that it provided significant cost savings for the IND in comparison with enforced removals and enabled people to return to a greater number of countries. The programme was commended for providing asylum seekers with a dignified, timely departure. However, the study also evidenced shortcomings in the referral system, which affected the level of demand for the programme. To increase the demand for voluntary returns, the programme is in the process of being made available to detainees in removal centres.

Under Polish law, rejected asylum seekers are not granted any direct assistance from the Government, but are referred to IOM. In Poland, IOM started to run its first voluntary return programme within the framework of the European Refugee Fund in 2004 and is aimed at asylum seekers in the refugee procedure and also at rejected applicants.

Following their detention by the Portuguese police, rejected asylum seekers and other illegal immigrants are provided the opportunity to return freely to their origin country before detention and before a procedure of expulsion is initiated. According to article 100 of the Aliens Act, the illegal alien can be notified by the Aliens and Borders Service to leave voluntarily the Portuguese territory within a time period from 10 to 20 days. In this case he or she will not be subject of a ban of re-entry the territory. This is an incentive to voluntary return. In order to encourage voluntary return, Article 126 A of the Aliens Act foresees state aid for co-operation programmes established with IOM. With the exception of aliens who benefit from temporary protection, the beneficiaries of the Voluntary Return Program are banned from entering Portugal within a period of at least 5 years and can be found in the
Schengen Information System with the purpose of non-admission (Article 126-A (2) and (4) of Immigration Law).

5. Administrative Procedures for Enforcement of Return

Taking the 2002 ICMPD report as a basis it becomes apparent that the problems attached to the other actual removal of third-country national have remained unchanged. The main difficulty of national administrations is related to the issue of identification of irregular migrants. As technical a detail as it may appear, it is the single most pressing issue when we talk about return. To know at least the minimum about a potential returnee, such as nationality and the country origin is a key prerequisite for effective implementation of any removal order. Keeping in mind the high percentage of undocumented asylum seekers it becomes clear that efficiency of return policies hinges upon effective identification procedures. If managed to identify, the next step is to arrange replacement documents which are accepted by the country of origin in question. The next question which arises in the removal process is whether or not the person is to be escorted by escorting personnel or not. The main reasons for escorting are security related. Complex legal considerations arise in the context of escorting officers executing their tasks on board of airplanes, in transit situations and in countries of origin.

As can be concluded from the country reports in Annex, increasing removal seems to be a part of the immigration and asylum strategies of EU Member States. These strategies include plans to expand detention and fast-tracking of asylum claims and secure more effective return arrangements with the countries of origin.

There is a large variety of different removal procedures for rejected asylum seekers from a Member States. The formal procedures for removal are triggered by the un-
derlying immigration decision against the individual. According to the information provided in the country reports, the actual implementation of return measures appears to be problematic for the majority of the Member States. The reported difficulties seem to be uniform to a great extent. As mentioned above, lacking identification and travel documents and uncooperative behaviour on behalf of aliens pose severe problems for responsible authorities to implement removals. For obvious reasons, there are limits as to the means to establish identities during the asylum procedures. It is only after final negative decisions that authorities may resort to the whole range of measures, including presentations at foreign representations, making use of foreign immigration experts or even taking rejectees to the border of the assumed country of origin.

In the UK new provisions were enacted in 2004 which are meant to cater for returns. Section 9 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 aims to encourage more families to return voluntarily by ending their unlimited right to support when the legal process has been exhausted and when they are able to take up a voluntary, paid route home. This policy is currently being piloted by the Home Office’s Immigration and Nationality Directorate (IND) at three of its local enforcement offices across the UK (Manchester, Leeds and Becket House), covering 120 families. Section 2 introduces a new offence of deliberately destroying or discarding travel documents in an attempt to frustrate removal. In addition, airlines are asked to copy travel documents on certain routes.

The removal policies and practice in Spain give the same treatment to all aliens, whether they are rejected asylum seekers or illegal aliens on other grounds. The asylum procedure and/or any other kind of international protection only applies to aliens who clearly ask for asylum or international protection, either at the Spanish border or inside the Spanish territory. The procedure applied to those persons is described by
1994 Asylum Act\textsuperscript{157} and its 1995 Implementation Rules. If they do not obtain the refugee status or a subsidiary protection status, the asylum authorities finish their tasks by notifying the rejected asylum seeker and the request to voluntarily leave the Spanish territory within 15 days.

At this moment the refused asylum seekers fall under the 2003 Aliens Act and the 2004 Implementation Rules to that Act\textsuperscript{158}. Thus, if they do not leave the Spanish territory in the established period of time, and provided that they are not able to regularise their status as legal aliens through the 2003 Aliens Act, they incur into a grounds of expulsion and an expulsion order may be delivered against them. They become irregular aliens in the same way as other irregular aliens who never have applied for asylum (i.e.: those who managed to enter the Spanish territory irregularly or those who entered the Spanish territory regularly but incurred into an irregularity \textit{sur place}).

It is to be noted that in practice most irregular aliens in Spain ("\textit{sin papeles}") manage to remain into the Spanish territory even if they have incurred into grounds for expulsion due to their irregular residence. Quite often those irregular aliens find a job in the black market and sometime afterwards an important number of them reaches some kind of regularisation, either because they are in the list of preferences to obtain a work permit, or because they obtain a temporary permit due to the figure of "\textit{arraigo}" (irregular residence during a time period of three years jointly with special links in Spain).


Moreover, there have been already five extraordinary regularisation procedures in Spain since first 1985 Aliens Act\textsuperscript{159} was approved. Currently (April, 2004) the sixth extraordinary process is open and the Spanish Government thinks that around 800,000 irregular worker immigrants could obtain their work permit during this process, however, nearly to finish it, only some 350,000 have acceded to the procedure.

Hence, it is to be said that most of irregular aliens in Spain are not removed. The practice in Spain is that the expulsion orders are executed when the irregular alien commits a summary crime or is involved in acts contrary to public order, otherwise the practice is a kind of unofficial “toleration” of irregular immigrants.

As in most other EU Member State Germany is also trying to pursue a stricter policy of removal and return. Stronger efforts are undertaken in order to promote voluntary return. Therefore, a number of programmes have been undertaken to organise government-assisted return programmes. Most recent statistics available on voluntary return indicate that from 2002 – 2004 on the whole 33 381 persons have voluntarily returned, among them 1 302 persons from Bosnia-Herzegovina, 1 401 from Bulgaria and 1 117 from Iraq and 1 153 from Iran, to mention the largest countries. In addition, by a special programme 14 510 persons from Serbia-Montenegro have returned and 2 2217 persons from Turkey. It is recognised that repatriation must meet various requirements whose necessary degree of interplay local aliens authorities cannot achieve. Therefore, repatriation should include counselling adapted to the foreigners individual needs. The Independent Migration Commission 2000 has noted that the offer of support for economic and vocational reintegration should be incentive enough to leave Germany on the one hand, but must not, for instance, act as an incentive for renewed immigration to Germany.

\textsuperscript{159} Organic Act 7/1985 (BOE of July 3, 1985) and its Implementation Rules approved by Royal-
5.1 Competences and Procedures for Deportation Decisions

The capacity to remove individuals from the territory of the EU Member States has in recent years been streamlined by way of enactment of rules which seek to restrict or remove the courts’ jurisdiction against negative asylum decisions made by immigration authorities, and by making greater use of detention of asylum seekers and restricting their ability to work and access support.

In the Member States an expulsion decision may be issued if the following premises occur: a) illegal residence; b) illegal employment or illegal self-employment; c) lack of sufficient financial means necessary for maintenance while in the host country; d) an alien’s further stay would constitute a threat to national safety or security or the protection of public security and order or would be contradictory to national interests; e) illegal entry or an attempt to enter illegally; f) non-compliance with a decision obliging an alien to leave the territory of the host country voluntarily; g) non-compliance with fiscal obligations in the host country; i) completion of an imprisonment sentence for intentional criminal offence or fiscal offence.

Generally, illegal residents are subject to detention and are subsequently removed. This also concerns all other migrants who are illegally in a host country because they could not or were not willing to obtain a residence permit. The law in some Member States has got an additional category, namely the illegal entrant. Categories of illegal entrants include those who enter by deception of an immigration officer, by virtue of using false documents, or failing to supply all the relevant information to an immigration officer. Most of them lodge an asylum claim after irregular entry and if the claim is unsuccessful they will be liable to removal as illegal entrants.

---

Decree 1119/86 of May 26 (BOE of June 12, 1986).
5.1.1 Institutional Responsibility

According to the administrative structures, the overall responsibility for forced return lies within the Ministry of Interior and the Immigration Office in most Member States, whereas the enforcement falls under the competence of the police. In some countries there are special units who carry out all forced returns, with or without escorts.

In Finland, removal decisions are made by the Directorate of Immigration and upon recommendation of the police. In France removal enforcement is carried out under the competence of the Directorate of Civil Liberties and Legal Affairs/Central Border Police Directorate.

5.1.2 Operational Steps for Forced Return

A final negative decision on a residence permit or asylum application is usually accompanied with by a request to leave the country within a certain period of time. After expiry of the time limit, an expulsion/removal order is issued. Expulsion order can be appealed against with suspensive effect. Expulsion orders are enforceable after becoming legally binding and the alien may then be removed.

Moreover, aliens may be expelled by administrative order if they are unlawfully resident in a host country. The lack of financial means for self-maintenance is a ground for expulsion, as well as illegally entering, working in prostitution without permits, or where the person’s presence is deemed to be a threat to public security and order.

Removal will generally not be considered appropriate where there are minor dependent children in a family that has been living continuously in most host countries cer-

---

tain amount of time, unless there are strong countervailing factors, such as a conviction for a serious offence.

The Italian country report is a good example to show in what way the limits and the obstacles mentioned when dealing with the access to the asylum procedure are dramatically linked to the measures foreseen for rejection and expulsion: asylum seekers arriving on the Southern coasts\textsuperscript{161} or through the Eastern borders are at risk of being rejected or expelled without even having the chance to express the will to ask for protection\textsuperscript{162}. In order to understand the framework in which return policies could be managed and deportation is implemented, the most important legal instruments concerning repatriation of irregular migrants are described below.

Italy, as well as other countries, has implemented the Directive 2001/40/CE on mutual recognition of return decisions, which foresees that removal decisions adopted by the competent national authorities are rejection or expulsion (as specified further on), as well as the correspondent measures adopted by authorities of another EU Member State. The Prefect (Local Government authority) is charged to adopt the implementation of a removal provision issued by another Member State, if necessary after having had the necessary documentation from that country.\textsuperscript{163}

Rejection is an immediate denial of access to the national territory (art. 10 S.A.) and is enforced mainly by Border police when a foreign citizen attempts to enter the territory without fulfilling the entry conditions. Rejection implies non-admission or re-

\textsuperscript{161} One of the latest cases occurred in Lampedusa (Sicily): In March 2005 some 180 people were deported from Italy to Libya, with police escort. The European Parliament adopted a Resolution inviting Italy to prevent from implementing collective expulsions of asylum seekers and “irregular migrants” towards Libya or other countries and to grant the individual treatment of asylum requests and the respect of the non-refoulement principle.

\textsuperscript{162} See also UNHCR, Press-Communicate, Italy: UNHCR deeply concerned about Lampedusa deportation of Libyans, 18.03.2005.

\textsuperscript{163} See also country reports of Spain, France and Portugal.
EU Member States – Return Policies and Practices

removal of the foreign citizen from the territory, without being prejudicial to his/her request for entry afterwards, if conditions are fulfilled.

Differently from rejection, expulsion (art. 12-16 S.A.) affects a foreign citizen after having entered the country and it represents the measure to remove the foreign citizen and to prevent him/her from re-entering the territory for a certain period. Recently, two Constitutional Court judgements deal with this specific part of the “special” immigration law. When provided with an expulsion order, the foreign citizen is compelled to leave the national territory (autonomously or through escorting), immediately or within a certain period of time, and is prevented from re-entering the national territory.

The Single Act envisages three forms of expulsion: 1) Administrative expulsion, 2) expulsion for security reasons and 3) expulsion substituting detention.

An administrative expulsion may be a) ordered by the Minister of Interior for reasons of public order and national security and enforced by the Head of local Police – Ministry of the Interior; or b) ordered by the Prefect, Prefetto – Head of the Provincial Governmental Authority, in case of illegal entry or stay in the national territory or in case the migrant belongs to categories identified as dangerous. This is the normal kind of expulsion, ordered by a Prefectorial decree and usually immediately enforceable (by the Questore) even if the person appeals.

164 Judgement n.222/2004 declares unconstitutional the immediate enforcement of the expulsion and the lack of sufficient defence measures for the foreign citizen within the validation procedure and states the necessity of a judicial validation of the expulsion order – before the escort to the border, and with the possibility for the foreign citizen to be listened to and to be defended. Judgement n.223/2004 deems unlawful the provision foreseeing arrest for a crime for which it was not possible to apply custody in prison.

165 According to the Convention of the Schengen Agreement (ratified by Law n. 388/1993), the foreign citizens can be registered on the Schengen Information System by the security or judicial au-
2) *Expulsion as a security measure* (judicial provision): the penal judge can order the expulsion of any migrant who is convicted of some of the crimes envisaged by the Code of Criminal Procedure, if he deems the foreign citizen to be socially dangerous. If identity, nationality are clear and a carrier is available, the expulsion is executive.

3) *Expulsion as a sanction substituting detention* (judicial provision): if the term of imprisonment inflicted by the judge is up to 2 years and there is no possibility for a suspended sentence, and if the execution is immediately enforceable, the judge can decide to substitute the sentence with an expulsion lasting at least 5 years. The foreign citizen is escorted to the border.

The key features of the Italian removal system are the so-called “centres for temporary permanence and assistance” (CPTA) or “temporary permanence centres” (CPT), introduced in 1998. Since then, detention measures in CPTs have been adopted for rejected asylum seekers, who have been given notice of an expulsion order with immediate conduct to the border. Detention centres in Italy are guarded by the Police force and are considered to help in the implementation process of the expulsion.\(^{166}\)

### 5.1.3 Escorts

As a general observation drawn from the information of the country reports, Member States are making use of escorts -usually police officers- for difficult removal.\(^{167}\)

\(^{166}\) See Italian Country report for further details.

\(^{167}\) In the UK escorts are sometimes provided by private contractors.
5.1.4 Chartered Flights

Here, the practice of the Member States differs very much, as countries like Belgium, the Netherlands and Luxembourg usually remove deportees by chartered flights, whereas deportees from Austria are mostly removed on commercial flights, due to the high costs of chartered flights.

The following examples taken from the country report in Part 3 shall illustrate the procedural arrangements for forced return in selected Member States.

Ireland has recently introduced a series of new measures to speed up the asylum and removal process in respect of nationals of states which are subject to prioritisation orders for the purposes of asylum processing: this concerns nationals of Nigeria, Romania, Bulgaria, Croatia and South Africa. In addition to an expedited asylum-determination process and speedier processing of deportation orders for applicants found not to be in need of refugee protection (and having no other protection or humanitarian needs), the new arrangements will include the establishment of dedicated accommodation centres. Individuals concerned will have statutory obligations to reside in such centres and to report to immigration officers in the course of the asylum and deportation processes. Failure to comply with these obligations in the removal process is an arrestable offence. It is expected that these arrangements will facilitate the speedier processing and effecting of deportation orders, since failed asylum seekers will be more readily available to the immigration authorities and Garda National Immigration Bureau while return travel arrangements are being made. It is made clear that the choice to avail of the voluntary return procedure prior to the making of a deportation order will continue to be available. The Minister has stated that the “possibility for faster returns “are more adequate on the individual and are critical to the protection of the integrity of the asylum system”. ¹⁶⁸

¹⁶⁸ These new measures appear to have been applied in a deportation exercise carried out in March 2005. It appears that 35 Nigerian nationals were arrested and deported using a specially-chartered aircraft. Several of those deported were “aged-out” minors, who had arrived in Ireland as unaccompanied minors and had been placed in the care of the Health Service Executive until the age of
In the United Kingdom so-called “port removal” applies to people who arrive at a seaport or airport and apply for leave to enter the country. If, after consideration, their application is refused, they will then be liable to removal under a procedure known as ‘port removal’, against which they have limited rights of appeal. It is an uncomplicated process as the only decision, which needs to be made by the immigration officer, is that the individual does not qualify for leave to enter the country. The term “port removal” is not a technical term, but is generally used to describe this group of removals. It applies both to those removed directly from the port of arrival, and to those who are granted temporary admission to the United Kingdom for a period of time while their claim for asylum is considered, before being removed when the claim is unsuccessful. Enforced removals are usually carried out with the assistance of the police and the escorting services. Most deportations are effected singly or in family groups on scheduled flights. Charter flights are organised occasionally to remove groups of detainees.

In France, once a final negative decision is made, the Préfet has the responsibility to issue a request to leave the territory (IQF). The alien at this stage is normally informed about the possibility to benefit from voluntary return assistance programmes offered by OMI. When the rejected asylum-seeker has received an IQF he/she is considered to be in an irregular situation and consequently receives no material assistance anymore. At that stage of the process he is also informed about the possible prosecutions in case of non-compliance. The individual must leave the territory within 30 days. Moreover, once an “arrêté préfectorale de reconduite à la frontière” (APRF) has been signed by the Minister or the Préfet, the removal operation must be carried out as soon as possible. The “sous direction des étrangers et de la circulation

18, after which they could be deported: one of these was about to sit his School Leaving Certificate and the Minister for Justice has subsequently decided to allow him to return for a limited period. A number of adults – who seem to have been failed asylum-seekers – left children behind in Ireland and this separation of parent and child – effected by the deportee – has caused considerable concerns (as have reports of “heavy-handed” tactics by the police and other officials).
transfrontière” has the responsibility to implement forced removals and the enforcement itself is carried out by police officers.

In Poland an expulsion decision may be given as an order of immediate enforceability (i.e. an appeal does not have the suspensive effect) for reasons regarding national safety or security or the protection of public security and order, as well as national interest. An expulsion decision sets a time limit of maximum 14 days for leaving the territory of Poland. The decision may also determine a route and the place of crossing the border, and can oblige the alien concerned to stay in a determined place and report to the relevant authority until the execution of the decision. The alien is not allowed to leave the place determined without the consent of the authority, which issued the decision.

As described in the country report of Spain, two expulsion procedures are stipulated, which are ordinary and preferential. The law referring to preferential expulsion extends from very serious to serious infringements, and provides efficacy to the urgency procedure. This reform attributes the function of regulation and control to expulsion.

The reasons for preferential expulsion are the following:

1. Participation in activities putting at risk the internal security or which might damage the external relations of Spain or carrying out activities contrary to public order and classified as very serious by article 24 of the Organic Law 1/1992 on the Protection and Safety of Citizens (hereinafter LPSC).

2. Induce, promote, favour or facilitate, as part of a profit making organisation, the smuggling of persons in transit or whose destination is Spain as long as this does not constitute an offence.
3. Being on Spanish territory irregularly.

4. Failure to comply with the measures imposed as regards public security, as regards periodically reporting to an authority or as regards staying away from a border or a specific town.

5. The participation of aliens in activities which are contrary to public order and are considered to be serious in article 23 of Organic Law 1/1992, on LPSC.

Preferential expulsion is immediately executable and scant time is given for allegations and proof: forty-eight hours. This limited period makes it practically impossible to guarantee the alien’s right to effective judicial protection. Moreover, the alien cannot request the suspension of the expulsion in accord with section 2 of article 21 LOE and article 132 of Royal Decree 2393/2004.

Once preferential expulsion is adopted, the alien must leave Spanish territory. This implies that s/he cannot enter Spain or any other Schengen state for a minimum of three and a maximum of ten years. The reasons for ordinary expulsion are two: serious or very serious offence as described in articles 53 and 54 LOE, and as a substitute for certain penalties imposed for a number of offences described in sections 7 and 8 of article 57 LOE. The sanctioning process of the LOE is characterised by the difficulty to suspend the decision. Firstly the short periods of time given. Secondly, the discretion of the judge to appreciate the suspension of the appeal or not. Thus, the alien only has the possibility of requesting asylum which would mean the suspension of the expulsion under the terms of Article 141.9 of Royal Decree 2393/2004.

The alien must be notified of the expulsion resolution together with the appeals he may lodge and the competent body. The person is banned from entering the country for a period of three to ten years, increased by five years after the reform extensive to the territory of the Schengen States.
5.2 Administrative Measures to Secure Enforced Return (Restriction of Movement, Detention, Restriction of Social Assistance)

A major obstacle in asylum determination procedures, as well as in return operations is the fact that a number of asylum-seekers, respectively rejected asylum-seekers, are reported to show a lack of co-operation. Lacking co-operation together with missing identification and travel documents represent the core problems authorities are facing. Several states have adopted special provisions which aim at securing the individual’s co-operation during the asylum procedure, i.e. in establishing identity and travel routes, etc. The majority of states, however, use existing regulations which allow some discretion as to their application. Most of states’ regulation in regard to social assistance for asylum-seekers and rejectees allow the reduction of such benefits towards those who are deemed uncooperative. In some countries cash benefits may completely be withdrawn and replaced by in kind contributions. In regard to rejected asylum-seekers some countries do not provide any form of assistance at all once a final decision is handed down. There are in any case significant differences as to authorities’ discretion and available measures to sanction uncooperative behaviour.

Additional measures include reporting obligations, restrictions to the freedom of movement and assigning to specific accommodation facilities. Asylum cases are going to be terminated if the lack of co-operation has reached a certain level.

Greater emphasis on removal has resulted in an increasingly assertive detention policy as a way to support removal. An increasing number of asylum claimants are detained on arrival and held in detention during part or all of the process of dealing with their application. In some countries the name of detention centre was changed to removal centres, a change that, according to government statements, was intended to send a message to people that they will be removed if they are unsuccessful in their asylum claim. There is careful case-tracking of applicants who have passed through
the detention centre, so that if the appeal is dismissed, prompt action can be taken to remove the individual. Increasingly authorities in Member States\textsuperscript{169} operate fast-track process at such centres, where asylum seekers are detained from arrival throughout the asylum process. Nationality is the main criterion for expedited decision-making. In the United Kingdom, it is primarily asylum seekers from China, Turkey, India, and Nigeria figure as having the highest detention rate in normal as well as fast-track detention facilities.

As stated in several country reports, detention aims to ensure the removal from the territory. It is legitimate only if the aim is to remove a person from the national territory. Usually, prolongation of detention is possible under the following conditions:

- detention is limited to the time necessary for the actual removal procedure
- the steps for the removal were taken within seven working days of the arrest;
- removal is possible.

It depends on the situation in the country of origin whether removal is possible. In certain cases, the removal is objectively not possible because the state refuses to cooperate, in the sense that no travel documents are being issued or the country simply refuses to take people back\textsuperscript{170}

In the Italian country report the return process with its administrative, legal and other barriers is described as a rather complicated one.

\textsuperscript{169} See country report of Austria and UK.
\textsuperscript{170} See for example the country reports of Belgium, Luxembourg and Liechtenstein.
The enforcement of an expulsion order is often a very time consuming procedure and requires a series of administrative measures, such as the check of the aliens’ identity and/or nationality, the need to obtain travel documents and the possibility of the carriers’ availability. As a consequence, aliens who are subject to a refusal of entry or to an expulsion measure, are detained in a temporary detention centre ("centro di permanenza temporanea e assistenza"), by order of the Head of the local Police. If it is not possible to keep the migrant in the CPT, or the detention terms have expired without enforcement of the expulsion order, the person is ordered to leave the country within 5 days of notification. If the alien does not comply, he/she is sentenced to further detention from 6 months to 1 year. Where the renewal of the stay permit has not been renewed, imprisonment may last from 1 to 4 years. Following the arrest, the migrant is expelled and escorted to the border by the police force.

Due to these complex features, the Italian return system has proved to be inadequate to the dimensions of the migration phenomenon, and as a consequence the figures people staying in the country in an irregular situation have increased and illegal entries are still on the rise.

Regulations in regard to detention as well as the number of detention facilities vary to a considerable degree throughout European states. Of particular relevance in the present context are maximum duration of detention pending removal and the number of detention units. Comparing the duration of detention pending removal, it becomes evident that significant differences prevail as regards the maximum duration of detention. Legislations of a number of states stipulate an absolute maximum duration, after which the alien is to be released. Moreover, even within this group of states, notable time differences exist. According to some, the rather short duration often proves insufficient in regard to the regularly protracted procedures to obtain necessary identification and travel documents. This fact has at times led to the rejectee being released before the authorities had been able to acquire the documents. In a number of countries, however, no time limits in regard to detention exists at all, which means that in practice aliens may be held in detention indefinitely.
Secondly, there are differences as to the number of detention units. It must be borne in mind, that, according to international legal standards, aliens detained pending removal are to be placed in suitable premises strictly separated from accused and convicted criminals. Description of the present situation regarding detention facilities is not always an easy exercise, since reality sometimes looks different than the respective laws foresee. According to their legislations, states provide for special detention facilities. However, reality looks somewhat different.

The following, described in the country report of the NL is a good example that in theory the solution to the problem of absconding, is putting asylum seekers in aliens detention at the moment they receive a (final) negative decision. But this ‘solution’ shows little sense of reality. Firstly, alien detention is only possible when there is a real prospect of return and the government does participate actively in this return. Secondly, there is only limited detention capacity. Moreover, the detention often has only a relative effectiveness. The longer the detention takes, the less chance there is on a successful return.

Generally, governments are recognizing that not all rejected asylum seekers can be removed. This may be due to the fact that there is no country which is willing to admit the person. A distinction has to be drawn between aliens who refuse to cooperate in establishing their identity and thus deliberately frustrating the return process and those aliens who do cooperate, but cannot return because of the reluctance of some countries to accept their returning nationals and cooperate in providing return documents. In such cases, according to the policy, the alien should be able to qualify for a regular temporary residence permit, due to the fact that it is not his/her fault that removal cannot be carried out. In such cases the alien has to demonstrate that he has done everything which could reasonably be expected in order to leave the country which is often hard to prove. This policy is applicable in most Member States and explicitly mentioned in the country reports as one of the main obstacles to effective return.
In some countries only an insufficient number of detention units appear to be available. A reason for this lack often put forward, are the fluctuating numbers of asylum-seekers and rejectees who the authorities decide to detain. In order to cope with variable numbers, authorities have developed flexible systems which allow at times of increasing demand additional facilities to be made available.

Another reason for lacking detention capacities may lie in the fact that recent amendments to aliens legislations have extended the grounds on which aliens may be detained, and additionally have increased the maximum duration of detention.

Apart from detention, authorities may resort to other measures to control the presence of aliens under the obligation to leave and thus prevent them from absconding. It is evident, however, that responsible authorities appear rather cautious about the effectiveness of alternative measures. Nevertheless, national as well as international legal standards call for tests of proportionality of measures of deprivation of liberty, according to which liberty may only be deprived if it appears indispensable for the implementation of expulsion orders and if there are no alternative measures which would interfere less with the rights of the alien. In many countries detention of minors is not permissible, hence, in such cases, milder measures have to be applied.

In the Netherlands and in the UK another significant deterrent measure is the restriction of access to social support by asylum seekers introduced in some countries. This harsh measure was meant to deter asylum applications by overstayers or other irregular migrants, enforcement action against whom is frequently frustrated by their lodging an asylum claim on detection. However it was applied in such a draconian way as to leave destitute thousands of individuals who had claimed asylum within hours of arrival.
Some Member States, such as Austria, recently established so-called initial reception centres which might be seen as centres for management of deportation in a wider sense. The objective was to have places for screening procedures and procedures about the admissibility of the claim. One effect however is that also the deportations following a decision rejecting the claim or declaring it inadmissible are more easily manageable as these persons stay at one place.

The legislative changes are mostly intended to cope with the situation of illegal migrants and/or to speed up procedures by introducing the admissibility and screening procedure in the initial reception centres.

In several Member States, admissibility procedures or pre-screening procedures in the initial reception centres were introduced to speed up the asylum procedure and allow quicker and easier return. In order to keep track of an alien who is to be removed from the MS, the person may also be subject of an obligation to report to authorities, or to stay at designated residence rather than in a detention centre. Germany has recently set up under the responsibility of the Länder centres for controlled return, where the logistical preparations for return is being carried out. Returnees receive psychological support to be better prepared for the return.

A detention order may be issued if an asylum seeker has left the initial reception centre during the admissibility procedure without justification and also if an expulsion order – even if it is not final – has been issued pursuant to Art. 5a Asylum Act (Dublin) or in case of manifestly unfounded claims, and also if an alien files a second application for asylum following a final ruling in the admissibility procedure or following a final negative decision.

Rejected asylum seekers, migrants residing illegally in the host country and criminal migrants who have committed minor offences may be arrested and held in detention pending their removal provided that such action is necessary as a procedural security
measure in connection with the imposition of a residence ban or expulsion order. The practice of whether detained or in special facilities is very different in the Member States.

In Ireland aliens are usually detained in prisons, whereas in Austria aliens are placed in special facilities. The duration of such detention is usually restricted but may be extended under special circumstances, i.e. if it is necessary to clarify the identity of the person, to obtain necessary travel documents or in cases where the deportation could not be carried out due to physical resistance of the alien. Social care is mainly provided by NGO’s. Some police detention facilities have so called open centres where persons detained are free to move during daytime.

The country report of the United Kingdom states that it is a relatively small number of people who are actually removed to their countries of origin. Mostly, deportation has been applicable only to those whose departure from the country is judged ‘conducive to the public good’ or who have been convicted of a criminal offence and recommended for deportation by the court, or who are family members of a deportee. The Immigration Rules specify that in considering whether deportation is the right course of action on the merits, the public interest will be balanced against any compassionate circumstances of the case. The factors to be taken into account before reaching a deportation decision are age; length of residence in the United Kingdom; strength of connections with the United Kingdom; personal history, including character, conduct and employment record; domestic circumstances; previous criminal record and the nature of any offence of which the person has been convicted; any representations received on the person’s behalf.

There is also the possibility to apply more moderate measures, especially for persons under full age. More lenient measures are mainly seen in accommodation in premises specified by the authority. Persons staying at an allocated accommodation are obliged to regularly present themselves to the authorities.
Regarding minors the use of moderate measures is obligatory in most Member States. In some countries there is an exception to this rule, in cases where the authorities have reasons to believe that this measure will not facilitate the procedure. In some Member States minors cannot be put in detention or forcibly removed, other countries do not have such restrictions in place, but only pay special attention to the best interest of a child (under 18 years of age) as well as to the minor’s special needs during detention and removal.

Consequently, in some countries unaccompanied minors may be accommodated in separate centres (e.g. clearing houses). In these centres minors usually stay for a certain period of time during which the authorities have to clarify the status and perspectives of the minor. During the stay the minor receives adequate care and counselling. Then the minor may be transferred to other accommodation premises As stated in the ICMPD-study on comprehensive EU return policies and practices of 2002, the standards of treatment regarding minors are quite different in European countries and as lined out above, this still has not changed.

5.3 Legal Barriers to Deportation (Interpretation of International and National Impediments to Deportation such as Concept of Inhuman Treatment)

All countries dispose of a statutory scheme for asylum determination and appeals either based on the Geneva Convention or making it part of the national law. Immigration rules must not be implemented in any way which contravenes the states’ obligation to provide protection to those in danger of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in their source country. The enforcement of immigration law against persons who enter the country is therefore suspended if they claim asylum, while that claim is considered. Immigration law has also been affected by the European Convention on Human Rights (ECHR). Most importantly, Article 3 of the ECHR, and its interpreta-
tion by the courts, prohibits torture or inhuman and degrading treatment or punishment, and prevents the removal of people to a country where they might be exposed to such harm. As a matter of policy, most countries would also not seek to remove a person to a state where there is a real risk that they would face unlawful killing contrary to Article 2 of the ECHR or would face a real risk of the death penalty being imposed (contrary to Protocol 6 or even where the exception in Article 2 of Protocol 6 applies).

In a few countries and under certain circumstances, an asylum seeker at the end of the legal process still has the right, on human rights grounds, to make an appeal against removal from the country. In the United Kingdom, since October 2000 when the Human Rights Act 1998 came into force, appellants have been required to state reasons why their human rights have breached by the refusal of their asylum claim, as part of the appeal process. However, for those who applied for asylum before this date, the appeal process can proceed without human rights grounds being raised until the removal stage. In effect, lengthy delays between refusal of an asylum application and removal have resulted in asylum seekers becoming increasingly integrated into British society, forming ties and relationships, and challenging removal on the grounds that it would amount to an unjustifiable interference with their private life under Article 8 ECHR, a common situation in many countries. In addition, if the situation of the individual has changed between the appeal decision and removal, such that new grounds for claiming breach of human rights have come into being, a further appeal may be brought.

Article 3 ECHR is relevant to the consideration of most applications for asylum. Where there are substantial grounds for believing that, if removed, the applicant would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment, humanitarian protection is normally granted. In the majority of the EU member states, applicants may also claim that their removal from the host

171 The Immigration and Asylum Appeals (One-Stop Procedure) Regulations 2000.
country would constitute a breach of Article 3 on account of their medical condition. Recent Strasbourg case law, has established that the circumstances in which such a breach could be found will be exceptional. In those exceptional cases consideration may be given to the grant of discretionary leave on medical grounds. The initial period of discretionary leave granted is normally three years unless there are clear reasons for granting a shorter period. Examples may include where the applicant is undergoing a course of treatment of a finite duration or is awaiting surgery, after which Article 3 barriers may no longer apply.

It has recently emerged that some EU governments are trying to overcome barriers to removal on Article 3 grounds, in cases where the presence of the person in the host country is believed not to be conducive to the public good, by seeking diplomatic assurances from the countries of origin. Governments tend to be satisfied that the person concerned will not be at risk of ill-treatment if returned if it obtains assurances from the government of the country to which he/she is to be removed regarding the future treatment of that person. The UN Committee Against Torture has singled out such development in the removal policy as a matter of particular concern.172

5.4. Factual Barriers to Deportation (Destruction of Document, False Identity, Non-cooperation in Getting Travel Documents)

There is a number of obstacles to the return of rejected asylum seekers such as the difficulties in establishing their identity and nationality where identity or travel documents are lacking. Further obstacles are the lack of co-operation of countries of origin, the risk of absconding and in some Member States the extremely long asylum procedures and the consequently very long stay of a person in the host country. Member States also claim the vulnerable status of rejected asylum seekers to be an obstacle as well as the lack of capacity and poor administrative decision-making.
In an attempt to reduce the delay between decision-making and removals and so reduce the scope for legal barriers, EU Member States have dramatically increased the processing of asylum applications, including putting a high percentage of cases through fast-track procedures. However, the quality of decision-making by immigration caseworkers often remains poor and many cases go unnecessarily to an appeal, as explicitly stated in the UK country report. Many governments know that more resources should be invested into achieving high quality administrative decision-making in asylum cases, which could make it easier to return failed applicants more quickly.

### 5.4.1 Difficulties in Establishing Identity/Lack of Documentation

One of the major barriers to return is the difficulty of providing appropriate travel documents. Almost 90 per cent of asylum applicants do not present travel documents or other identity documentation, without which removal is not possible. Some countries will issue their nationals with travel documents only after lengthy verification processes. Particular delays appear to arise when awaiting documents from Indian, Pakistani, Chinese and Algerian authorities. To tackle this problem, some European states have created a special units tasked with liaising with immigration authorities abroad and departments across government are involved in negotiating practicable agreements with the receiving countries. However, the provision of adequate documentation is still a source of major difficulty, as exemplified by attempts made to return Iranians, the top applicant nationality in 2004 in the United Kingdom. Out of 24 applications made by British authorities to the Iranian government for travel documents to facilitate return, none has as yet been issued by the Iranian authorities.

In an attempt to pre-empt documentation problems, new legislation has been introduced by host countries in order to deter asylum seekers from destroying or disposing of their documentation between embarkation and claiming asylum. A new of-

---

172 Committee Against Torture, Conclusions and recommendations, CAT/C/CR/33/3, 10 December 2004.
fence of entering the European Union without a valid passport or document establishing satisfactorily an individual’s identity and nationality has been created. The fact that the document was deliberately destroyed is not a reasonable excuse for not being in possession of the document unless the destruction was for a reasonable cause beyond the control of the person charged with the offence. A reasonable cause does not include delaying the handling or resolution of a claim or application; or taking a decision that increases the chances of success of a claim; or complying with instructions or advice given by those who have facilitated immigration into the host country.

To illustrate the above mentioned, the author of the Austrian country report states that, in many cases removals from Austria are not possible because the countries of origin do not cooperate, this e.g. goes for India and for (west) African countries. Often there is no possibility to establish the identity and nationality of a person. Also if the identity is established countries often refuse to issue a so called return home certificate (Heimreisezertifikat). Even if they are ready to issue such a certificate the procedure does take a long time and there are many practical impediments.

In cases where removal is complicated by the lack of a travel route or instability in the country of origin, the person’s presence will be tolerated as long as they comply and co-operate with efforts being made for their removal. They may qualify for ‘hard case’ support and receive of full board and accommodation. The individuals concerned are not granted any form of leave, which leaves the failed claimants without any status or rights in the host country although there is no foreseeable prospect of returning to their home country. Some groups of claimants—Iraqi Kurds and Zimbabwean nationals in particular— have been left in this limbo status for years and have recently had the continuance of hard case support made conditional on them applying to return under the IOM assisted programmes.
5.4.2 Absconding

Another reason for delay in removals is that the asylum seeker to be removed frequently absconds. However, there is no statistical analysis of absconding rates the host countries do not know what proportion of those who are not detained abscond or fail to co-operate with the removal directions. Many states have therefore introduced measures to keep track of claimants more easily and equally to reduce the likelihood of disappearance by tracking the location of claimants while claims are decided. New claimants may be issued with the application registration cards which contain detailed biographical information and fingerprint data. An increasing number of asylum seekers are detained or subjected to various restrictions or reporting requirements. In the United Kingdom recent legislation permits the electronic monitoring of persons granted temporary admission or bail and those liable to be detained pending deportation. This may take the form of an electronic tag to be worn on the wrist or ankle, or as technology develops, the wearing of a satellite tracking devise which can monitor a person’s whereabouts on a continuous basis. In the NL, according to investigations carried out by the Aliens Police only 6-8 percent of the persons arrested for residence without the required documents in the period July -September 2004 were rejected asylum seekers.\(^{173}\) Striking is that the number of asylum seekers arrested in the rural areas was higher than in large cities. This may indicate that this figure represents the relative (in)activity of the police in looking for illegal residents, rather than their actual presence in the country. Another research shows however that at least part of the people who depart for unknown destinations stay in the country or leave for another European country.\(^{174}\)

5.4.3 Difficulties with transportation

The methods used to send people back by airplane are either scheduled flights, which often involves airports and each deportee is often accompanied by police escorts. The alternative means – chartered flights – is more flexible, requires a smaller escort (one

officer per two refugees) and may be open to sharing arrangements between sending countries.

The Dutch Minister for Aliens Affairs and Integration indicated at the beginning of 2004 during a meeting in Dublin that she wanted to strengthen cooperation between European countries in returning failed asylum seekers. According to the Minister, such joint deportations are more efficient and increase the number of countries to which aliens can be deported. However, since the first joint government organized charter flight in May 2004 only a few of such joint government flights with other EU member states have actually taken place. Most of the joint government flights that take place are carried out in the framework of the Benelux or with a single neighbouring country, mainly Belgium.\textsuperscript{175}

In the country report of Ireland, special reference is made to the cost-savings in going the charter route, which may be considerable, according to the Irish experience: In a February 2004 operation involving the deportation of 65 failed asylum-seekers to Romania and Moldova, at a total average cost per deportee of euro 1,400, it was reckoned that use of scheduled flights would have cost considerably more.

The Department has previously chartered services to Romania, Bulgaria, Moldova, Algeria, Nigeria and Ghana. It has indicated that it may for the future also seek services to CIS countries and to States in the Northern Africa and West Africa regions. Since January 2002 to end-December 2004, there have been 12 repatriation charter flights. There has been at least one chartered flight to Nigeria in 2005. Flights, which have generally been made from Dublin Airport, have been accompanied by an appropriate number of police escorts, based on a prior risk assessment of the operation.

\textsuperscript{174} Research by A.M. van Kalmthout, University of Tilburg, on Possibilities of Return of Aliens in Alien Detention, December 2004.
EU Member States – Return Policies and Practices

As in other countries as well, concerns have been expressed about “heavy-handed” behaviour by police escorts involved in the process. There were recent, unsubstantiated, reports about forced sedation of deportees to Nigeria. The ICMPD country report correctly states the legal constraints on the use of force (principles of reasonableness, proportionality and minimum force necessary in the circumstances): clearly it is difficult to judge, in highly emotive situations, whether these constraints are always observed.

The following example taken from the Belgian country reports, illustrates the practical aspects of transportation problems during the removal procedure. It is the ministerial decree of 11 April 2000 that regulates the transportation aboard civil aircrafts returnees who present a high safety risk. As in other MS, the returnees are escorted by police.

The decree envisages notification of the airline company and determines the safety measures to be taken during the flight.

The airline has to be notified at least forty-eight hours prior to the transport of a foreigner not authorised to enter the territory and at least five days in case of removal of a residence title. The aliens to be sent back to their country of origin are brought aboard ahead of the other passengers. The use of force by the escorting police officers is not allowed. \(^{176}\)

---

\(^{175}\) On 9 September 2004 a joint government organized charter flight of the Netherlands and Belgium left Schiphol Airport in order to return 25 rejected asylum seekers to Nigeria and Guinea (Press Release Ministry of Justice, 9 September 2004).

\(^{176}\) See Belgian report, chapter on forced removal.
5.5 European Cooperation and EU Measures – Impact of EU Regulations, Directives and Measures on Return Procedures

Recently, substantial efforts have been taken to tackle the problem of return by the European Union, as for instance is indicated in the Directive 2003/110 on assistance in cases of transit for the purposes of removal by air\textsuperscript{177}. The Community has also started to conclude readmission agreements, although it is obviously difficult to come to terms with third states on the conclusion of readmission agreements. The agreement of the government of Macao and the Republic of Albania, however, indicates the willingness of the European Union to establish a network of readmission agreements. It is, however, quite interesting that it is in practice frequently administrative or legal barriers in the enforcement process which create large difficulties. There are major difficulties with the legal status of armed guards on board of the aircraft, the rights of the aircraft commander and the legal rules in case of transit stops etc., which are frequently in the way of an effective return policy.

An interesting development has been started with the Directive of 2001 on the mutual recognition of decision on the expulsion of third-country nationals\textsuperscript{178}. It seems only logical to recognise expulsion decisions as a basis for enforcement rather than insisting that only national administrative decisions can be enforced. However, the scope of application of the Directive is still very limited. A number of legal questions arise concerning mutual recognition of decisions terminating the residence of third-country nationals since national alien legislation is still very diverse. The harmonisation of rules concerning long-term third-country nationals will contribute to the willingness of Member States to accept administrative decisions of other Member States.

With regard to the Member States, there seems to be no real public debate on the impact of EU regulations and measures on return procedures. The Member States did not report about the status of the impact in the sense that no major changes concern-


ing the return of aliens were observed. Several Member States explicitly mentioned EURODAC as one element of a more efficient return policy. It is more often possible to establish the identity of persons. However, since there are still not that many actual returns under Dublin, there is a discrepancy between decisions and transfers.

It was generally intended and awaited that Dublin II together with EURODAC would help to speed up proceedings. Statistics in some countries confirm this tendency and also show that there are only few safe third country cases but an increased number of Dublin cases as stated in the country report of the UK. EURODAC makes it possible to establish the identity of persons in a much easier way as reported in the country reports of the Member States, as the systematic recording of fingerprints has resulted in a much easier identification of asylum seekers who had already lodged an application in another EU-country. In the country report of Luxembourg it is stated, that the use of EURODAC has led to the transfer of some asylum seekers to other Member States, but that the number is not also not overwhelming. With regard to the impact on facilitating the return of rejected applicants to their home countries, in Luxembourg it is seen as rather limited since these applicants are being sent to other EU-countries.

According to the information provided in the Portuguese country report, the EURODAC system has had a positive performance within the domain it was created for. It not only identifies undocumented asylum seekers but also identifies rejected asylum seekers. However, the impact of the EURODAC system on the return policy is limited due to its application being restricted to the determination of the State Member responsible for analyzing the request, as pursuant to the Dublin II Regulations. Its application for other purposes not foreseen in Art. 1 of EURODAC Regulation will necessarily imply the approval of another legal instrument which will contemplate new purposes for EURODAC to become more efficient within the scope of the Return Policy.
With regard to the Dublin Regulations II Portuguese authorities seem so be less satisfied for the following reasons: on the one hand, the transfer of asylum seekers to the responsible State Members in terms of Dublin Regulations II is not always enforced. On the other hand, many of the asylum seekers who are effectively transferred in pursuauant to the Dublin Regulations II are not always deported in cases in which the request for asylum has been denied.

When asylum seekers are transferred to Portugal and their request is denied, they are subjected to the administrative expulsion regime foreseen in the Aliens Acts. In cases in which the asylum seeker is not taken into preventive arrest, there is a strong probability that they will try to abandon national territory and continue to request asylum in other EU Member States. This leads to the successive enforcement of the Dublin Regulations II.

Hence, in Portugal EURODAC and Dublin II Regulations are not considered as instruments which facilitate the return of rejected asylum seekers to their countries of origin. The proposal is to establish an expulsion mechanism for rejected asylum seekers which would function at a European Union level, rather than having to transfer these people to the State Member responsible for them under the terms of Dublin Regulations II. This way, “asylum shopping” might be avoided as noted in the Portuguese country report.

As the example of a new EU Member State, such as Poland, shows, the Dublin rules and the EURODAC have led to an increase in the number of asylum-seekers in Poland, as expected. Figures for 2004 show a disproportion of incoming requests (1361 submitted requests and 357 persons transferred to Poland) and outgoing requests (54 submitted requests and 10 persons transferred from Poland)\textsuperscript{179}. In the Polish Report it is stated that the tendency seems to continue and further increase might be expected.

\textsuperscript{179} For further statistical data please refer to the country report of Poland in the Annex.
EU Member States – Return Policies and Practices

It is noticeable in this context that Poland with 8080 asylum requests in 2004 (the highest on record) faced the increase of 17 per cent in comparison to 2003, whereas the 25 EU Member States recorded 19 per cent fewer asylum requests. The fall in asylum requests in the 10 new Member States was smaller, however still of 12 per cent.\(^\text{180}\)

Both Dublin rules and the EURODAC seem to function effectively. The special Polish Dublin Office has been established within the Repatriation and Aliens Office to deal with the requests. The Border Guard proved to be prepared in this respect too.\(^\text{181}\)

Member States further report that here has been no public or publicly noticeable discussion of EU plans concerning Community return policy. There are no comprehensive NGO debates about it. There seems to be an equally strong discussion in Member States when new drafts of national immigration and aliens laws are presented to the public on political as well as on public level.


\(^\text{181}\) The Dublin II Regulation (343/2003), as well as the EURODAC Regulation (2725/2000) have been applicable to Poland since the day of accession on 1 May 2004. Moreover, Poland has adhered to the Dublin Convention which is applicable in relations with Denmark.
6. Costs

The question concerning the financial aspects is legitimate and decisive for any serious attempt to create a common European return policy which is able to address the persisting problems attached to the return of third-country nationals without the right to remain on the territory of the EU MS. Presently, however, this question is hard to answer, as information in this respect neither exists on a national nor on a EU level. At present there is no report, study or any other piece of research of quality which would provide insight into the budgetary impacts of an effective return policy.

It is due to the high number of state actors involved in removal procedures that it is impossible to accurately describe the overall costs attached to an effective return policy at this stage. To undertake a comprehensive cost analysis would, without doubt, go way beyond the scope of this report. Administrative and personnel costs included in the determination procedure and during the preparation phase and the actual removal operations, the maintenance costs for return facilities, such as return centres and detention facilities, the costs attached to liaise with countries of origin combined with the variable number of returnees all make it extremely hard to estimate the costs of a common European return policy. It becomes even more unpredictable when eventual ‘indirect’ costs incurred by sustainability measures are included in such estimations. The debate on return is increasingly concerned with sustainability considerations. ‘Revolving door’ returns, in which returnees simply re-enter the territory of one of the EU MS in an irregular way once they have been removed, are more and more seen as running counter an effective and efficient return policy. Consequently, costs of measures and programmes aimed at facilitating reintegration in the home society could become necessary. Such considerations presently form part of the debate on modern migration management.

Generally speaking, the importance of an effective return policy cannot adequately be described in terms of their budgetary implications. Conversely, the financial and social costs of an inadequately functioning return policy may be a multiple of the expenditures arising in the context of return. An economic analysis of immigration...
EU Member States – Return Policies and Practices

and asylum policies in general, and of effective return systems, moreover, may fall short to adequately take into account the costs created by inadequate or ineffective return policies. Arguably, the lacking of an effective and efficient return policy would render any immigration policy futile.

Nevertheless, it can be assumed that costs attached to the creation and the putting into operation of such policy in the long-run could have a cost-saving effect. Despite increased short- and medium-term costs caused by the development of the common return system, costs of joint return operations, such as the organisation joint flights, the conclusion of European readmission agreements and other jointly used return facilities may well be reduced once the common European return policy is in place.

It is interesting to note that in 2003-04 the Home Office’s Immigration and Nationality Directorate spent £1.89 billion on its immigration and nationality operations, including £1.07 billion spent on the National Asylum Support Service, which provides accommodation and financial support to asylum applicants. In the same year, the Directorate spent £285 million (including overheads) on supporting voluntary return, detaining immigration offenders, enforcing removal and other immigration enforcement work - 15 per cent of the Directorate’s total spend. In addition, Her Majesty’s Prison Service spent £15 million on the detention of immigration offenders prior to their removal. To highlight what costs incur regarding non-removals the following figures may be of interest: the Directorate estimated that some £308 million (€ 447 million) of the money spent on supporting asylum applicants in 2003-04 was attributable to failed asylum applicants awaiting removal from the United Kingdom.182

For illustration purposes, however, it might be of interest to have a closer look at the distribution of expenditures of the former Federal Office for Refugees in 2001 in the field of asylum, and more specifically the percentage accumulated in the field of re-

turn assistance and enforcement. Nevertheless, the chart below shall be read with caution as it does not record any other expenditures incurred by other factors involved in this area.

Expenditures in the field of asylum in Switzerland\textsuperscript{183} in 2001

The following charts show the developments of the costs attached to return in Denmark and the UK.\textsuperscript{184} As in the above case, however, the charts have to be read with care, as they do not provide detailed information as to what the costs include (the sharp decrease in costs related to return is due to the fact that figures were available only until June 2002). Thus, they do not provide a clear and comprehensive picture of the financial impact of return policies. Moreover, it might be arguable that present return policies are effective and comprehensive given the persisting problems in this field.

\textsuperscript{183} The overall budget of FOR in 2002 amounted to SFR 922 millions.

\textsuperscript{184} The charts are taken from ‘Study on Return, A Swiss perspective’; Final Report prepared by ICMPD, October 2002.

DK - Costs for Return (in €)


UK - Budget for Return
- CHAPTER V -

CONCLUDING REMARK
1. Coherent Return and Readmission Policy

Return and readmission policies have developed in the EU Member States usually as part of the public order responsibility of police and alien affairs departments. In principle, it is recognised that the consideration of return policies as a mere implementation of public order requirements is not sufficient to grasp the political, social and legal dimension of return and readmission policies and their impact upon other policies, like foreign policy, economic policy, social relations etc. It appears that the existence in the Member States of a coherent and coordinated approach at all levels of government may facilitate the establishment of a more coherent return and readmission policy on the EU level as well.

Within the EU, return and readmission policies have understandably also developed in a piecemeal strategy in cooperation with the Member States. Parallel to the situation in the Member States there is growing recognition of the need to “liberate” return and readmission policies from its original police and public order connotation and to devise a comprehensive return and readmission policy concept providing guidelines for all branches of EU government, in particular foreign affairs, development assistance and migration management.

In spite of the common subscription to a need for a coherent return concept, there are still areas in which return aspects have not or not sufficiently been included. Topics like the integrated border management, the establishment of a visa information system, the operation of the Dublin Regulation and EURODAC limited for the purpose of processing asylum seekers may be used also for return policies. It is, in addition, a promising step forward to include the External Border Agency in the effort to organise joint return operations of Member States and to acquire travel documents.\(^{185}\)
In the relations with third countries it is not sufficient to include clauses on readmission obligations if there are no precise rules on enforcements or sanctions. The international legal aspects of return also are sometimes formulated too vaguely or left in uncertainty. An effort should be made to draft more precise rules to international duties of cooperation and facilitation of return actions.

Whether the establishment of new agencies or the creation of a new central authority responsible for return policies may be recommendable, is an open question. In any case, within the European Union, there should be clear and unequivocal competences for all aspects of a coherent return policy.

A coherent approach to a EU return policy does not necessarily imply increased competences of the Union to the disadvantage to the Member States. Return policies are not only, but also, a matter of public order and therefore closely connected with the essence of Member States’ responsibilities. The replacement of Member States by a common EU policy does not necessarily lead to a more efficient and humane return policy. The subsidiarity principle has to be respected also in the area of return and readmission policies. It appears that in some areas some Member States have been more successful than the EU. This should be explored in more detail with the possible aim to use the special practices of individual EU Member States in coping with particular categories of returnees more efficiently than other states. Generally speaking, there is a need to develop projects aiming at finding out better or best practices in dealing with different aspects of voluntary or involuntary return. The European Refugee Fund could be used to finance projects as has been suggested by the European Commission in its paper of 17 December 2004.186

---

186 MIGRAPOL 98.
2. A Higher Level of Information

The lack of sufficient information on the number and types of third country nationals obliged to leave has been deplored for a long time. It is undisputed that there are no sufficient statistics on the number of illegal third country nationals, their legal status, the quota of voluntary and involuntary return to third countries and countries of origin, as well as irregular movements of persons within the EU. It is evident that better data are needed in order to make a more rational EU return policy.

If this aim is to be achieved, there is no realistic alternative than including the existing and proposed information systems like the Schengen Information System (SIS), the Visa Information System (VIS) and EURODAC for return purposes. Efforts must be undertaken to secure a person’s early identification in order to issue travel and/or identification papers. The Irish presidency has explored the possibility of extending the proposed information and coordination network for Member States’ migration management services (ICONET) to include a facility for date exchange on expulsion decisions. However, for technical and legal reasons, it has been considered as not possible to use the ICONET for the exchange of personal information relating to expulsion decisions. Concerning the use of the other information systems a major difficulty seems to be that some EU Member States do not take part in SIS and the ten new Member States having joined the EU on 1 May 2004 will not participate in SIS for some time after accession. Notwithstanding such difficulties, the development of the SIS could be used as a start to collect data on visa applicants and rejected applicants in one of the EU Member State’s consulates and embassies and to introduce formal requirements for registering the return of such persons and to use the data of third country nationals with an irregular status registered on the basis of the EURODAC Convention for return purposes.
It is obvious that the use of such information systems raises difficult legal issues concerning data protection and judicial control of data collection and registering. However, it seems inevitable that with the growing establishment of different data information systems the legal implications on protection of data have to be explored particularly in the context of an increasing effort to combine different data information systems.

3. A Highly Qualified, Efficient and Fair Asylum Procedure

Without fair as well as efficient asylum procedures no efficient return asylum policy can be established. Although a fair and efficient asylum procedure may not be a guarantee for facilitated return, there is no legitimation for any return policy unless the individual applicant as well as the general public can trust that the procedures provide a fair chance of presenting a claim and having all individual aspects of a claim for protection thoroughly examined.

The fairness of the procedure, however, requires also that the decision is made in an appropriate time. Unduly long asylum procedures and a multiplicity of diverse procedures do not only create legal uncertainty for an asylum seeker, but also contain the inherent danger of making return more difficult. It is common knowledge that the duration of an asylum procedure including successive judicial procedures are a major factor for the possibility to manage return. As a rule, the longer the stay of a third country national who is not in need of protection, the more difficult return becomes. This assumption is true with respect to almost all aspects of return and readmission policy, like the technical problems to procure travel documents, the establishment of links with the country or residence making it eventually unacceptable to return as a result of estrangement with the country of origin.
In this context the suggestion of the European Commission for a single asylum procedure is relevant. The proposal is based upon a comparative survey of the practice in Member States indicating a series of different procedures and possibly successive or multiple claims brought in different procedures which will lead inevitably to long proceedings. A single asylum procedure will generally contribute to the greater acceptability of return systems. Greater transparency and more uniformity in the application of relevant laws may also be considered as an advantage, since different evaluations by different authorities on related questions undermine the acceptability of the system and lead to the impression of a highly complex and intransparent system\textsuperscript{187}, which may serve as an essential pull factor for illegal immigration. It follows that return concepts are inseparably connected with speedy and fair asylum procedures.

4. Preference for Voluntary Return Programmes

Voluntary and involuntary return are part of the same concept. Just as it would be an illusion that even on the basis of a harmonized return policy and efficient mechanisms of cooperation with destination countries, all problems relating to the deportation of a large number of persons could be overcome easily, it would be an illusion to rely exclusively on the concept of a voluntary return based upon incentives and psychological and financial assistance. Experience shows that no larger return program has effectively worked without a corresponding mechanism to enforce return. More than 350,000 refugees from Bosnia/Herzegovina have returned from Germany to Yugoslavia. Very few of them were deported. Most observers, however, argue that this is due to a clear policy to enforce return if necessary. It is fairly obvious that any program of voluntary return must be accompanied by clear and transparent rules on

\textsuperscript{187} For further details see Hailbronner, Study on the Single Asylum Procedure „One-Stop-Shop“ Against the Background of the Common European Asylum System and the Goal of A Common Asylum Procedure, European Commission, 2003, at p. 19.
involuntary return in case of termination of a residence permit. This does not mean that voluntary return should not be of priority. On the contrary, experience indicates that there is no coherent return policy without repatriation programs on a voluntary basis. Switzerland, which has perhaps developed the most sophisticated return assistance programs, has repatriated a substantial number of persons on a voluntary basis. Some of the features of the Swiss programs are clearly ahead of the standards of most EU Member States and are therefore particularly valuable for a future EU policy.

There is a vast amount of experience of EU Member States with voluntary return programmes. Two organisations, IOM as well as ICMPD in assisting governments in devising, executing and controlling return programmes have produced a range of practices which may be used to draft general guidelines of how to implement return programmes in practice. It seems that rules on the basis of which voluntary return programmes are functioning are fairly well explored. There may be divergent opinions as to the usefulness of financial incentives with regard to attraction of unwanted illegal immigration and the connection of voluntary and involuntary return. Apart from the general guidelines which IOM and ICMPD as well as UNHCR have practiced in assisting voluntary return programmes, one may observe that generally speaking voluntary return programmes have been more efficient with coupled with clear and transparent legal rules that in case of non compliance with return orders involuntary return will eventually be possible. UNHCR EX COM Conclusion No. 96

“stresses the importance of ensuring the sustainability of returns and avoiding further displacements in countries emergent from conflict and noted that phasing return of persons found not to be in need of international protection can contribute to this…..”

This cannot mean, of course, that in any individual case of return specific preparatory measures are needed or even appropriate. Generally speaking, however, the use of facilities for third country nationals required to leave for preparation of return decisions may be a useful contribution to an efficient return policy. At the present stage
such measures seem to be largely dominated by national perceptions. Yet, some of the technical and psychological issues as well as administrative problems concerning the cooperation with third states and the facilitation of transport may be better handled by using the experience of other EU Member States. It would seem advisable to establish a task force to identify common problems of return of a specified category of third country nationals to be returned to their country of origin and provide for a mechanism to lay down common conditions for return without, however, endangering the necessary flexibility of the authorities in the Member States in charge of the implementation of return orders.

5. Better Cooperation Between Member States

A request for better cooperation between Member States seems almost as meaningless as a call for a common European Asylum Policy unless there are specific suggestions as to areas in which such cooperation should take place and the content of such cooperation. There is a substantial amount of cooperation between the Member States, partly on the basis of common decisions and directives. Most prominent is the Council Directive on assistance in cases of transit for the purpose of removal by air whereby Member States have agreed on assistance in case of transit by air via another Member State. Although the Directive is certainly an important step forward, one is surprised to see to what extent Member States have considered it necessary to reserve their rights to refuse assistance according to Art. 3 of the Directive, for instance, if the removal measure requires a change of airport on the territory of the requested Member State or if the requested assistance is impossible at a particular moment for practical reasons.
Removal operations of Member States while transiting through another Member State take place in a legal grey zone.\textsuperscript{188} The competences of escorts of the removing Member State and the transit Member State are unclear for the time being. Assistance of the transit Member State is required, but also in this phase the legal basis for the continuation of the removal operation initiated by another Member State could be questioned, in particular if the use of coercive force is needed. It is clear that at the present stage of EU legislation Member States are still exclusively responsible for the exercise of police power and the maintenance of public order on their territories. However, parallel to the limited acceptance of an extra-territorial exercise of police powers within the framework of the Schengen Implementation Agreement, there should be legal rules allowing the exercise of necessary powers for implementing removal orders in transit through other Member States.

Cooperation between Member States requires as well a common position in matters of cooperation with third states on the formulation of standards and practices relating to the transportation of returnees to their countries of origin. Within the ICAO FAL-Division\textsuperscript{189} new rules are suggested concerning orderly operations of international civil aviation to facilitate the transport of persons being removed from another state. As a recommended standard it is suggested that when operators have cooperated with the public authorities to the satisfaction of those authorities, for example pursuant to memoranda of understanding reached between the parties concerned, in measure designed to prevent the transportation of inadmissible persons, contracting states should mitigate the fines and penalties that might otherwise be applicable should such persons be carried to their territory. Concerning deportees it is provided that contracting states when determining that a deportee must be escorted and the itinerary involved a transit stop in an intermediate state, shall ensure that the escort remains with the deportee to his final destination, unless suitable alternative arrange-

\textsuperscript{188} See European Commission, 5\textsuperscript{th} Immigration and Asylum Committee, 10 February 2003, MIGRAPOL 34.

\textsuperscript{189} European Civil Aviation Conference, Facilitation-Sub-Group on Immigration, 7\textsuperscript{th} Meeting, Paris, 30 August 2004.
EU Member States – Return Policies and Practices

ments are agreed, in advance of arrival, by the authorities and the operator involved at the transit location.

There is a variety of activities ranging from joint return actions, organisation of common charter flights, cooperation in procuring travel documents or exchange of information about “difficult” states. In addition, an attempt could be made to find out whether attribution of exclusive responsibilities for certain categories of returnees to an individual EU Member State may be a feasible alternative to the responsibility of each Member State to remove its illegal third country nationals from its territory.

There is also a need for enhanced cooperation on dealing with third countries of origin and transit states. Better cooperation on readmission arrangements requires larger efforts of coordination of foreign policies of Member States, particularly relating to

- definition of clear rules of readmission of a state’s own nationals and third country nationals moving illegally to a EU Member State,
- common criteria of identifying persons to be readmitted including the use of biometric,
- exchange of information on application of bilateral and EU readmission agreements and evaluation of practical difficulties arising in the application of such agreements,
- drafting common rules on obligations of transit states,
- common strategies on enforcement of treaty obligations and sanctions in case of non-compliance.
6. From Mutual Recognition of Expulsion Decisions to A System of EU-Wide Enforcement of Return Decisions

A significant step forward of achievement of a common EU return policy has been achieved by the mutual recognition of expulsion decision by the Directive 2001/40. However, the Directive’s scope of application is extremely limited to return decisions in case of a serious and actual threat to public order or to national security. Beyond the psychological aspect the Directive does not seem to have been of great practical importance. It needs, therefore, to be extended to other categories of third country nationals subject to a return or removal order.

A common EU return policy must be based on the assumption that the aim of return is not successfully achieved if a third country national required to leave is returning to another EU Member State. Successful return requires that the illegal resident has left the territory of the EU Member States rather than of a particular Member State. The European Commission, therefore, has rightly emphasised that

“only the binding mutual recognition of return decisions can lay the foundations so that enforcement activities, including mutual assistance and cooperation, finally lead to the desired results. To that end an approximation of the legal conditions for the ending of residence is a prerequisite. With other words, common minimum standards are necessarily linked to the question of a binding regime for mutual recognition.”\footnote{190}

\footnote{190 MIGRAPOL 34, 5th Immigration and Asylum Committee, 10 February 2003, at p. 2.}
7. Harmonised Standards of Return

There is no harmonisation of standards of return on the EU level. First ideas and proposals have been laid down in various papers of the European Commission on common standards on return in preparation of a proposal for a Directive on common standards and procedures in Member States for illegal staying third country nationals.\textsuperscript{191} The “Non-Paper” tries to fix clear, transparent and fair return rules, suggesting harmonised two-step procedure, containing a first return decision and a subsequent removal order in case of non-compliance. It also provides for a minimum set of legal safeguards against return and removal decisions primarily by making use of the provisions of the Asylum Procedure Directive. The possibilities of international recognition of all kinds of return decisions and removal orders are extended.

In addition, it established an obligation of a first Member State to take back illegally staying third country nationals from a second Member State. In principle, the attempt to harmonise return standards is an indispensable requirement for achieving progress in the aim of a common EU enforcement of removal decisions. Considering the divergent laws and practices in the EU Member States concerning return and removal proceedings, appeal rights and the effect of final removal orders there is a convincing argument for an approximation of standards. However, common minimum standards on return decisions should not overly restrict the necessary administrative flexibility of EU Member States. A common EU return policy does not require a harmonised administrative procedure throughout the European Union. In May 2005, the Council of Europe’s CAHAR Committee has also produced a recommendation on 20 guidelines on forced return, identifying best practices and describing standards and guiding principles serving as a practical tool for use.\textsuperscript{192}

\textsuperscript{191} European Commission, 14\textsuperscript{th} Immigration and Asylum Committee, 27 October 2004, MIGRAPOL 90.

\textsuperscript{192} CM (2005) 40 final, 9 May 2005.
Two basic changes are required for achieving progress on the way to a more efficient EU return and readmission policy:

- according to the understanding of return of third country nationals required to leave as an obligation which also applies with respect to all other EU Member States, the execution of removal orders must amount to a removal from the EU territory and must be carried out in any EU Member State unless another EU Member State chooses to grant a particular third country national a residence right under its national laws,
- a harmonisation of minimum standards concerning procedural and substantive rules on return.

It is doubtful to what extent this would require a two-step administrative procedure distinguishing between a return decision and a removal order, both in principal subject to legal remedies. The removal order is defined in the Non-Paper as an order fixing a point in time at which the removal order will be enforced and specify the country of return. Member States shall ensure that the reasons in fact and in law are stated in the order, that the third country national has the right to an effective remedy before a court and that he/she is informed about this right in writing.

Although there can be no argument about the right of an effective remedy against a decision to return, it may be questionable whether a separate removal order is a useful instrument to facilitate the enforcement of return orders or whether it may be rather interpreted as a “runaway-order” leading in consequence to successive enforcement measures. National systems do not necessarily require a removal order as a condition for executing a final decision to leave.
The harmonisation of obstacles for return is in principle a useful step for the application of a principle of recognition and enforcement of return decisions. A codification of obstacles should include such categories as

- lack of transport capacity or other technical difficulties making it impossible to enforce the removal in a safe and dignified manner,
- a situation concerning the country of return which does not allow that the removal takes place in a safe and dignified manner,
- in the absence of any clear concept of the meaning of safety and dignity, it is to be avoided that the concept causes new divergent practices of Member States without achieving a sufficient degree of legal certainty. There may certainly be a need to agree on certain common conditions relating to the situation in the country of return as well as to the transportation conditions. It is doubtful, however, whether it is advisable to defer the interpretation of such issues to the courts rather than trying to attempt on a political level to collect experiences and formulate principles on administrative practices.

On the other hand, it seems necessary to have a higher degree of legal certainty when it come to the divergent practices of Member States on the interpretation of certain legal obstacles to return, like the concept of inhuman treatment.

Provisions on re-entry following a removal order can be considered as a useful element of harmonised return standard. Divergent rules and practices of EU Member States may lead to conflicts and difficulties in the application of common EU rules on return. In the absence of internal border controls and the possibility to control irregular movements within the EU, there is clearly a need for standardised rules prohibiting re-entry. Such rules should also provide basic standards relating to a returnee’s compliance with a removal order.
Harmonisation of the rules and practices on detention should also be considered as a necessary element of harmonised return standards. The principles suggested by the European Commission reflect largely a consensus on detention in the Member States, without, however, stating detention standards on the lowest common denominator. Return procedures must not only respect dignity and safety of returnees, but should also take into account the particular situation of specified groups of returnees, in particular vulnerable groups such as separated children and women. Although it must be acknowledged that the intentional sending of unaccompanied children cannot be abused as an instrument for unauthorized immigration of parents and/or other family relatives, particular precautions have to be taken that separated minor children are properly taken care of during a return procedure as well as upon arrival in the country of origin. The wellbeing of a child under the UN-Convention on Children must be acknowledged during all stages of a return procedure as a primary concern of authorities involved in the return procedure. Better cooperation between EU Member States as well as between a receiving state and a country of origin may be useful to identify problems and difficulties arising in connection with return of unaccompanied children.

Concerning means of restraint the CAHAR guidelines provide useful recommendations which have been in principle accepted by EU Member States without, however, always having been properly implemented in national practices. Within the EU, the practical aspects of enforced return should be taken up as a part of common training seminars and exchange programmes between authorities involved in return procedures. In addition, monitoring on forced return should be encouraged and financially assisted by the funds of the European Union.

A new element introduced by the European Commission defines the obligations of EU Member States in case of irregular movements of third country nationals subject to return orders. The choices of EU Member States are either recognition of a removal order and carrying out the order using the financial compensation scheme of
EU Member States – Return Policies and Practices

the EU or requesting a first EU Member State to take back the person or launching a return procedure under national law or issuing a residence title under national law.

In general, the ideas and suggestions present a valuable effort on the way to a common EU return policy. On a second stage, further efforts might have to be undertaken to explore the possibilities for developing a return/removal scheme on the EU level which might entail the establishment of new organisational structures and new forms of cooperation with third states.

8. Cooperation with Third States

With regard to countries of origin efforts have been undertaken for a common EU policy, including issues of return and readmission in negotiations with such countries. Clauses on return and readmission have been included in recent cooperation and association agreements concluded by the European Union with third states. Nevertheless, there is large scope of more concerted efforts which should include aspects for cooperation concerning the readmission of persons and establishment of procedures facilitating return. The concept of partnership with countries of origin and third countries in the implementation of return and readmission policies requires the development of a comprehensive return concept in all negotiations on cooperation and association agreements and the integration of readmission policies with other EU policies in other areas. An effort should also be made to draft uniform principles on the obligation of countries of origin and third countries involved on

- proof of nationality and identity of returnees by use of biometrics,
- assistance of transit countries in return actions,

- modalities of enforced return and use of force by escorts,
- transfer of responsibility of countries of origin,
- promotion of conditional return,
- consular cooperation in procuring documents and administrative assistance in case of return of vulnerable persons,
- common preparatory strategies facilitating the return.

Action programmes like the European Action Programme of 28 November 2002 or integrated return plans recommending practical cooperation among Member States and between Member States and countries of origin or transit may be a useful tool for the development and identification of best practices.

9. **Protection of Human Rights**

There is no dispute about the principle that return and readmission must be in compliance with human rights obligations of EU Member States. The existing directives and resolutions on EU level unanimously confirm the need for a fair and humane return and readmission policy.

To actually implement such requirements monitoring procedures may be a useful instrument to ensure the observation of principles by sending observer missions to specific countries supervising the situation of returnees and providing information on the general conditions returnees are facing on return. A comprehensive monitoring system neither appears necessary nor even appropriate since countries of origin might be reluctant to agree to such procedures. However, in appropriate cases a mechanism of supervision with the assistance by private organisations may contrib-

---

EU Member States – Return Policies and Practices

ute to the legitimacy of the return and readmission policy and alleviate the concerns of the public and of refugee groups that deportation amounts necessarily to a violation of human rights.

However, an essential element of protection of human rights is a fair and efficient asylum procedure. Human rights are best protected by a procedure which enables a comprehensive examination of all claims for international protection in a single procedure.
PART 2:
SYNOPTIC TABLES
- Hier einfügen:

Synoptic Tables, Seite 1/17: Table of Contents
- Hier einfügen:

Synoptic Tables, Seite 2/17
- Hier einfügen:

Synoptic Tables, Seite 3/17
- Hier einfügen:

Synoptic Tables, Seite 4/17
- Hier einfügen:

Synoptic Tables, Seite 5/17
- Hier einfügen:

Synoptic Tables, Seite 6/17
- Hier einfügen:

Synoptic Tables, Seite 7/17
- Hier einfügen:

Synoptic Tables, Seite 8/17
- Hier einfügen:

Synoptic Tables, Seite 9/17
- Hier einfügen:

Synoptic Tables, Seite 10/17
- Hier einfügen:

Synoptic Tables, Seite 11/17
- Hier einfügen:

Synoptic Tables, Seite 12/17
- Hier einfügen:

Synoptic Tables, Seite 13/17
- Hier einfügen:

Synoptic Tables, Seite 14/17
- Hier einfügen:

Synoptic Tables, Seite 15/17
- Hier einfügen:

Synoptic Tables, Seite 16/17
- Hier einfügen:

Synoptic Tables, Seite 17/17
PART 3:
COUNTRY REPORTS
- CHAPTER I -

COUNTRY REPORT AUSTRIA

by
Dr. Ulrike Brandl,
University of Salzburg
Return and repatriation – EU policies and national practices

Report on Austria

March 2005

Ulrike Brandl and Philip Czech

Initial remarks: The Austrian report is based on the legal and factual situation and the laws in force at the time of writing the report. It has to be stressed however that on 7 March 2005 the drafts of a new Asylum Act (Asylum Act 2005) and of a new Aliens Police Act (Aliens Police Act 2005) together with amendments to other laws were published in order to allow giving expertise on the text. The deadline for commenting the drafts is 14 April 2005. Furthermore drafts of a new Immigration Law and a Law on the Residence of Aliens in Austria together with amendments to other laws especially the present Aliens Act were published. The deadline for commenting these drafts is 21 April 2005. Hearings will take place during the next weeks and legal advice and comments (from NGOs, UNHCR and others) will be given. According to the intention the drafts should be seen as “real drafts” and it is intended to make amendments according to comments and proposals made in the discussion process. Experience gained from former amendments however

195 Philip Czech wrote the part on voluntary return.


show that at least the focal points remain unchanged. As it is not foreseeable how the final version of the new laws and amendments will be the report focuses on the law in force but also refers to – possible – major changes which are contained in the drafts and differences between the texts especially relating to questions of voluntary or involuntary return. The explanatory report to the Asylum Act 2005 explicitly states that Dublin procedures should be more efficient. When a request to another Dublin State is launched it should be possible to detain the applicant and to start the deportation procedure. Provisions regulating second asylum applications intend to shorten these proceedings and allow quicker deportation. The explanatory report to the draft Aliens Police Act stresses the intention that Aliens Police Act should contain more efficient measures which should follow the (final) decision in the asylum procedure. The draft Asylum Act 2005 also contains a list of safe countries of origin. These countries are grouped in Member States of the European Union, where special rules apply and other countries (Australia, Canada, Liechtenstein, Norway, New Zealand, Switzerland and also Bulgaria, Romania and Croatia). For persons coming from these countries asylum applications are possible, suspensive appeal in the appeals proceedings however must not be granted. The interesting point in this respect is that the explanatory memorandum contains a detailed analysis on the situation in Croatia, Romania and Bulgaria. The explanatory report to the Immigration Law and a Law on the Residence of Aliens in Austria stresses the intention to separate immigration and residence rules on the one hand and aliens police measures on the other hand.

---


199 Fn. 4, p. 4.

200 Fn. 4, p. 32 -45.

Relevant questions and problems:

Official statistics\(^{202}\) and numbers are only available for certain not for all groups of persons who are obliged to leave Austria based on various legal acts terminating the presence in Austria. There are e.g. no figures available about withdrawals of asylum. For categories where no figures are available only the legal status is described below.

1. Number and status of foreigners obliged to return to their home country (legal status and statistics)

1.1 after rejection of an asylum claim or a claim for subsidiary protection

In the initial stage of asylum proceedings the asylum authorities decide if the application is admissible. This initial procedure is conducted by the Federal Asylum Agency at the so called initial reception centres\(^{203}\). This procedure precedes the substantive examination of the asylum application. Asylum applications are inadmissible if the applicant is able to find protection in a safe third country (Art. 4 and Art. 4a Asylum Act\(^{204}\)) or – in case there is no such safe third country – if Austria is not responsible for examining the asylum application due to the Dublin II Regulation or a parallel Agreement (Art. 5 Asylum Act). These decisions have to be issued in conjunction with an expulsion order. Following a negative decision the person has to leave the country and may be deported if he or she does not voluntarily leave. This

\(^{202}\) Official statistics by the Ministry of the Interior are available on http://www.bmi.gv.at/publikationen/.

\(^{203}\) These centres were established following an amendment of the Asylum Act in 2003, which entered into force on 1 May 2004 (see fn. 10 below). There are three such centres, one near Vienna in Traiskirchen, one in Upper Austria (St. Georgen) and one at Vienna International Airport.

system is quite similar in the draft Asylum Act 2005\(^\text{205}\), details however are possibly changed.

If the application has been rejected as being inadmissible pursuant to the safe third country clause and if the person cannot be returned or deported within two months following the issue of the decision, the decision ceases to be valid. This happens if the failure to return the person is due to practical reasons which are not based on the person’s conduct. In this case the asylum procedure is to be declared admissible and a residence entitlement card valid for the duration of the asylum procedure has to be issued (Art. 5a, Art. 24a and Art 36b Asylum Act). If the application for asylum has been rejected pursuant to the Dublin II Regulation and the applicant cannot for practical reasons be returned or deported, the decision also ceases to be valid.

An application has to be dismissed as being **manifestly unfounded** if it clearly lacks any substance (Art. 6 Asylum Act). An **expulsion order** has to be issued. Other reasons to declare applications as being manifestly unfounded are if the asylum seeker is a national of a safe country of origin\(^\text{206}\), if the applicant has deceived the authority concerning his or her true identity or nationality or the authenticity of documents or if an or if an asylum seeker has entered Austria via an airport and his or her allegations concerning a situation of danger clearly do not correspond with reality.

A **quick pre-screening procedure** was introduced by the 2003 amendment to the Asylum Act, which entered into force on 1 May 2004 with the intention to accelerate the asylum determination procedure as the first or initial decision has to be taken within 72 hours. Initial or “first contact” reception centres (Erstaufnahme-Zentren) were established\(^\text{207}\).

**Art. 24a Asylum Act** contains provisions about the screening procedure. This procedure is designed as a preliminary measure preceding the substantive examination

\(^{205}\) See fn. 1.

\(^{206}\) Art. 6 (2) Asylum Act: “Safe countries of origin as referred to in subparagraph 1 of paragraph (1) above shall be the member States of the European Union, Australia, Iceland, Canada, Liechtenstein, New Zealand, Norway and Switzerland.”

\(^{207}\) See fn. 9 and fn.10.
of the asylum application. A first interview is conducted within 48 hours (at the latest after 72 hours). The “testimony” given in the first interview “will be accorded increased credibility”. Upon completion of the initial interview, the asylum seeker is informed either if the procedure is admissible or if it is intended that the application is to be rejected as inadmissible or is intended to be dismissed. If it is intended to reject or to dismiss the application the asylum seeker receives a copy of the case record. He or she is granted a time-limit of not less than 24 hours to express the views and a further interview has to be held after that time-limit has elapsed. Legal advice according to Art. 39 has to be provided. The legal adviser has to be present at this further interview. If the Federal Asylum Agency does not rule that the application for asylum is to be rejected as inadmissible pursuant to safe third country clause or the Dublin II Regulation within twenty days following the submission of the application, the application is to be admitted unless consultations take place in accordance with Dublin II. The draft of the Asylum Act 2005 explicitly restricts the freedom of movement of applicants to the district where the initial reception centre is located\textsuperscript{208}.

Expulsion and deportation of asylum seekers is possible despite pending appeal decisions as appeals against rejections because of the safe third country clause or because another Dublin state is responsible do not have suspensive effect, \textbf{suspensive effect may be granted by the appeals authority}, the Independent Asylum Senate (Art. 32 Asylum Act). In Dublin cases the granting of suspensive effect was totally excluded by a provision of the Asylum Act inserted into the Asylum Act by the 2003 amendment\textsuperscript{209}. This total exclusion of suspensive effect concerning the decision about the expulsion in Dublin cases was ruled to violate Constitutional Law by the Constitutional Court in a judgment from October 2004. The Court held – referring to previous jurisprudence – that a remedy has to be an efficient means to law enforcement. Where however the person is obliged to leave the country or may be deported with-

\textsuperscript{208} See Art.13 draft Asylum Act, fn. 1.

\textsuperscript{209} See fn. 10.
out any possibility to stay during the appeals proceedings this is not an effective remedy.\textsuperscript{210}

The Constitutional Court also ruled that the asylum application may not be rejected simply because the person has been transferred to another Dublin state.\textsuperscript{211}

When an \textbf{asylum claim is dismissed on the merits the asylum authorities} have to declare \textit{ex officio} by administrative decision \textbf{whether the applicant’s deportation to the country of origin is admissible according to Art. 8 Asylum Act}. Such a decision has to be issued in conjunction with the ruling dismissing the asylum application. If the decision allows deportation to the country of origin these persons are obliged to leave Austria. There is no possibility for regularisation. If the asylum authorities decide that the person may not be sent back a \textbf{limited right of residence} has to be granted by administrative decision according to Art. 8 (3) Asylum Act. Such a right of residence shall be granted for one year and, after the first extension, for a maximum period of five years (Art. 15 Asylum Act). If the Asylum Office declares that the factors which disallow the deportation do not exist any longer, the limited right of residence is to be revoked.

The following table shows statistics for safe third country cases, Dublin cases, manifestly unfounded cases, negative asylum decisions on the merits and also decisions where subsidiary protection is denied.

<table>
<thead>
<tr>
<th></th>
<th>Rejected asylum application according to Art. 4 Asylum Act (safe third country clause)</th>
<th>Rejected asylum application according to Art. 5 Asylum Act (Dublin)</th>
<th>Decisions that the asylum applications is manifestly unfounded (Art. 6 Asylum Act)</th>
<th>Negative decisions on the merits (Art. 7 Asylum Act)</th>
<th>Subsidiary protection denied (Art. 8 Asylum Act)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1998 – December</td>
<td>1459</td>
<td>1507</td>
<td>2528</td>
<td>13,666</td>
<td>14,682</td>
</tr>
</tbody>
</table>

\textsuperscript{210} Federal Constitutional Court 15 October 2004, G 237/03 \textit{ua}.

\textsuperscript{211} Federal Constitutional Court 15 December 2004, B 1019/04-10 \textit{ua}.
<table>
<thead>
<tr>
<th>2003</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>37</td>
<td>904</td>
<td>113</td>
<td>3426</td>
<td>3665</td>
</tr>
<tr>
<td>2004 enforceable (form 1 May 2004 to 31 December 2004)</td>
<td>165</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>January and February 2005</td>
<td>3</td>
<td>169</td>
<td>14</td>
<td>579</td>
<td>518</td>
</tr>
<tr>
<td>January and February 2005 enforceable</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The figures comprise only final decisions. For 2004 and January and February 2005 the official statistics also show the category decisions due to implementation, meaning that the person may be transferred to another Dublin state or returned to the safe third country or that the asylum application is considered to be manifestly unfounded and the applicant may be deported. There is a sharp discrepancy between the number of negative decisions in Dublin cases and the decisions due to implementation. The reason in Dublin cases mainly is that if the other Dublin state accepts the request because there is e.g. a EURODAC hit, the asylum seeker is informed about the intention to transfer him or her to this state. A second interview has to be held. Meanwhile a high number of applicants “disappear” and no transfer can take place.

Statistics for 2004 also show figures concerning Dublin procedures with new member States of the European Union. In the same period there were only few safe third country decisions but an increased number of Dublin cases as the new Member states are fully participating in the Dublin system.

<table>
<thead>
<tr>
<th>Acceptance of the request by the new Member State</th>
<th>Non acceptance</th>
<th>Transfer</th>
</tr>
</thead>
</table>

208
<table>
<thead>
<tr>
<th>Period</th>
<th>Count</th>
<th>Count</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>May to October 2004</td>
<td>1,864</td>
<td>379</td>
<td>210</td>
</tr>
<tr>
<td>January and February 2005</td>
<td>519</td>
<td>65</td>
<td>16</td>
</tr>
</tbody>
</table>

As an additional comment to the figures in the tables above it has to be mentioned that between January 1998 and the end of 2003 in 102,944 cases the procedure ended either after withdrawal of the claim or because the person left Austria and the procedure was closed or because of various other reasons.

1.2 after termination of a protected status (termination of temporary protection scheme; withdrawal of refugee status)

A protected status according to the Asylum Act or Aliens Act might be terminated either a) when there is a deprivation of the right to asylum, b) if the subsidiary status is not renewed and/or the limited right of residence granted according to Art. 15 Asylum Act is revoked or c) if temporary protection schemes and residence permits issued according to the Aliens Act are not prolonged.

A person who has been granted asylum is to be deprived of his or her right to asylum according to Art. 14 Asylum Act if Art. 1 C or F 1951 RC is applicable. Further reasons to deprive the right of asylum are if the person has his or her centre of life in another country and also if the person constitutes a danger to the security of the Republic or has been convicted of a particularly serious crime\(^{212}\). In the latter case and if Art. 1 F 1951 RC is applicable the authorities also have to decide if refoulement is allowed. In all other cases of withdrawal it is (theoretically) possible that the person obtains a residence permit according to the Aliens Act\(^ {213}\). There are

---

\(^{212}\) According to Art. 14 (4) Asylum Act withdrawal of the right of asylum because Art. 1 C 1952 RC applies is no longer be admissible if five years have already elapsed since asylum was granted or if eight years have already elapsed since the relevant application for the granting of asylum was submitted and the aliens have their principal domicile in the federal territory. In such cases, the authority shall report the facts to the authority which is competent under the terms of the Aliens Act.

no figures available about cases of withdrawal of asylum neither in the official statistics nor in reports by NGOs. According to information there are no systematic deprivations of asylum. Only in cases where the Asylum Office is informed that a person already returned to the home country or settled down in another country the status is revoked.

For situations of **war and civil war a sort of ad hoc mechanism is foreseen in Art. 29 Aliens Act**\(^{214}\). In times of armed conflict the Federal Government may by ministerial order grant a temporary right of residence to directly affected groups of aliens who cannot find protection elsewhere. In practice the right of persons from Bosnia\(^{215}\) and Kosovo\(^{216}\) was regulated by a number of such ministerial orders (Verordnungen). Refugees from Bosnia received temporary residence permits, which were prolonged several times. They also received social aid and other benefits. This programme was established and financed by a joint relief campaign between the Federal Government and the Governments of the Federal States\(^{217}\). For Bosnians integrated in Austria a possibility of permanent residence has been provided for under the so-called Bosnians’ Act\(^{218}\).

---

\(^{214}\) Art. 29 Aliens Act reads as follows: “(1) In times of armed conflict or other circumstances threatening the safety of entire population groups, the Federal Government, in agreement with the Executive Committee of the National Council, may by ministerial order grant temporary right of residence in the federal territory to directly affected groups of aliens who can find no protection elsewhere (displaced persons). (2) In the ministerial order referred to in paragraph (1) above, the aliens entry and the duration of their residence shall be regulated with due regard for the circumstances of their particular case. (3) The right of residence conferred under the ministerial order shall be certified in the aliens travel document by the authority. (4) If permanent integration becomes necessary as a result of the prolonged duration of the circumstances referred to in paragraph (1) above, it may be stipulated in the ministerial order that specific categories of persons having right of residence may validly submit within Austria an application for the granting of a settlement permit and that the settlement permit may be issued to them notwithstanding the existence of any grounds for refusal pursuant to Art. 10 Sect. 1 (2) – (4).”


\(^{216}\) FLG II 133/1999 as amended by FLG II 461/1999.


\(^{218}\) FLG I 85/1998.
Austria also received a certain quota of refugees from Kosovo in an international joint programme. These persons got a limited residence permit by a general order of the Government based on Art. 29 Aliens Act. The right of residence was prolonged several times.

For Bosnians and also for persons who came from Kosovo programmes for *voluntary return* were run\(^\text{219}\). The programme for Bosnians is described comprehensively in a country report on Austria about temporary protection in Europe\(^\text{220}\).

Art. 57 (1) Aliens Act states that a person’s deportation to a country is inadmissible if there are valid grounds for assuming that the person would run the risk of being subjected to inhuman treatment or punishment or to the death penalty in that country. Art. 57 (2) stipulates that rejection at the border or forcible return to a country are inadmissible if there are valid grounds for assuming that a person’s life or freedom would be endangered in that country on account of race, religion, nationality, membership of a particular social group or political opinion (according to Art. 33 (1) 1951 RC). The examination if reasons exist which do not allow to send the person back to a certain state has to be carried out *ex officio* in all procedures deciding about the person’s deportation or about any other form of sending a person (back) to a certain state. During the procedure for the imposition of an expulsion order or residence ban also a petition may be filed claiming that the person fears these risks according to Art. 75 Aliens Act. In these cases a “humanitarian residence permit” can be granted *ex officio* on the basis of Art. 10 (4) Aliens Act. It is the right to residence for a certain time. The Administrative Court decided that it is impossible to apply for such a permit, it only may be granted *ex officio*\(^\text{221}\). The Court held that there is no legal claim for the grant of humanitarian residence permits even if reasons in the sense of Art. 57 Sects. 1 or 2 Aliens Act are fulfilled and the person may not be sent back to a

\(^{219}\) For details see below the section on voluntary return.


specific country. These persons are “officially tolerated” if the authorities do not grant a permit *ex officio*. The humanitarian residence permit also might be issued to persons who became victims of an armed conflict in their state of origin; for these persons the permit has to be limited to the foreseeable length of the conflict, up to a maximum of three months. If the humanitarian residence permit is not prolonged the person has to leave the country and may be deported. At present only few humanitarian residence permits are issued, e.g. in January and February 2005 46 new permits have been issued and 32 have been prolonged. The official statistics for 2004 showed a total number valid at the end of December 2004 of 477 permits.

A settlement permit according to Art. 19 (2) 6 Aliens Act may be granted without regard to the question whether the general quota requirement according to the Aliens Act is met. This permit might be issued if a person is the family member of an alien who is lawfully settled on a permanent basis or if he or she intends to pursue a gainful occupation in Austria in a non-self-employed capacity and fulfils the criteria specified in Art. 10 (4) Aliens Act (humanitarian reasons).

1.3 after illegal entry and residence and a final order to leave

Rejection at the border under Art. 17 Asylum Act: According to the wording of Art. 17 Asylum Act aliens shall not be brought to the initial reception centre if, having travelled from a safe third country they intend to enter Austria at the land frontier and who file an application for asylum at the time of the border control. Austria is surrounded by Member States of the European Union where the Dublin Regulation is applied and by Liechtenstein and Switzerland. According to a judgment of the Federal Constitutional Court there is no scope for application of Art. 17 Asylum Act as the Asylum Act contains special provisions for Dublin cases and for persons who

---


223 A humanitarian residence permit may also be issued to victims or witnesses of trafficking in illegal immigrants for the necessary length to enforce a court trial.

224 Federal Constitutional Court 15 October 2004, G 237/03 ua.
enter Austria coming from Switzerland and Liechtenstein. An NGO report from December 2004\textsuperscript{225} however reveals that there are still rejections at the border based on Art. 17 Asylum Act.

**Persons who apply for asylum after illegal entry:** Nearly all asylum seekers enter Austria illegally or apply at the airport. Asylum seekers who enter Austria illegally are brought to an initial reception centre or if they arrive by plane they stay at the transit area and the centre at Vienna international airport. According to Art. 18 Asylum Act asylum seekers have to be brought to an initial reception centre by agents of the public security service in order to guarantee their expulsion if they cannot produce any entry or residence authorization or certification of provisional right of residence. Persons who apply at the airport and are to be brought to the initial reception centre at the airport may be required, in order to guarantee their forcible return, to remain at a specific place in the border control area or in the area of the initial reception centre during the week following the border control in order to guarantee their forcible return. The entry decision has to be rendered by the Federal Asylum Agency on the basis of the information available from the initial interview by the agent of the public security service. If the claim is rejected on the safe third country or Dublin clause or dismissed as being manifestly unfounded they do not get a residence permit but do have to leave the country. Their status is described above\textsuperscript{226}.

The 2003 report on human trafficking (Schlepperbericht)\textsuperscript{227} reveals that in 2003 32,380 persons applied for asylum, which is a percentage of 71,75% of persons who were detected after illegal entry.

**Persons who do not apply for asylum after illegal entry:** The presence of aliens who entered Austria illegally and do not apply for asylum may be terminated by various means regulated by the Aliens Act in force.


\textsuperscript{226} See above 1.1.

**Rejection at the border according to the Aliens Act:** Aliens have to be rejected at the border for a number of reasons enumerated in Art. 52 Aliens Act. Art. 53 Aliens Act provides for measures to guarantee rejection at the border. If such a person cannot leave the border control area immediately for legal or practical reasons, he or she may be instructed to remain at a specified place, within that area, for the period of such stay. Persons are to be rejected i.a. if doubts exist concerning their identity, or if they have not complied with the passport or visa requirement, or if it had been stipulated that they must use a different border crossing point (Arts. 6 and 42 Aliens Act), if an enforceable residence ban has been enacted, or if the person attempts to re-enter Austria despite a prohibition or does not have sufficient means to maintain him/herself and does not have a domicile in Austria.

**Forcible return within seven days after entry:** If an alien already crossed the border he or she might be constrained by the authority to return abroad (Zurückschiebung), if the entry took place by evasion of the border control and the person is discovered within seven days. A further reason for forcible return is that the person entered without having satisfied the requirements laid down for entry and residence purposes.

According to Art. 60 Aliens Act rejection at the border and forcible returns are called acts “with direct powers of command and constraint” or “direct administrative power and compulsion” (Akte unmittelbarer behördlicher Befehls- und Zwangsgewalt). Complaints (from abroad) may be filed to the independent Administrative Senates in the Federal States.

---

228 Art 53 Aliens Act contains further reasons for forcible return: “1a. If they entered without having satisfied the requirements laid down for entry and residence purposes and are discovered within seven days; 2. If within seven days of their entry into the federal territory they have had to be returned by the Republic of Austria under a re-admittance agreement (Art. 4 (4)) or in accordance with international practice. (2) The forcible return may be indicated in the alien’s travel document.”

229 There is however a divergence in the jurisprudence of the Federal Constitutional Court and Federal Administrative Court about the question in which cases deportation is to be qualified as a act of direct administrative power and compulsion according to Art. 131a Federal Constitution. A complaint to the Independent Administrative Senate is only possible if deportation is such an act of direct administrative power and compulsion. If it is not qualified as an act of direct administrative power and compulsion a remedy is only possible against the residence ban or the expulsion order (the underlying decision). Embacher, W./Lepschi, A., Fremdengesetz 1997, 2003, 133 f.
Expulsion order: Austrian legislation distinguishes between expulsions of aliens without residence permits (Art. 33 Aliens Act), expulsions of aliens with residence permits (Art. 34 Aliens Act), and expulsions of aliens with a settlement permit (Art. 35 Aliens Act). Art. 35 Aliens Act contains provisions for persons who had their legal residence in Austria on the basis of a settlement permit for a period longer than five years, eight years and ten years (Aufenthaltsverfestigung). The reasons for expulsion are gradually restricted.

According to Art. 33 Aliens Act aliens may be expelled by administrative order if they are unlawfully resident in Austria. The lack of financial means for self-maintenance is a ground for expulsion, as well as illegally entering Austria, prostitution, working without prescribed permits, or where the person's presence is deemed to be a threat to public security and order. According to Article 40 expulsion orders are enforceable after becoming legally binding. The person may be deported.

Art. 36 of the Aliens Act allows a residence ban (Aufenthaltsverbot) to be imposed on aliens who are deemed to constitute a threat to law and order or public safety or to contravene other public interests, as specified by Art. 8 (2) ECHR. It can be imposed for an unlimited period (in cases of serious criminal offences and/or trafficking) or up to five and generally to a maximum period of ten years depending on the reasons that led to the issuance of the residence ban (Art. 39 Aliens Act).

Non refoulement provisions in the Aliens Act: Art. 57 Sect. 1 Aliens Act states that a person’s rejection at the border, forcible return or deportation to a country is inadmissible if there are valid grounds for assuming that the person would run the risk of being subjected to inhuman treatment or punishment or to the death penalty in that country. Art 57 (2) Aliens Act stipulates that rejection at the border or forcible return to a country are inadmissible if there are valid grounds for assuming that a person’s life or freedom would be endangered in that country on account of race, religion, nationality, membership of a particular social group or political opinion (according to Art. 33 Sect. 1 1951 RC). The examination if reasons exist which do not allow to send the person back to a certain state has to be carried out ex officio in all procedures deciding about the person’s deportation or about any other form of sending a person (back) to a certain state. During the procedure for the imposition of
an expulsion order or residence ban also a petition may be filed claiming that the person fears these risks according to Art. 75 Aliens Act.

The following table shows rejections, forcible returns, expulsion orders, residence bans and deportations.

<table>
<thead>
<tr>
<th></th>
<th>Rejections at the border</th>
<th>Forcible returns</th>
<th>Expulsion orders</th>
<th>Expulsion orders</th>
<th>Residence bans</th>
<th>Deportations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>22,371</td>
<td>3135</td>
<td>7387</td>
<td>144</td>
<td>15,057</td>
<td>8073</td>
</tr>
<tr>
<td>2004</td>
<td>26,270</td>
<td>4132</td>
<td>6104</td>
<td>274</td>
<td>9132</td>
<td>5274</td>
</tr>
<tr>
<td>January 2005</td>
<td>3440</td>
<td>131</td>
<td>297</td>
<td>22</td>
<td>620</td>
<td>327</td>
</tr>
</tbody>
</table>

Statistics also show how many persons left Austria voluntarily after a residence ban or an expulsion order had been issued (according to Art. 23 (3) Schengen Implementation Agreement) and also cases where the person did not leave the country.

<table>
<thead>
<tr>
<th></th>
<th>Exit confirmed by the border police authorities</th>
<th>No exit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>2,433</td>
<td>1,608</td>
</tr>
<tr>
<td>2004</td>
<td>2,871</td>
<td>1,788</td>
</tr>
<tr>
<td>January 2005</td>
<td>281</td>
<td>106</td>
</tr>
</tbody>
</table>

**Deportation:** Art. 56 contains provisions about the deportation of aliens against whom a residence ban or an expulsion order is enforceable. They may be deported if the supervision of their exit appears necessary for reasons relating to the preservation of law and order or public safety, if they fail to comply with their exit obligation on time or if, on the basis of certain facts, there is reason to believe that they will not

---

230 Arts. 33, 34 and 36 Aliens Act.
comply with their exit obligation and finally if they have returned to the Federal Territory in contravention of a residence ban. Complaints may be filed to the Independent Administrative Senates in the Federal States. According to Art. 60 Aliens Act deportation, transit of aliens and transit security measures relating to aliens have to be enforced by agents of the public security service “with direct powers of command and constraint” or “direct administrative power and compulsion” (mit unmittelbarer behördlicher Befehls- und Zwangsgewalt) if they cannot be carried out (promptly) by other means. The only provision contained in the Aliens Act relating to the factual exercise of deportation is that a threat to life or persistent threat to health is inadmissible.

Art. 107 Aliens Act provides for punishment for unauthorized residence. A person who does not depart promptly following the imposition of a residence ban or deportation order or returns without permission or resides in Austria as an alien who is subject to the passport requirement but does not possess a valid travel document or unlawfully resides is guilty of an administrative infraction.

The Aliens Act also contains provisions for the punishment of assistance to enter Austria illegally or to obtain a certain status illegally. According to Art. 104 Aliens Act human trafficking (smuggling) is to be sentenced by a Court to a term of imprisonment of up to one year or to payment of a fine of up to 360 times the average daily wage. Further provisions contain higher sentences e.g. for persons who engage in alien smuggling on a commercial basis or as a member of a criminal group. These persons shall be liable to a term of imprisonment of up to five years. Where the offence is committed in such a way that the alien is subjected to conditions of great suffering throughout a lengthy period, in particular during transportation, shall be liable to a term of imprisonment of between six months and five years or, if the offence results in the death of the alien, to a term of imprisonment of between one and ten years. Reports about human trafficking are published by the Ministry of the Interior.

231 See for the divergence in jurisprudence fn. 36.

232 2003 report, fn. 34. The 2004 report has just been published on http://www.bmi.gv.at/.
Art. 106 Aliens Act provides for punishment for **arranging fictitious marriages** (marriage of convenience) and Art 106a for **arranging of adoptions** of aliens enjoying full legal capacity where such an adoption is intended as a ground for the granting of a residence authorization and there is no intention to pursue a relationship conforming to that between natural parents and children.

According to information provided by NGOs and UNHCR only in exceptional cases persons are deported to the country of origin, usually persons are deported to third countries.

**Deportations to neighbouring countries** are usually carried out on the basis of bilateral readmission agreements. Already when a person enters Austria illegally and then applies for asylum and the Dublin procedure starts Austria also requests the other State to take the person back under the bilateral readmission agreement. If the other State does not accept responsibility under the Dublin rules there is an asylum procedure on the merits in Austria. After a final negative decision or also during the appeals proceedings if there is no suspensive effect the person may be sent back to the neighbouring country on the basis of the readmission agreement.

Austria has concluded a couple of bilateral cooperation agreements\(^{233}\). With Slovenia and Hungary implementing agreements on closer cooperation were already signed, with Poland, the Czech Republic and Slovakia such agreements are negotiated. Their legal basis is Art. 23 Dublin II Regulation. The agreements shorten the time limits (e.g. with Slovenia the time limits are reduced about 50 %) and make the transfer and readmission proceedings quicker and easier. With the Netherlands a cooperation exists, which is based on an ARGO programme. Liaison officers are exchanged and facilitate cooperation, readmission and transfer.

**Deportations carried out by plan and deportations to the country of origin:** In most cases persons to be deported do not resist their deportation. In these cases **regular scheduled flights** are used. These persons are attended by escorting officers. These officers are specially trained.

\(^{233}\) See below 4.4.
Deportations by means of charter flights: For so called problematic deportations charter flights are used, the persons are attended by human rights observers. Charter flights are used when a number of persons are to be deported to the same destination and if these persons resist their deportation and/or already resisted it before when it was intended to deport the person by scheduled flight.

Initially an independent human rights observer should be only present in the plane. It was however successfully negotiated by these observers that they are allowed to be present when the initial contact interview with the person to be deported by the accompanying official(s) is held at the day before the scheduled deportation. They are also allowed to be present when the persons are picked up at the place of detention (usually detention pending deportation (Schubhaft)) and transferred to the airport. Furthermore there is monitoring of events happening after the return: telephone contact with the person returned, with the family or persons of confidence. Focus lies on immigration procedures and interviews taking place after return. It is also monitored if the person is detained, if money is confiscated and how the local officials treat the returned person. According to information provided by a member of the Human Rights Advisory Board in a personal mail “a system to secure respect for human rights in deportation proceedings has been established”234.

Official statistics on problematic deportations are only available for 2004 with a number of 108 from total 5811, commencement of the enforcement of an expulsion order postponed (pursuant to Art. 33 (1) or Art. 34 Aliens Act): 149.

The following overview of charter flights was provided by SOS Menschenrechte Austria.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of flights</th>
<th>Number of persons deported</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>3</td>
<td>Not available</td>
</tr>
<tr>
<td>2002</td>
<td>3</td>
<td>8</td>
</tr>
</tbody>
</table>

234 Mail by Günter Ecker, Platform Human Rights Austria and also Member of the Human Rights Advisory Board (Mitglied des Menschenrechtsbeirats beim BM für Inneres).
The reporting Member of the Human Rights Advisory Board reported in his capacity as an independent human rights observer that he attended 7 charter flights, the first one to Lagos/Nigeria in October 2001. For other flights there was not enough space in the plane (Lear jet), but he accompanied the persons till boarding and carried out further monitoring after return. A doctor (physician), three escorting officers and a human rights observer have to be present during the flight. Media reports refer to costs of € 40,000, -- for such charter flights\textsuperscript{235}.

Taping, gagging and forced medication are not allowed. Art. 29 Security Police Act stipulates strict adherence to proportionality. Any measure used has to be proportional to the aim to be reached.

The **Austrian Human Rights Advisory Board** was founded in 1999 by an amendment to the Security Police Act (Arts. 15a, 15b and 15c Security Police Act and implementation order FLG. II 1999/395\textsuperscript{236}). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommended the establishment of an independent body entrusted with the regular inspection of the conditions of detention in all police detention centres already in 1990. But only when Marcus Omofuma, a Nigerian national who had applied for asylum in Austria, came to death in police custody in the course of his deportation to Bulgaria in May 1999, the efforts to create a body safeguarding human rights in general were intensified. The 1999 Amendment to the Security Police Act contains i.a. provisions on the human rights advisory board. The provisions entered into force on 1 September 1999. The Board issued a recommendation on deportation practices in 1999.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & \# of Flights & \# of Officers & \hline
2003 & 1 & 3 & \\
2004 & 8 & 27 & \\
2005 & 3 & 12 & \\
\hline
\end{tabular}
\end{table}

\textsuperscript{235} See IOM report.
\textsuperscript{236} Statistics provided by SOS Menschenrechte.
There is specific training for escorting officers. The specific training covers basic legal training, first-aid, English language courses, psychology and the use of force during deportations. The escorting officers are, furthermore, obliged to meet with the person to be deported prior to deportation. At least 24 hours before departure the person has to undergo a medical check. In order for the Austrian escorting officers to receive support from competent national authorities at stopovers the deportation is particularly routed via such countries with which transit agreements have been concluded 237.

2. Regularisation of illegal immigrants

2.1. Has the legal situation of “illegal” immigrants changed in the last five years?

There have been a number of changes and amendments to existing laws with the intention to speed up procedures and to allow the termination of the presence of the person in question within a shorter time. The present Aliens Act is in force since January 1997 and there have been a couple of amendments in recent years. There were however no decisive changes concerning regularisation.

Several gaps exist. Such a kind of “gap” exists in cases where persons may not be refouled according to provisions of the Aliens Act but do not have the possibility to get a residence permit. A humanitarian residence permit might be issued depending on the discretion of the authorities. As these persons do not have any kind of status and rights attached to that status, they are simply “tolerated”, which causes serious problems for the persons concerned, especially if the situation continues for a longer time. This is the consequence if deportation is either inadmissible due to Art. 57 Aliens Act (non-refoulement) or if it is impossible on actual reasons – mostly if no country issues a laissez passer or return home certificate and/or because no readmission agreement exits. In these cases a deportation deferment can be issued for the maximum period of one year (Art. 56 (2) Aliens Act), however this does not legalise

237 See IOM report.
a person’s sojourn in Austria. The deportation deferment can be renewed. If it is revoked this has to be done by an individual order, where a remedy is possible. Furthermore Art. 40 (1) Aliens Act allows postponing the commencement of the enforcement of an expulsion order (pursuant to Art. 33 (1) or Art. 34) or a residence ban up to three months (Durchsetzungsaufschub) upon application. In such cases, the “public interests of the person’s immediate exit must be weighed against those factors that he has to take into account in the settlement of his personal affairs”238.

If the duration of detention pending deportation has elapsed these person have to be released but do not have a right to a status and there is possibility to obtain social aid (except otherwise provided for by the social security laws of the Federal States).

In the present draft Aliens Police Act a so called toleration (Duldung) should be granted in cases where persons cannot be deported due to legal or practical reasons. In case these reasons cease to exist the toleration also ceases; it is not necessary to revoke the toleration and the person concerned has no further remedy.

2.2 new developments in law or administrative practices taking place in order to cope with the legal situation of “illegals”?

The present drafts generally intend to cope with the situation of “illegals”. There were changes in the Asylum Act to speed up the procedure by introducing the admissibility and screening procedure in the initial reception centres239. The draft Asylum Act 2005 intends to speed up expulsion and deportation proceedings for asylum seekers who committed crimes or are suspect of committing crimes. There are however serious doubts about the figures quoted and presented. These figures are used to legitimise the restrictions. The figures often only refer to persons suspected of having committed a crime or offence and not to cases where persons are charged or found guilty.

238 Art. 40 Sect. 1 Aliens Act.
3. Legal and administrative arrangements concerning return and repatriation

3.1 Have legal or administrative measures been undertaken to speed up return procedures, for instance by introduction of single procedures, accelerating asylum procedures in connection with return, introduction of preclusion rules etc.?

Admissibility procedures or pre-screening procedures in the initial reception centres were introduced to speed up the asylum procedure and allow quicker and easier return (a first decision has to be taken within 72 hours). These procedures are described above\textsuperscript{240}. Expulsion and deportation of asylum seekers is possible despite pending appeal decisions as suspensive effect may only be granted.

There is a kind of single procedure for persons who apply for asylum (that also embraces protection under the 1951 Refugee Convention)\textsuperscript{241}, as the asylum authorities do have to decide about the granting of asylum and – following a negative decision – also about the admissibility of refoulement. If an asylum claim is dismissed on the merits, the authorities have to decide about the admissibility of the person’s expulsion and deportation to the country of origin.\textsuperscript{242} Asylum seekers whose asylum application is dismissed may not be sent back to the country of origin for reasons specified in Art. 3 ECHR or Art. 33 1951 RC or because they claim to fear death penalty. If the non-refoulement examination under the Asylum Act prohibits an expulsion these persons shall be granted a limited residence permit according to Art. 15 Sect. 1

\textsuperscript{239} See above.

\textsuperscript{240} See above 1.1.

\textsuperscript{241} Art. 3 Asylum Act 1997: “(1) Aliens who in Austria seek protection against persecution (Art. 1 Sect. A (2) of the Geneva Convention on Refugees) shall request the granting of asylum by means of an application for asylum. A separate application for the determination of refugee status shall not be admissible.” Art. 12: “Rulings whereby aliens are granted asylum ex officio or on the basis of an asylum application or of an asylum extension application shall be issued in conjunction with a declaration recognising that refugee status is accordingly conferred upon the alien by operation of the law.” (Unofficial translation by UNHCR).

\textsuperscript{242} Art. 8 Asylum Act (evaluation of the applicability of the non-refoulement principle).
Asylum Act.\textsuperscript{243} \textit{This kind of single procedure does not really speed up the proceedings.}

\textbf{Carrier sanctions:} A measure to avoid the entry of persons without the documentation required and speed up and guarantee their immediate departure are provisions about carrier sanctions\textsuperscript{244} contained in the Aliens Act. These provisions intend to transpose Council Directive 2001/51/EC on carrier sanctions\textsuperscript{245}. Art. 53 and Art. 54 in combination with Art. 103 (3) Aliens Act contain obligations for carriers and impose sanctions if they do not comply with their duties. If a person is rejected at the border the carrier is obliged to ensure the immediate departure at its own expense. Carriers are obliged to provide the identification particulars (name, date and place of birth, address and nationality) and details of the documents required for entry purposes (type, period of validity, issuing authority and date of issue) for ten days. This does not apply for passengers who do not need a visa, provided that the carrier has satisfied itself that such aliens are in the possession of the necessary travel document. Before the carrier allows the alien access to the means of transport, the latter must render plausible that his travel document is substantively accurate according to its appearance and his own indications. If the carrier fails to comply promptly with the obligation to communicate particulars the carrier has to pay 3,000 Euro. There is no reimbursement of expenses if the carrier arranges at its own expense for the alien’s immediate exit. The amount has to be paid back, if the respective alien is being granted asylum. Already before this Directive has been adopted and had to be im-

\begin{footnotesize}
\begin{enumerate}
\item Art. 15 Sect. 1 reads: “If the aliens are deprived of residence entitlement upon the dismissal of their application, the order granting limited right of residence shall be issued by the Federal Asylum Agency in conjunction with the dismissal ruling; if their residence entitlement ceases at a later date, limited right of residence may be conferred at that time. Should the aliens be deprived of residence entitlement only upon the upholding of the dismissal ruling, the order granting limited right of residence shall be issued by the Independent Federal Asylum Review Board in conjunction with the appeal ruling. The extension of any such limited rights of residence and their revocation shall, however, be the responsibility of the Federal Asylum Agency.”

\item The explanatory report defines the obligations to pay the amount of 3,000 € as a private law obligation. The concept and definition however shows that in fact it is a criminal law sanction. Muzak, G., Fremdenrecht, in Muzak, G./Taucher, W./Pinter, C./Lobner, M., Fremden- und Asylrecht, Kommentar, Vienna, 8 Suppl. 2004, 302.

\end{enumerate}
\end{footnotesize}
implemented there have been provisions imposing sanctions on carriers. A judgment of the Constitutional Court declared that some provisions which regulated duties for carriers as violating the Austrian Constitution\(^{246}\). The obligations were not clearly specified. Still doubts exit if the present wording fully corresponds to constitutional requirements; especially the avoidance of costs by returning the passenger is often not possible and does not fall in the sphere of the carrier. Furthermore it is by no means foreseeable if a person will be granted asylum in Austria\(^{247}\). The present obligations do not fully implement the 2004 Directive\(^{248}\) which has to be transposed by 5 September 2006 as they e.g. do not contain the duty to be ready to submit the data by the end of check-in as required by Art. 3 of the Directive.

### 3.2 administrative measures (centres for management of deportation; procurement of travel documents by central agencies etc.)

The initial reception centres which were established in 2004 might be seen as centres for management of deportation in a wider sense\(^{249}\). The objective was to have places for screening procedures and procedures about the admissibility of the claim. One effect however is that also the deportations following a decision rejecting the claim or declaring it inadmissible are more easily manageable as these persons stay at one place.

Deportations under the Aliens Act are mainly carried out where persons are already held in detention pending deportation.

**Detention pending deportation according to the Asylum Act:** According to Art. 34b Asylum Act a detention order may be issued if an asylum seeker has left the initial reception centre during the admissibility procedure without justification and also

\(^{246}\) Federal Constitutional Court, 2.10.2001, G 224/01.

\(^{247}\) Muzak, G., Fremdenrecht, in Muzak, G./Taucher, W./Pinter, C./Lobner, M., Fremden- und Asylrecht, Kommentar, Vienna, 8 Suppl. 2004, 302.


\(^{249}\) See above 1.1.
if an expulsion order – even if it is not final – has been issued pursuant to Art 5a Asylum Act (Dublin) or Art. 6 Asylum Act (manifestly unfounded claim), and also if an alien files a second application for asylum following a final ruling in the admissibility procedure or following a final negative decision. In these cases the Aliens Act applies.

**Detention pending deportation according to the Aliens Act:** According to Art. 61 of the Aliens Act aliens may be arrested and held in detention pending deportation provided that such action is necessary as a procedural security measure in connection with the imposition of a residence ban or expulsion order. The Austrian Aliens Act provides for a maximum duration of 2 months. The duration may be extended for up to 6 months under special circumstances, i.e. if it is necessary to clarify the identity of the person, to obtain necessary travel documents or in cases where the deportation could not be carried out due to physical resistance of the alien. Social care is mainly provided by NGO’s. Some police detention facilities have so-called open stations (offene Stationen) where persons detained are free to move during daytime\(^{250}\).

There is also the possibility to apply **more lenient measures**, especially for persons under full age. More lenient measures are mainly seen in accommodation in premises specified by the authority. Persons staying at an allocated accommodation are obliged to regularly present themselves to the authorities. Regarding minors the use of more lenient measures is obligatory, except in cases where the authorities have reasons to believe that this measure will not facilitate the procedure. Unaccompanied minors may initially be accommodated at so-called “clearing houses”. At such houses minors may be accommodated for 3 months during which the authorities have to clarify the status and perspectives of the minor. At such places the minor receives adequate care and counselling. Then the minor may be transferred to other accommodation premises\(^{251}\).

The following table shows the number of cases where persons are detained pending deportation and more lenient measures.

\(^{250}\) See IOM report.

\(^{251}\) See IOM report.
Year | Detention pending deportation | More lenient measures
--- | --- | ---
2003 | 11,149 | 622
2004 | 9051 | 359
January 2005 | 582 (32 according to Art 34b Asylum Act) | 23

3.3. Availability of alternative procedures to obtain a humanitarian toleration or leave to remain?

The Asylum Act provides for a kind of subsidiary status in Arts. 8 and 15 Asylum Act\(^{252}\). The Aliens Act also contains some provisions which can be seen as the legal basis for a kind of humanitarian protection. The non refoulement provisions are described above\(^{253}\). If deportation is either inadmissible due to Art. 57 Aliens Act (non-refoulement) or if it is impossible on actual reasons – mostly if no country issues a laissez passer or return home certificate and/or because no readmission agreement exits –, a deportation deferment can be issued for the maximum period of one year (Art. 56 (2) Aliens Act). This deportation deferment can be renewed. A deportation deferment however does not legalise a person’s sojourn in Austria. It also does not serve as a residence permit. Furthermore Art. 40 (1)Aliens Act allows postponing the commencement of the enforcement of an expulsion order (pursuant to Art. 33 Sect. 1 or Art. 34) or a residence ban up to three months (Durchsetzungsaufschub) upon application. In such cases, the “public interests of the person’s immediate exit must be weighed against those factors that he has to take into account in the settlement of his personal affairs”\(^{254}\). As already mentioned the draft Aliens Police Act contains a provision about a so called toleration (Duldung)\(^{255}\).

---

\(^{252}\) See above 1.1.
\(^{253}\) See above 1.2.
\(^{254}\) Art. 40 (1) Aliens Act.
\(^{255}\) See above 1.1.
3.4. Have restrictive measures been undertaken to secure return procedures like detention of foreigners, restrictions to work, reducing social welfare etc.?

Detention practice is described above. Federal Social Care during the asylum procedure has been restricted. In 2002 certain nationalities and groups were excluded from Federal Social Care (e.g. persons from Armenia, Azerbaijan, Georgia, Serbia and Montenegro, Macedonia, Nigeria and Turkey (where the claim was rejected in the first instance)). The underlying aim was to confine Federal Care to those asylum seekers unable to support themselves, but with a realistic prospect of being granted asylum.

Regarding this practice the High Court ruled that asylum seekers who cannot maintain themselves are to be supported by the State\textsuperscript{256}. The Act on Federal Social Care for Asylum Seekers as amended in 2004\textsuperscript{257} and an Agreement between the State and the Federal States\textsuperscript{258} contain provisions about social care. The question of financing accommodation, social welfare, means of subsistence, medical care and other benefits is part of this Agreement. This Agreement covers the sharing of expenses for asylum seekers, persons under certain forms subsidiary protection and also persons under temporary protection. The Agreement neither contains rights of individuals to be granted such benefits nor obligations for the authorities concerned to provide these benefits. Still the Agreement is not fully implemented and some Federal States do not fulfil their obligations. On the one hand these measures intend to restrict and reduce the presence of asylum seekers in Austria on the other hand they are a result of (financial) differences between the State and the Federal States.

\textsuperscript{256} OGH 9 Ob 71/03m.
4. The impact of EU-directives, regulations and measures on return and repatriation policies

4.1 Directive on mutual recognition of return decisions

Art. 34a Aliens Act intents to implement the Directive on mutual recognition of return decisions. A final enforceable expulsion order or residence ban issued by a State Member of the European Economic Area shall be equivalent to a final enforceable Austrian deportation ruling. This is the case if the expulsion order is based on a serious and acute threat to public safety and law and order or to national security and the residence ban is either based on the criminal judgement of an offence that carries a minimum sentence of imprisonment of one year or was imposed owing to the existence of a well-founded suspicion that the third-country national had committed serious offences or to the existence of material evidence to suppose that he was planning such acts within the territory of a Member State. A third reason is that the residence ban was imposed because the third-country national had infringed the entry and residence regulations of the State pronouncing the ruling. “Serious and acute threat to public safety” is a legal term which is not regularly used in Austrian terminology but was included in that case to use the terms contained in the Directive.

Also Art. 74 draft Aliens Police Act 2005 provides for the implementation of this Directive.

4.2 Regulation Nr. 93 and No. 694/2003 on facilitation of transit of third-country nationals

Transit of third country nationals is regulated by Art. 58 Aliens Act, Art. 59 provides for the conclusion of transit agreements. According to Art. 58 a transit shall be possible if such a transfer is ordered in a transit declaration pursuant to an international

261 See fn. 3.
agreement. Readmission agreements usually provide for transit of persons to be re-admitted.

4.3 Council Decision on information for voluntary return Nr. 97/340/JI

Section 6 below deals comprehensively with voluntary return.

4.4 Readmission Agreements of the EU or clauses in other EU agreements on readmission and return (relationship between bilateral readmission agreements and EU efforts)

Austria has concluded a number of readmission agreements. These agreements either contain obligations to readmit nationals of the Contracting Parties or nationals and third country nationals. Time limits and details vary in the different agreements. Many readmission agreements include a time limit of 3 months, during which Austria is obliged to file a request for transfer. As the inadmissibility procedure can take several months before the Federal Asylum Office renders a decision, the Austrian authorities are increasingly requesting readmission before completion of the asylum procedure to meet the time limits stipulated by the relevant agreements\(^{262}\).

The following table shows readmission agreements.

Restricted to nationals of the Contracting Parties:

<table>
<thead>
<tr>
<th>FLG. 255/1965</th>
<th>Tunisia</th>
<th>Signature</th>
<th>Entry into force</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Exchange of notifications</td>
<td></td>
</tr>
</tbody>
</table>

Not restricted:

<table>
<thead>
<tr>
<th>FLG. 51/1965</th>
<th>Benelux countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>FLG. 337/1962</td>
<td>France</td>
</tr>
</tbody>
</table>

\(^{262}\) See also IOM report.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(Agreement between Austria and the Czech and Slovak Federative Republic, the Agreement was upheld with the Czech Republic by FLG. III 123/1997)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Many readmission Agreements contain provisions about the transit of third country nationals. Austria has also concluded a special Transit Agreement concerning return to Kosovo and transit through other countries\textsuperscript{263}.

\textsuperscript{263} Vereinbarung über die Gestattung der Durchreise ausreisepflichtiger jugoslawischer Staatsangehöriger samt Anhang, FLG. III 68/2000.
5. Dublin II and Eurodac

5.1 Have they had an influence on facilitating the return of rejected applicants to their home countries?

There are no reports about the return of rejected applicants to their home countries following the application of the Dublin system. It seems however that their have been cases of chain refoulement. Statistics show “negative” Dublin decisions counting cases where Austria is not responsible but another Member State of the system. Statistics from May 2004 onward also show actual transfers to the new Member States of the European Union\textsuperscript{264}. The bilateral return proceedings are described above\textsuperscript{265}.

It was generally intended and awaited that Dublin II together with Eurodac and Dublinet would help to speed up proceedings\textsuperscript{266}. A first NGO report and statistics confirm this tendency\textsuperscript{267} Statistics also show that there are only few safe third country cases but an increased number of Dublin cases. Eurodac makes it possible to establish the identity of persons easier. The 2003 report about human trafficking\textsuperscript{268} refers to the positive effect of EURODAC as the identity of persons can be defined easier. In 2003 32.380 persons applied for asylum. This is a percentage of 71,75% of persons who were detected after illegal entry.

5.2. Psychological influence; better knowledge about identity and number of persons obliged to leave?

\textsuperscript{264} See above 1.1.
\textsuperscript{265} See above 1.3.
\textsuperscript{266} See FIDE Country report on Austria by Taucher, W./Marth, T./Jelinek, A., 39.
\textsuperscript{268} 2003 report, fn. 34. The 2004 report has just been published on http://www.bmi.gv.at/.
5.3. To what extent is Eurodac an element for more efficient return policies?

Eurodac is seen to be one element to be one element of a more efficient return policy. It is more often possible to establish the identity of persons. However there are still not that many actual returns under Dublin²⁶⁹, there is a discrepancy between decisions and transfers.

5.4 If there is not noticeable direct effect of EU directives and measures on return and repatriation policies of your country, how are EU plans, green papers (for instance COM 2002 (175)) on a Community return policy or other suggestions (Minimum standards for return procedures) received in your country by government, the general public or NGOs?

There has been no public or publicly noticeable discussion of EU plans in this regard. There are no comprehensive NGO debates about it. There is a big discussion about the recently presented drafts.

6. Main legal and administrative schemes for voluntary return – incentives for voluntary return (repatriation programmes, financial assistance, monitoring in home countries etc.)

6.1 Legal framework

The legal basis for voluntary return assistance to persons who wish to return to their home countries but lack financial means to do so, can be found in the Federal Asylum Act and in the Federal Law Regulating the Provision of Federal Care for Asylum seekers (Federal Care Provision Act).

Article 40a of the Federal Asylum Act states that *Asylum seekers may be given repatriation advice at any stage of the procedure*. According to that provision, *repatriation advice shall encompass an explanation of prospects in Austria and in the country of origin or third country*. Due to Paragraph 2 of Article 40a, financial support
can be granted to an asylum seeker prior to his departure from Austria, if he accepts
the repatriation advice offered to him and to leave Austria. Article 40a provides vol-
untary return assistance only for Asylum Seekers, i.e. persons who applied for Asy-
ylum and whose application has not yet been decided upon (Article 1, no. 3 Federal
Asylum Law). If the application for asylum has been dismissed or rejected, return
assistance can not be granted under the head of Article 40a.

Nevertheless voluntary return assistance is also open to persons whose application
for Asylum has been dismissed or rejected. Article 12 of the Federal Care Provision
Act states that *Aliens whose application for asylum has been rejected or dismissed
and refugees as defined in the Asylum Act may, if they are persons in need and are
willing to return to their home country or – if they are stateless – to their country of
origin – be provided with repatriation assistance.* In 2003 Paragraph 1 was amended
to the effect that asylum seekers (i.e. persons, whose application for asylum has not
yet been decided upon) are no longer covered by this provision. In it’s expertise on
the draft, UNHCR criticized this amendment, because asylum seekers should have
the change to receive voluntary return assistance in any stage of the proceedings\textsuperscript{270}. It
seems that this amendment didn’t have any practical consequences.

According to Paragraph 2 of Article 12 of the Federal Care Provision Act, *repatria-
tion assistance shall in all cases include the necessary costs of the return journey.*
Paragraph 3 provides that repatriation advisory centres (*Rückreiseberatungsstellen*)
are established by the Ministry of the Interior, which provide persons willing to re-
turn to their home countries / countries of origin with *information on repatriation
opportunities and advice on all related matters*. The Ministry may also engage the
service of appropriate organisations for such purposes.

6.2 Voluntary return programmes in Austria

The Ministry of the Interior made use of the possibility to engage the services of ap-
propriate organizations for voluntary return advice and assistance, provided for in
Article 12 of the Federal Care Provision Act. In 2004, programmes of the following organisations concerning voluntary return have been co-financed by the Ministry of the Interior and the European Refugee Fund (ERF):

- Caritas Austria (*Rückkehrhilfe* and *Mobile Perspektivenabklärung*) and Caritas Graz-Sekau (*Mobile Rückkehrberatung Steiermark II*)
- Volkshilfe Oberösterreich (*Mobile und regionale Rückkehrberatung von AsylwerberInnen in Oberösterreich*)
- Verein Menschenrechte Österreich (*Aufsuchende Rückkehrberatung Niederösterreich (West) und Burgenland*)
- International Organisation for Migration (IOM) Vienna (Coordination of support for voluntary return to Afghanistan)

### 6.2.1. Programmes run by Caritas

a) The general programme for assisted return (*Rückkehrhilfe*)

This programme has been in operation since November 1998. From 1 December 1998 to 31 December 2004, 7,467 persons from about 60 countries have received counselling regarding the voluntary return programmes carried out by Caritas. During this period, 4,479 aliens have voluntarily returned with the assistance of Caritas. The programme is aimed at supporting aliens who want to return to their home country and lack the necessary means to do so on their own. But the programme does not only provide financial support. The clients also receive help in finding a decision and developing plans for a restart in their home countries. Another important part is the support in organisational matters, especially to obtain necessary documents and organise the journey.

Normally the counselling of a client includes the following steps:

---

• Clarification of voluntariness: In a first step it must be clarified if the client really wishes to return to his home country.

• Development of prospects in the home country: Concrete options for reintegration are to be developed.

• Organisation of documents: In many cases, asylum seekers haven’t got any identity documents. Caritas supports in obtaining identity and travel documents.

• Application for financial support at the Ministry of the Interior: If the alien cannot pay the travel costs by himself, Caritas supports him in filing a request for financial support to the Ministry of the Interior.

• Booking of flights via IOM: In organising the journey itself, Caritas cooperates with IOM. In 2004 92,8 % of the returnees travelled air route. IOM books the flights and takes care of the client during stopovers.

• Financial support for reintegration: Usually financial support for reintegration is provided for in form of a remittance to the home country.

Statistics 2004:

In 2004, 1.016 new clients received counselling about voluntary return by the Caritas. Together with the 169 persons who had already been advised in the preceding years, a total of 1.185 persons have been advised in 2004. In 2004, 664 aliens returned to 47 different countries, that’s 65,4 % of the advised persons. Nine of the 664 returning aliens did not go back to their home country, but travelled to a third country. Most of the returning aliens went back to Georgia (16 %), Turkey (14 %) and Kosovo (11 %). 79 % of the returnees were man. 80 % of the returnees were asylum seekers in different stages of the proceedings, 15 % were aliens obliged to leave Austria under the Aliens Act. The remaining 5 % were refugees who had obtained asylum (0,3 %), aliens under subsidiary protection (0,6 %) and other groups of aliens.

521 persons (78,5 %) have been granted financial support for their reintegration in the amount of an average € 233,- per person. The amount depends on the facts of every individual case. If the alien has stayed in Austria for up to one year, the maximum is fixed at € 365,-. Has he or she already stayed in Austria for more than one
year, the amount can reach up to € 1,500.-. The amount actually granted depends on the country of origin, the length of the stay in Austria, possible incomes in the home country, state of health, family ties and other personal factors.

The total costs of the project amounted to € 658,400.- in 2004. The Ministry of the Interior provided € 217,881,32 to this sum, the European Refugee Fund provided € 302,118,68.

b) Mobile evaluation of prospects (Mobile Perspektivenabklärung):

The programme “mobile evaluation of prospects” (Mobile Perspektivenabklärung) is also run by Caritas Austria. The project has been in operation since 1 March 2003. The aim is to help asylum seekers to clarify their prospects in Austria as soon as possible and to evaluate if a voluntary return might be an option, in the case they have got no chances to be granted asylum. The staff members of Caritas visit asylum seekers in their accommodations. The counselling focuses on a clarification of the chances to be granted asylum in Austria. If the client decides to return to his home country voluntarily, a concrete advice is carried out that correlates to the procedure described above.

From 1 March 2003 to 30 April 2004 94 clients returned to their home countries, from 1 May 2004 to 15 March 2005 another 90 persons made use of the opportunity to return via this project of Caritas Austria.

The total costs of the project amounted to € 261,599.- in 2004. The Ministry of the Interior provided € 111,201.- to this sum, the European Refugee Fund provided € 130,799.-.

c) Mobile return counselling Styria (Mobile Rückkehrberatung Steiermark II)

A similar programme is in operation in Styria since 1 May 2003. It is run by Caritas Graz-Sekau, a regional branch of Caritas Austria. The project is co-financed by the Ministry of the Interior and the European Refugee Fund. The costs of the project from 1 May 2004 to 30 April 2005 amount to € 111,775,74. The Ministry of the Interior and the European Refugee Fund bear € 55,887,87 each.
No statistical data was available yet, but as there will be a final report on the project after it’s conclusion on 30 April 2005, nearer information on the project will be included in the final version of this report.

6.2.2. Volkshilfe Oberösterreich: Mobile and regional return counselling for asylum seekers in Upper Austria

(Mobile und regionale Rückkehrberatung von AsylwerberInnen in Oberösterreich)

The Volkshilfe Oberösterreich is active in the field of voluntary return assistance in Upper Austria. It’s programme co-financed by the Ministry of the Interior and the European Refugee Fund, called “mobile and regional return counselling for asylum seekers in Upper Austria” (Mobile und regionale Rückkehrberatung von AsylwerberInnen in Oberösterreich), is running from 1 May 2003 to 30 April 2005. It’s aim is to provide asylum seekers (i.e. persons whose application for asylum has not yet been decided upon), people whose application for asylum has been rejected or dismissed and aliens without a valid claim for sojourn in Austria with information about the possibility of a supported voluntary return to their home countries.

Volkshilfe clarifies the prospects of the asylum seeker to be granted asylum in Austria or other possibilities of a legalisation of his sojourn respectively. If the person thinks about returning to his home country, Volkshilfe supports him in realising this intention. Volkshilfe files the request for financial support to the Ministry of the Interior. If the Ministry decides to bear the travel expenses because it reached the conclusion that the returnee lacks own means enabling him to return to his home country on his own costs, Volkshilfe organizes the documents required for the return journey. The organisation also takes care for the legal matters concerning the asylum procedure (e.g. withdrawal of the application for asylum). The journey itself is organized by IOM Vienna (see below).

Volkshilfe supports the returnees also in form of an allowance for reintegration. The allowance amounts from € 300,- to € 600,-, depending on the personal circumstances of every individual case.
As the programme is running until 30 April 2004, there is no statistical data available yet. There will be a final report after the conclusion of the project on this date. The information will be included in the final version of this report.

6.2.3. Verein Menschenrechte Österreich

The NGO „Verein Menschenrechte Österreich“ offers voluntary return counselling in Lower Austria, Burgenland, Vienna and – since December 2004 – also in Upper Austria.

The offer is addressed to asylum seekers and aliens staying in Austria illegally. The programme consists in the following steps:

- Information about the possibility of a voluntary return, the further process of the return proceedings and the organisational and financial support available in case of a return.
- Support in organisational matters, such as filling the application form requesting the Ministry of the Interior to bear the travel expenses.
- Accompaniment of the returnee to different authorities or embassies respectively.
- Organization of travel documents when needed.
- Booking of the flight in cooperation with IOM Vienna.
- Transfer to the airport.
- Disbursement of reintegration allowance (depending on the indigence of every single person).

The Verein Menschenrechte reaches potential returnees in different accommodations for asylum seekers in Burgenland and Lower Austria, in it’s own offices in St. Pölten, Linz and Vienna and in the detention centres of the police (Polizeianhaltezentren) in Schwechat, Linz, Wels, Steyr, Ried and Vienna, where the organisation also offers legal and psychological counselling for persons in detention pending deporta-
tion. Since December 2004 return counselling is available in the Initial or “first contact” reception centre (Erstaufnahmезentrum) Thalham (Upper Austria) as well.

In 2004 288 clients received counselling on voluntary return by the Verein Menschenrechte. 70% of these actually returned to 32 different countries. The most important countries of destination were Moldavia, Serbia-Montenegro (including Kosovo), Georgia, Ukraine, Bulgaria, China, Romania and Armenia.

6.2.4. International Organisation for Migration (IOM): Coordination of support for voluntary return to Afghanistan

(Koordination der Hilfe für freiwillig Rückkehrende nach Afghanistan)

A special project directed exclusively at persons from Afghanistan is carried out by the International Organisation for Migration (IOM) since April 2003. It’s aim is to coordinate the different voluntary return projects, the organisation of the journeys and the care for the returnees and reintegration efforts after their return as far as Afghan nationals are concerned. IOM periodically informs about the actual social and economic situation in different Afghan regions via a newsletter sent at different NGOs, authorities and Afghan representations in Austria. If a person is willing to return to Afghanistan, she/he fills in a questionnaire about her/his special needs and tasks. This form is transmitted to IOM Kabul, that sets appropriate measures of reintegration in Afghanistan.

The Ministry of the Interior provides Afghan nationals willing to return to their home country with a support for their reintegration. This allowance is fixed at € 500,- for a single person and € 800,- for married couples plus € 100,- per child. (Up to a maximum of € 1.200,- per family). This financial allowance normally is paid via IOM Vienna.

IOM Vienna takes care for the organisation of the journey. This includes obtaining flight tickets and the necessary documents as well as accompaniment to the plain and during stopovers and reception in Afghanistan.
IOM Kabul welcomes the returnees in Afghanistan, supplies them with accommodation when necessary and organises the continued voyage to their actual destination. When required, IOM Kabul takes care for a participation of the returnee in existing reintegration programmes. These comprise inter alia language and computer courses, but also training in skilled crafts. After the graduation from these programmes the participants are provided with a set of the needed tools to support their entering the business scene. Since March 2003 IOM Kabul supplies returnees also with a financial allowance of € 1.700,- and supports them in the evolvement of realistic business plans. These reintegration activities of IOM Kabul are open to every afghan citizens returning from the European Union. They take place in the context of the RANA project (“Return, Reception and Reintegration of Afghan Nationals to Afghanistan”) and are financed mainly by the European Commission with the support of the EU member states.

The project is financed by the Austrian Ministry of the Interior and the European Refugee Fund (ERF). From 1 October 2004 to 30 September 2005 the costs of the project amounted to € 126.789,-. The Ministry of the Interior provided € 53.833,- to this sum, the European Refugee Fund provided € 63.399,-.

6.3. Return counselling provided by European Homecare

Besides the different voluntary return programmes run by NGOs, there is also one private agency active in this field. In October 2002 the Ministry of the Interior commissioned European Homecare to provide return counselling in the refugee camp Traiskirchen. As the camp in Traiskirchen is one out of three Erstaufnahmезentren, there is also an office of the asylum authority (Bundesasylamt). During the asylum procedure, the possibility of receiving return counselling is pointed out to the asylum seekers by the authorities. European Homecare together with the asylum seeker analyses her/his perspectives to stay in Austria and the possibilities to receive assistance should he/she decide to return to his/her home country. European Homecare emphasized the voluntary character of this offer. There are no consequences for an asylum seeker if he does not make use of the return counselling.
People willing to return voluntarily receive an allowance of up to € 370,- or € 500,- respectively if they return to Afghanistan or Iraq. This amount is paid by the Ministry of the Interior, that also bears the travel costs. The returnee receives the money when entering the plane from an employee of the IOM.

It seems that the clarification of the situation in the destination countries is left to the people willing to return. As European Homecare imparted, the returnees get the opportunity to contact friends and relatives in their home countries via telephone at the cost of European Homecare or the Ministry of the Interior respectively. This should enable the returnee to get himself an idea about the situation in his home country. What European Homecare does is organizing the documents required for the journey. If necessary European Homecare also provides cloth and medicines.

European Homecare cooperates with the Ministry of the Interior, the embassies of the destination countries and the IOM. IOM Vienna organizes the journeys of the returnees, e.g. flight tickets and accompaniment to the plain and during stopovers (see below).

Between October and December 2002 a total of three persons was returned via referral through European Homecare. In addition European Homecare obtained return documentation for nine returning migrants, who were assisted to return by IOM Vienna. In 2004, 259 persons were assigned to the return counselling of European Homecare. 224 persons returned voluntarily to their home countries. Most of them went back to the former Yugoslavia (49), Afghanistan (24), Moldova (24), Georgia (23), Turkey (19), Armenia (14), Russia (13), Iran (11) and Iraq (10). The other twelve states were represented with less than 10 persons.

No information about the costs of the project was provided by European Homecare.

______________________________

6.4. The role of the International Organisation for Migration (IOM) 

Since 14 June 2000 there is an agreement between IOM and the Austrian Ministry of the Interior concerning voluntary return. Based on that agreement, IOM maintains the „General humanitarian voluntary repatriation programme” („Allgemeines Humanitäres Freiwilliges Rückkehrprogramm”). In operating the programme, IOM cooperates with the Ministry of the Interior, different NGOs operating in the field of legal advice and care for refugees and migrants (mainly Caritas Austria) and the refugee offices of the regional governments (Landesflüchtlingsbüros).

The programme is targeted at asylum seekers, whose applications for asylum have been rejected or dismissed, asylum seekers, who gave up their efforts to be recognised as refugees under the Austrian asylum law and other migrants, who have actually been ordered to leave Austria by the authorities or who meet the conditions for such an order.

On request of the different NGOs (mainly Caritas Austria), who advise persons willing to return to their countries of origin, IOM Vienna takes care for the organisation of the journey and supports the returnees before their departure, during the journey and after their return. IOM Vienna organises flight tickets, accompaniment to the plain and during stopovers and support for reintegration in the destination countries. The Ministry of the Interior bears the travel expenses.

IOM Vienna is handling the journeys of all the persons willing to return who have been counselled in one of the aforementioned projects co-financed by the Ministry of the Interior and the European Refugee Fund, by European Homecare or by one of the Federal States’ departments responsible for refugees (e.g. the Landesflüchtlingsbeauftragte in Carinthia and Tyrol).

In 2004 1.158 persons returned to their countries of origin with support of IOM’s general humanitarian voluntary repatriation programme. Among those were 41 toddlers (under the age of two) and 59 other children. 924 persons were male, 234 female. The most important destinations were Serbia and Montenegro (188), Georgia (161), Turkey (115), Moldavia (93) and Armenia (74). Those 47 persons returning to Afghanistan benefited from the RANA project (see above).
### 6.5. Repatriation measures for displaced persons from the former Yugoslavia

The return of displaced persons from the former Yugoslavia has already been completed. Therefore, just a short synopsis shall be given on the measures taken to assist the return of this group of displaced persons. The survey is mainly based on the report on the theme written by Peter Valentini and published in a book edited by Hannes Tretter\(^{272}\).

The return of the large group of displaced persons from the former Yugoslavia (i.e. Bosnians and Kosovars) primarily took place on a voluntary basis. The rather disorganised return of Bosnian refugees from Bosnia and Herzegovina, starting after the situation consolidated with the end of the fighting following the Dayton peace agreement, was supported by the Austrian government mainly through bilateral negotiations to secure the transit of the returnees. These efforts lead to an agreement concluded between the Ministries of the Interior of Germany and Croatia, the federal government of Austria, the Swiss parliament and the government of Slovenia\(^{273}\). This agreement about the permission of transit, coming into force on 1 July 1996, allowed the transit of displaced persons to Bosnia and Herzegovina without a visa.

When in March 1997 the Austrian Federal Government and the Federal States (Bundesländer) implemented an assisted voluntary return programme for displaced Bosnians who were neither integrated nor in need for international protection, some 10,700 Bosnian refugees were staying in Austria. This programme was carried out in cooperation with different reconstruction and resettlement programmes carried out

---


<table>
<thead>
<tr>
<th>Year</th>
<th>Assisted returns</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>1,158</td>
</tr>
<tr>
<td>2003</td>
<td>1,063</td>
</tr>
<tr>
<td>2002</td>
<td>878</td>
</tr>
<tr>
<td>2001</td>
<td>427</td>
</tr>
</tbody>
</table>
by the European Union or UNHCR as well as reconstruction programmes led by the Austrian Federal Chancellery. In addition, financial allowances were granted by the federal government and the federal states to the returnees.

Starting from Summer 1997, all Bosnian displaced persons returning voluntarily were granted assistance in form of counselling and – if the were in need of it – a financial allowance, paid immediately before their departure. The allowance amounted to ATS 9,000.- (€ 654,-) per person plus to ATS 1,500.- (€ 109,-) for transport of luggage per family, when necessary. Persons in need for assistance for their organised return received the required organisational help and an reintegration allowance in the amount of ATS 7,500.- (€ 545,-). The individual return assistance was financed by the Austrian federal government, who paid two thirds of the costs and the federal states, paying one third.

As far as possible displaced persons from Bosnia were not deported involuntarily. The efforts to legalize the stay of these people lead to the “Federal Law securing the right of integrated displaced persons from Bosnia and Herzegovina to stay in Austria” (Bosniergesetz)\(^\text{274}\). The 1,600 people deported between 1995 and 1999 were mainly persons who had committed a crime and were therefore not allowed to stay in Austria.

7. Legal and administrative or other barriers for enforcement of return (deportation)

7.1. Basic legal schemes

The situation of persons who are obliged to leave but do not leave voluntarily leave is described above

\(^{273}\) FLG 298/1996.
\(^{274}\) FLG I 85/1998
7.2. Deportation barriers (what kind of legal impediments to deportation are most prominent in your country?)

The most important legal impediment is to be seen in cases where the person may not be deported due to non refoulement provisions but is not granted asylum or subsidiary protection.

7.3 Length of administrative or judicial procedures

7.4. Lack of cooperation (violent resistance etc.)

In cases of violent resistance the deportation has to be postponed. The use of charter flights is possible²⁷⁵.

7.5 Practical difficulties (absence of documents, false identity, failure to readmit; lack of cooperation of home country; excessive requirements to prove identity etc.)

In many cases removals are not possible because the countries of origin do not cooperate, this e.g. goes for India and for (west) African countries. Often there is no possibility to establish the identity and nationality of a person. Also if the identity is established countries often refuse to issue a so called return home certificate (Heimreisezertifikat). Even if they are ready to issue such a certificate the procedure does take a long time and there are many practical impediments.

The IOM country report on Austria also refers to problems with identifying and documenting with regard to Chechnya and China.

²⁷⁵ See above 1.2.
8. If the practical as well as the legal difficulties are predominant, what instruments are considered in your country as a primary objective or concept for a consistent or effective return policy?

8.1. European minimum standards or return

According to information provided by the responsible department in the Ministry of the Interior European minimum standards would be a goal which should be achieved. Furthermore a system of burden sharing is envisaged not only for asylum seekers and distribution systems but also for return proceedings.

8.2. Mutual enforcement of return decisions

8.3. Closer links between economic assistance policies with third countries and readmission obligations

There is no (open) debate about these questions.

8.4. Intensive European cooperation concerning the return of third-country nationals

So far there have been a few co operations with neighbouring countries (mainly Switzerland and Germany) in individual return proceedings, e.g. the combined use of charter flights\(^\text{276}\). A European cooperation is intended by the Ministry of the Interior.

8.5. New concepts of processing abroad or building up reception facilities in international protected areas or “safe” regions.

Austria was among the Member States promoting processing abroad and building up reception facilities in protected areas (close to the countries of origin or also outside the European Union but not in the region of origin). As is seems that these projects

\(^{276}\) See ICMPD Country report Austria.
are not realistic for the near future these ideas are currently not promoted and dis-
cussed in Austria.
- CHAPTER II -

COUNTRY REPORT BELGIUM

by
Prof. Jean-Yves Carlier/Sylvie Saroléa
Université Catholique de Louvain
I. legal framework

The administrative status of aliens covers the rules governing the access to the territory, the stay, the establishment and the removal of aliens from the Belgian territory.

It is organized by the Act of 15 December 1980 and concerns the situation of all aliens living or wishing to live in Belgium. The Aliens Act was amended several times: at least fifteen times since its enforcement in 1980. Those revisions were namely motivated by the obligation to put the domestic law in conformity with the European regulation, but the main issue was to make effective the decision to stop immigration taken by Belgium in 1974.

Another trend characterizes Belgian law for several years: the use of administrative directives to legislate in that domain. Those directives are usually addressed to the administrative authorities in charge of the application of the legislation. They have no legal force with respect to private individuals. However, those directives exceed more and more often an explicative aim and become interpretative of the legislation or add rules to it. In that way, they become a sort of part of the legislation, a root of it. For instance, the regime of displaced persons actually applied to the refugees from Kosovo. The constitutionality of the way of act is contested, in the same way as its opposability to private individuals.

II. TYPOLOGY OF THE REMOVAL MEASURES

Removal at the borders

The foreigner not complying to the conditions of access to the territory is submitted to a measure of removal at the border. This measure is decided by the authorities charged with the control-border, namely the national police. However, the foreigner carrying a valid visa could be removed only after its situation was submitted to the Minister of Interior Department or to his delegate (Office des étrangers).
The order to leave the territory

The order to leave the territory is delivered to an alien which is neither allowed to "remain more than three months", nor authorized to be established.

Article 7 of the Aliens Act states eleven situations in which a foreigner being on the territory without being authorized or without being established can receive an order to leave the territory. The order to leave the territory is notified by the Minister or his delegate. A time is granted to leave the territory. It is in principle eight days. But the delay is extended to thirty days for the order to take back delivered with the person in charge of a minor.

The ministerial decision of removal and the royal decree of expulsion

The ministerial decision of removal is a decision taken by the Minister of Interior Department with regard to a foreigner having a right to remain more than three months on the territory and which:

- has threatened public order or to national safety;

- did not observe the conditions put at its stay (example of the student which did not leave the country at the end of its studies).

The recognised refugees and the stateless persons has first to be heard by the Commission consultative des étrangers.

The royal decree of expulsion is taken by the King against a foreigner established and who seriously threatened the public order or the national safety. This royal decree must be deliberated in the Council of Ministers if it is based on the political activity of the alien.

These two measures must be founded on the personal behavior of the alien.

They raise to a prohibition to enter the Kingdom throughout one ten year, unless they are not suspended.
Specific situation of the refugees

The Aliens Act allows the Commissariat général aux réfugiés et aux apatrides to withdraw the refugee status (article 1 C Geneva Convention) if

- He has voluntarily re-availed himself of the protection of the country of his nationality; or

- Having lost his nationality, he has voluntarily re-acquired it, or

- He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

- He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

- He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

The Belgian law provides also that the Commissariat général aux réfugiés et aux apatrides may withdraw the quality of refugee of an alien to which the statute was recognized on the basis of misrepresentations or false or falsified documents, and to an alien whose personal behavior shows later on the absence of fear of persecution.

The consequences are provided by article 57 of the Aliens Act. The Minister or his delegate can give the order to leave the territory to an alien to whom the quality of refugee was withdrawn because he made misrepresentations or made use of falsified documents, except if it is established in the Kingdom.

One have then to distinguish between three situations:

- the foreigner who is established and whom the statute of refugee is withdrawn, without the reason for the withdrawal not importing. He is not distinguished between the withdrawal justified by a change in the country of origin or a withdrawal based on misrepresentations or false or falsified documents or on the personal behaviour which would show later on the absence of fear of persecution. He will have, in accordance with the rules common to all the foreigners, to be subject of a royal decree of expulsion.
- the foreigner who has a right of stay and with which it statute of refugee is withdrawn because the situation in its country of origin does not justify any more that one international protection is brought to him. Its residence permit could not be withdrawn to him that on the basis of common right, i.e. by a ministerial decree of removal.

- the foreigner who has a right to stay and with which it statute of refugee is withdrawn because of the misrepresentations that it made, of the false documents that it produced or of its posterior behaviour to its recognition. This foreigner could be removed by a simple order to leave the territory. This precariousness is justified by the application of the proverb "fraus omnia corrumpit": the withdrawal is equivalent in this case to a cancellation with retroactive effect, replacing the situation of the alien in his state before he arrives.

### III. humanitarian situations

**No subsidiary protection**

Until today, Belgian law does not organize a permanent regime of protection of aliens fleeing their country of origin or refusing to go back to that country apart from the procedure granting the status of refugee under the Geneva Convention.

But Belgium has to put the domestic law in conformity with the European law (Council Directive 2004/83/EC of 29 April 2004 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. Projects are in preparation.

"Clause de non-reconduite"

Rejected asylum seekers who do not fulfill the conditions for obtaining a residence permit on exceptional reasons but who cannot be removed or deported (usually because their countries of origin refuse to re-admit them or because of disturbances there) will
stay in Belgium without a temporary residence permit or any legal status, and will therefore be in a situation of legal uncertainty and insecurity.

If the Commissariat général aux réfugiés et aux apatrides confirms a decision of inadmissibility of an application, he has to pronounce himself in the decision about the deportation to the border of the fled country and where, following the application, his life, his physical integrity or his liberty are threatened. This rule does not imply an additional examination of humanitarian grounds or barriers to deportation. There is no specific questions asked on this point during the interview made during the asylum procedure. The Commissariat général aux réfugiés et aux apatrides decides to add this advice on his own initiative, on the basis of internal criteria nor published neither submitted to contradiction. For instance, this advice figured in the past on the decisions concerning the Somalian people, the persons from Sierra Leone, from Chechnya, etc. This measure is quite arbitrary because there is no systematization of its use.

There is no specific procedure because this advice only figures on the negative decision, without any distinct discussion on this point. Moreover there is no obligation for the Commissariat général aux réfugiés et aux apatrides to give this advice.

It is only an advice, a recommendation, that does not bind the Office des étrangers. Moreover, even if the Office des étrangers follows the recommendation, it does not lead to a grant of a permit of stay. The alien is only tolerated on the territory. It is one of the arguments useful in a file of regularization, but it does not work automatically.

**Article 9, pt 3 of the Aliens Act**

Since Belgium did not until today provide another system of protection that the refugee status, aliens use article 9.3. of the Aliens Act to ask an authorization to stay in Belgium

Article 9.3. gives to the Minister of Interior, competent to apply the Act, the possibility to grant aliens a permit of residence apart from the categories legally and automatically authorised to stay (in application of European law or in the case of family reunification). All the aliens not having a right to stay are subject to the discretionary power of the Minister of Interior. Following article 9 of the Aliens Act, the Ministry of Interior gets then the power to allow an alien to immigrate in Belgium.

---

278 Aliens Act, article 63/5, pt. 4.
Article 9 of the Aliens Act provides

"To be authorized to stay in the Kingdom [...] the alien who is not in one of the situations provided in article 10 must be authorized to by the Minister [...].

Except in cases of derogation provided by an International Agreement, a law or a decree, this authorization must be applied by the alien to the Belgian diplomatic or consular office of his place of residence abroad.

In cases of exceptional circumstances, this authorization may be applied by the alien to the burgomaster of the place of residence, who will send it to the Minister [...]. The authorization will in this case be delivered in Belgium".

This regime is governed by this only provision. In the line of the central principle of the policy, put an end to immigration since 1974, the decision of the Minister is usually, and logically, negative. The law does not prescribe any criteria or conditions.

However, in practice, authorizations are granted in some cases.

In general, it is possible to obtain a positive decision in the following cases:

- very qualified workers or economic operator having been granted the right to work or to operate in Belgium prior to requesting a right of residence.;

- persons having a close link with a family member in Belgium but who do not enter in the categories organized by the law or who do not satisfy to the legal conditions;

- persons living in Belgium for a long time but having only a temporary right of residence and wishing to stay in Belgium at the expiration of this right. For instance students having found a job, or refugees to which the status was refused after several years of procedure;

- persons invoking serious humanitarian circumstances (health problems for instance) or who argue that, even if they are not refugee under the Geneva Convention, they suffer a risk of treatment threatening their human rights in their country of origin, according to art. 3 ECHR.

This article is the legal basis of the "regularization" of the stay of the aliens for humanitarian reasons. Those permits of stay are granted on an individual basis. The way of working of this "regularization" is defined by administrative regulations.
IV. REGULARIZATION

Regularization *one shot*

Belgium did organize a punctual operation of regulation of the stay of four categories of aliens from 2000 until 2002. This was a *one shot* operation allowing aliens in illegal or uncertain stay to introduce their files during a short and limited period of time (three weeks in January 2000).

Article 2 of the Regularisation Act defines four categories of aliens whose stay could be regularised:

- aliens who have introduced an application to be recognised as refugees (Geneva Convention), without having received a definitive decision after four years (three years if they have children of school age);

- aliens who are, for reasons independent of their will, unable to return to their country of origin, or in the countries where they usually stayed before coming to Belgium;

- aliens who are seriously ill and thus unable to return to their country;

- aliens who may invoke humanitarian circumstances and who have durable ties in Belgium.

Currently

Since the end of 2004, after negotiations with the Minister of Interior, Office des étrangers decides to regularize the administrative situation of asylum seekers of which application is still pending since before the 1st of January 2001. The foreigners concerned receive a permit of stay for an unlimited period of time. This regularization does not prevent them from continuing the asylum procedure. The asylum seekers having introduced their application after this date may also receive a unlimited permit of stay if the length of the procedure has exceeded three years if they have children in age to go to school or
four years in others cases. But in this second figure they have to prove their well integra-
tion.

V. fingerprint

A new article 30 bis was introduced in the Aliens Act on the 27 of December 2004. It is
entered in force on the 10 of January.

The provision says:

"§ 1. For the application of present article, it is necessary to understand by "biometric data ac-
quision", the catch of fingerprints and photographs.

§ 2. Can be subjected to the biometric data acquisition:

1° the foreigner who asks for a visa, an authorization holding place of visa or an authorization
of stay in a diplomatic or consular representative Belgian or of a diplomatic representative or
consular who represents Belgium, except for the foreigner aimed by article 10, subparagraph
1st, 1° and 4°, or by article 40, §§ 3 to 6 [family reunification];

2° the foreigner who lodges into the Kingdom a request for authorization of three months stay
to the maximum or a request in order to there be admitted or authorized with a stay of more
than three months except for the foreigner aimed by article 10, subparagraph 1st, 1° and 4°,
or by article 40, §§ 3 to 6 [family reunification];

3° the foreigner removed on the basis of article 3 [at the borders] or to which an order to leave
the territory is notified in accordance with article 7 or 27;

4° the foreigner who is the subject of a ministerial removal measure of by a royal decree of ex-
pulsion in accordance with article 20".

Following the Aliens Act, the biometric data can be used only insofar as they are neces-
sary for:

1° to prove and/or check the identity of the foreigner;

2° to examine whether the foreigner concerned constitutes a danger to public order or
national safety;

3° to respect the obligations provided for by the European law.
Country Report Belgium

Article 30 bis does not aim at refugees. They are concerned by a specific provision: article 51/3. § 1.

Following this provision, can be subjected to the catch of the fingerprints:

1° the foreigner who declares himself as a refugee at the border or the Kingdom;

2° the foreigner whose application has to be taken in charge by Belgium in application of the provision relating to the determination of the State responsible for the examination of the requests for asylum;

3° the foreigner for which exist indices that it is already declared taken refuge;

4° the applicant of asylum whose identity is doubtful.

In fact, a fingerprinting is done in all the cases, even if the legal provision does use the term "can".
VI. Deprivation of liberty

**Hypothesis of deprivation of liberty**

The law provides that deprivation of liberty may be used in two cases:

- if the foreigner arrives at the border without having the documents necessary for the legal entry;
- or if he is on the territory in illegal situation.

The first measure aims at preventing the entry on the territory in waiting of removal (article 74/5), second is intended to guarantee the effective leave of the territory (articles 7, 25, 27, 51/5, 67, 74/5, 74/6). The first figure concerns in particular the asylum seekers who present their request for asylum at the border and who can be held during the first two stages of the procedure (article 63/5): determination of the State responsible for the request and admissibility.

According to quoted provisions, which use the verb "may", the deprivation of liberty is a faculty and not a systematic measure. In practice, it is however used in an automatic way with regard to the foreigners who present themselves at the border without having the required documents, including the asylum seekers during the first two phases of the procedure.

**The length of the deprivation of liberty**

The duration of detention was lengthened by the successive legislative modifications to be increased to eight month in 1996.

The provisions relating to detention for the majority are written as follows:

"The foreigner can be detained [...] during time strictly necessary to the carrying out of the measure without the duration of detention being able to exceed two months. The Minister or his delegate can however prolong this detention per two months period, when the steps necessary for
the removal of the foreigner were taken in the seven working days of the setting in detention of the alien, that they are continued with all necessary diligence and that there always remains a possibility of removal of the foreigner within a reasonable time. After a prolongation, the decision aimed to the preceding subparagraph cannot be made any more but by the Minister. After five months of detention, the foreigner must be freed. If the safeguard of the public order or national safety requires it, the detention [...] can be prolonged each one month time, after the expiry of the period aimed to the preceding subparagraph, without however that the total duration of detention be able of this fact of exceeding eight month ".

The maximum duration of detention is in theory two months. It can be prolonged up to five months if the removal is possible and in preparation and up to eight month for reasons of public order and national safety. Jurisprudential interpretation by the Cour de Cassation of the limitation in the time of detention leads however so that the loss of liberty can be unlimited. The Cour de Cassation judges indeed that "no provision prevent, when the measure of removal could not be carried out because of the unjustified opposition of the foreigner, that a new decision is made in accordance with article 74/5, § 1st, [...]. Deprivation of liberty is not a prolongation but "an autonomous title of maintenance".

**Conditions of legality of the deprivation of liberty**

- The necessity and the proportionality of the deprivation of liberty

The formulation of the provisions of the Aliens Act indicates that the only facts that the foreigner does not have the documents necessary for the entry on the territory or is in illegal situation are not enough to justify detention. Indeed, as well article 7 as article 27, 74/5 and 74/6, specify as the Minister or his delegate can, if he considers it necessary, make bring back without delay the foreigner who received an order to leave the territory at the border. These provisions also use the verb capacity and not the verb duty. The Office des étrangers has a capacity of appreciation. He must then justify its decision to deprive somebody of liberty. This requirement, related to the obligation to justify adequately on the grounds and formally the administrative decisions, imposes on the Office des étrangers to justify why detention appears to him to be the most relevant means to ensure the removal or to guarantee it. The Office des étrangers must show the proportionality of the selected option. When the foreigner lives illegally on the territory with considering and with known authorities since several years, it does not appear that it is necessary to deprive him of liberty. The majority of the caselaw is rarely so strict. It forces the
Minister to justify the decision but while being satisfied however with the indication which the foreigner is in illegal situation and must be removed from the territory.

- The reality of the removal and the effectiveness of the steps done to insure the removal

Detention aims to ensure the removal from the territory. It is legitimate only if this goal is real and is actually pursued. The law subjects the prolongation of detention to triple condition:

that detention is limited to time "strictly necessary" for the carrying out of the measure of removal;

that the steps for the removal were taken in the seven working days of the arrest;

and that the effective removal is always possible. This possibility depends from the situation in the country of origin and of the attitude of this one. In certain cases, the removal is objectively not possible and unrealizable for example because the State concerned refuses to deliver a pass. The effectivity of the steps for the distance must remain during all the duration of detention, with an increased rigour and an increasingly high level standard as time passes.

**The control of the deprivation of liberty**

The foreigner detained can, of month in month, bring an action against the deprivation of liberty near the chambre du conseil (civil court).

The foreigner detained at the borders at the time of his arrival, in accordance with article 74/5, § 3, can apply to the court only in case of prolongation of his detention and not against the decision of deprivation of liberty. When the minister decides to prolong detention, he has to, in the five working days of the prolongation, bring the case to the judge the, so that it analyze the legality of the prolongation.

The control of chambre du conseil is limited to the legality of the measurement of detention and does not relate to its opportunity. This restriction cannot be interpreted like limiting the role of the chambre du conseil to a "mechanical" examination. On the one hand, legality
includes as well external legality as internal legality, in comparison with the Belgian right and international law. In addition, the judge must appreciate the motivation of the measure taken and his proportionality.

When the chambre du conseil pronounces the cessation of the deprivation of liberty, the foreigner must in theory leave the closed center. Office des étrangers considered in certain files that when the foreigner is not authorized to enter on the territory, the decision of the chambre du conseil does not mean that the foreigner must be released on the territory but only which it must leave the center closed to be placed in zone of transit of the airport. By doing this, the Office des étrangers estimates to respect the judiciary decision, the foreigner being free to leave the territory.

This practice was sanctioned by the courts. The tribunal de première instance of Brussels has stressed that freedom could not refer to the transit zone. An application against the Belgian State is currently pending before the European Court of human rights about this practice.

The detention of minor continue to exist, with their family of sometimes alone when they are from 16 to 18 years old.
VII. criminal provisions

Organisation of assistance to illegal immigration

Article 77 of the Aliens Act punishes "whoever assists a foreigner is in the facts which prepared its illegal entry or its illegal stay in the Kingdom [...]". In the event of repetition within three year, these sorrows are worsened. The assistance or the assistance offered or mainly humane reasons are not aimed.

Article 77 (a) more heavily sanctions the organized or "interested" assistance brought to a foreigner and aims "whoever contributes, in some manner that it either, or directly, or by an intermediary, to allow the entry or the stay from abroad in the Kingdom and this, in:

- making use, in a direct or indirect way, fraudulent methods, violence, threats or any other form of constraint;

- misusing the particularly vulnerable situation in which the foreigner because of his illegal or precarious administrative status is, of a State of pregnancy, a disease, an infirmity or a physical or mental deficiency.

The sorrows will be increased if the activity concerned is usual and if the infringement constitutes an act of participation in the principal or additional activity of an association, and this, that the culprit has or not the quality of leader.

Being in illegal situation

Two provisions of the Aliens Act provide penal sanctions with regard to the foreigner in illegal situation. Article 75 provides that is punished of a eight days imprisonment and of a fine or of one of these sorrows only:

- the foreigner who enters or remains illegally in the Kingdom;
- the foreigner with whom it was order to leave determined places, to remain distant or to reside about it in a given place and which is withdrawn from this obligation without valid reason.

These provisions are very seldom applied.
VIII. REMOVAL FROM THE TERRITORY

Delays

The order to leave the territory grants to its recipient a time to leave the territory:

- Principle: It is generally eight days;

- particular cases:

  - It is five days for the asylum seekers of which the application is considered to be inadmissible;
  
  - It is thirty days for the asylum seekers whose request is rejected on the grounds;
  
  - It is thirty day for the orders to take back notified to the adult responsible for a minor;
  
  - the ministerial decision of removal and the royal decision of expulsion indicate the time in which the foreigner must leave the territory. It cannot be lower than fifteen days for the foreigner allowed or authorized to remain in the Kingdom, and than one month for the foreigner established in the Kingdom. If serious circumstances require it, this time can be shortened by the minister.

In exceptionally serious circumstances, the minister, if it considers it necessary for the safeguard of public order or national safety, can make the foreigner bring back to the border.

Article 28 of the law provides that the foreigner can be brought back to the border of his choice or be authorized to embark for the country of destination which it will choose - implied of a country other than his country of origin - if it is in possession of the necessary documents to be able to go there, which is rare. If the foreigner refuses to exert his choice or destroyed the documents which would enable him to penetrate in another country, the Office des étrangers determines the border by which the interested party will leave the country.
Forced removal

After the Semira ADAMU’s case, the Government decided to publish a decree describing the methods to use in case of forced removal from the territory. The case relates to the story of a young Nigerian, deceased at the time of an attempt of forced removal from the territory in September 1998. Taken along of force to the airport, she was embarked on an aircraft in company of policemen who affixed a cushion on its face; she lost conscience and died in Brussels in the hours which followed. This case raises the question of the techniques used by the authorities at the time of the removal of the territory. The technique of the "cushion" was envisaged by internal ministerial circular.

The ministerial decree of 11 of April 2000 regulating the transport conditions aboard civil aircraft of the passengers presenting of the particular risks in the field of safety. These passengers are accompanied by an escort.

The decree envisages the notification preliminary to the airline company and determines the safety measures which can be taken inside the aircraft.

The notification has to be done at least forty-eight hours before the transport of a foreigner not authorised to enter the territory and at least five days if he was entered the territory but is deprived of residence permit. At the latest forty minutes before the time of departure envisaged of the flight, the Commander concerned must be informed. He decides if he accepts or not this passenger. If he refuses, he has to motivate his decision.

The foreigners are embarked before the other passengers. They are installed in theory with the back of the aircraft. Shackles can be used. They can be it only in an exceptional way, especially during the phases of takeoff and landing. To in no case, a passenger cannot be attached to the aircraft or to a fixed object. The use of stress measurements likely to compromise the safety of the aircraft are prohibited, in particular 1° the obstruction, total or partial, of the respiratory tracts; 2° administration of calming or an unspecified drug in order to control the person against her will.

When more than four passengers, not included the children of less than 12 years accompanying them, travel in company of an escort on board the same flight, they moreover are accompanied by an independent doctor or an observer.
Voluntary return

The asylum seekers who receive a negative decision at the stage of the admissibility will also receive a written information about the organizations which could help them to leave voluntarily the territory. This information is annexed to the decision and include the name, addresses and telephone numbers of those associations.

Moreover, the foreigner who receives an order to leave the territory will continue to receive social help during one month if he signs a declaration of intent to leave the country. This time is possibly prolonged if the O.E. gives its assent. If necessary, an extension is granted during time necessary to the achievement of the steps.

The granted aid is the prolongation of the assistance previously delivered and does not consist in the delivery of plane tickets, since the State set up a system of assistance at repatriation in collaboration with the I.O.M.

More or less 3,000 foreigners use program REAB (Return of Asylum Seekers Ex Belgium) each year. This program is addressed to the taken refuge candidates suspending their procedure, whose request was rejected, like with any foreigner, not national of a European Convention country, being in indigence and who wishes to return back to his country of origin. The asylum seeker may decide to return to his country of origin during the procedure or if this one ends in a negative decision. In certain cases, the return is not carried out towards the country of origin but towards a Non-member state which agrees to accommodate the refugee and, if necessary, delivered a visa to him. Very often, the problem resides in that the foreigner does not possess any financial means allowing him to organize only his voyage and his return. It can be addressed to various organizations which work with the international Organization of migrations (O.I.M.). These organizations are inter alia Caritas International, the Red Cross of Belgium, and the majority of the reception centres. The O.I.M. takes care of the organization and the financing of the return in the country of origin. The financial intervention is limited to the expenses of the voyage and the granting of a sum helping the family to reinstall itself in the country of origin (for a maximum amount of 250 euros per adult and 125 euros per child).

Program REAB makes it possible also the foreigner to be informed on the situation in its country of origin, to obtain an assistance at the time of its arrival in certain countries of origin where the O.I.M. is present and to be assisted for obtaining documents of voyage. The foreigner must indeed have documents attesting of his identity in order to obtain the authorization to enter his country of origin.
- If it has a valid passport, that does not raise any difficulty;
- if its passport is out-of-date, it must obtain the renewal from it;
- if it does not have a passport, it must get a pass near the Embassy or of the Consulate of its country of origin.

When it does not manage to get these documents, it cannot travel and is condemned to remain in Belgium until a solution is found with its country of origin or another State. In the event of blocking, it happens that the Office des étrangers and, or the O.I.M. intervenes with the authorities of the country of origin.
IX. Status of the foreigners in illegal situation, mainly social assistance

One way used to oblige aliens to leave the territory after the reception of an order to leave the territory is the cessation of the social assistance.

The social assistance is the assistance granted by the community to a person to enable her to live in accordance with human dignity. The foreigner in illegal situation cannot work; it is then only through this help that it will be able to live. The right to profit from this help however is conditioned by the regularity of the stay, so that a foreigner in illegal situation does not have right in theory there, except for certain services and certain situations.

The social assistance covers several services:

- a financial assistance of an amount corresponding at least of means of existence;
- urgent medical aid.

For about fifteen years, several modifications of the regulation have restricted the right of an alien in illegal stay to receive social assistance. The objective of these legislative modifications which take part of a restrictive migratory policy consists in removing the right to the social assistance towards an alien having received an order to leave the territory against which an appeal having suspensory effect was not introduced. The constitutional court has ruled that the measure is not "unreasonable". When a State intends to limit immigration and that it appears that the means developed for this purpose are ineffective, it is proportional that the State does not provide the same help to the individuals, nationals or foreigners, in regular stay on its territory and to the aliens having received an order to leave the territory. This option is not disproportionate since the foreigner concerned will profit from the assistance necessary to his departure for one month and the temporally unlimited urgent medical aid. In addition, the Court said that she did not see in these measures a torture or an inhuman treatment.

However this principle must be combined with the right to an effective remedy. That means that asylum seekers must continue to receive social assistance during the appeal to the Conseil d'Etat even if it is non suspensive.

It is derogated from the limitation of the right to obtain a social help with regard to the urgent medical aid which will have to be granted the alien to which was notified an order to leave the executory territory.
X. SPECIFIC GROUPS

Unaccompanied minors

The Aliens Act does not provide any specific provision for the not accompanied foreign minors. They are subjected to the same procedure as the major ones, in particular when they lodge a request for recognition of the quality of refugee.

The regulation only provides that no order to leave the territory can be delivered to a foreigner who has less than eighteen years or which is a minor of age according to his personal statute. This order to leave the territory is replaced by an order to take back notified to the responsible major.

An internal directive of the Office des étrangers of March 1, 2001 organized a specific procedure providing that the minor can be put in possession of a residence permit until its majority. Whereas nothing was envisaged before, since May 1, 2004, all unaccompanied minors must be seen appointing a tutor who ensures their legal representation.

The minor is described as "not accompanied" when it is assisted neither by his father and mother, nor by any other adult in charge of him.

Such a note – of March 1, 2001 - which is not published with the Belgian Monitor does not have obligatory force. This note is based on the principle according to which unaccompanied minor should not be left without document since no durable solution consisting of a return towards the country of origin could be found. The "durable solution" is either the family regrouping, or the return to the country of origin with guarantees of reception and assumption of responsibility suitable or, failing this, the regularization of the stay in Belgium. The method used requires the co-operation of the minor, since the granting of residence permits and their prolongation are subordinated to the fact that he reveals his true identity, that he communicates information as for his familial status and that he does not defraud.

Specific situation of Afghans
Administrative directives adopted in February 2004 and in August 2004 have organized a specific regime for Afghans who have introduced an asylum application before the 1st of January 2003 and who have received a negative answer.

A prolongation of the order to leave the territory (for those who were rejected in the stage of admissibility) and of the temporary permit of stay (orange card) may be granted. Currently, the prolongation is granted until the 1st of September 2005 and will may be be prolonged.

**Situation of the victim of human trafficking**

By way of administrative directives, the Minister of Interior Department organized a specific protection for the victims of the traffic and the exploitation of the persons. This procedure is close to that organized for the minors. It is based, on the one hand, on the protection of the alien concerned and, on the other hand, on his collaboration, here with the penal repression of the traffic and the exploitation of the persons. The foreigners who left the background which involves them in this traffic and which address themselves to a specialized service receive an order to leave the territory in the forty five days. If during this time, they deposit a complaint against the person who exploited them, they are put in possession of a legal document valid three months. The Office des étrangers contacts the public prosecutor. If the complaint is not classified without continuation, a certificate of inscription covering a temporary stay is issued with the victim, in theory for a six months duration, renewable. If the exploiter is prosecuted, the alien can request the granting of an authorization of stay at unlimited period. In the field of employment, the victims can receive a labor permit as soon as they are in possession of the declaration of arrival.
Vergelijkende tabel betreffende het aantal verwijderingen vanuit de gesloten centra:

<table>
<thead>
<tr>
<th>Jaar</th>
<th>Repatrieringen</th>
<th>Terug-Drijvingen</th>
<th>Vertrek IOM</th>
<th>Grensleidingen</th>
<th>Totaal</th>
<th>Maandelijkse gemiddelde</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>1.269</td>
<td>1.565</td>
<td>61</td>
<td>108</td>
<td>3.003</td>
<td>250,25</td>
</tr>
<tr>
<td>2001</td>
<td>1.794</td>
<td>1.723</td>
<td>87</td>
<td>134</td>
<td>3.738</td>
<td>311,5</td>
</tr>
<tr>
<td>2002</td>
<td>3974</td>
<td>1474</td>
<td>70</td>
<td>207</td>
<td>5.725</td>
<td>477</td>
</tr>
<tr>
<td>2003</td>
<td>5.016</td>
<td>1.336</td>
<td>88</td>
<td>238</td>
<td>6.678</td>
<td>556,5</td>
</tr>
<tr>
<td>2004</td>
<td>4.065</td>
<td>989</td>
<td>210</td>
<td>348</td>
<td>5.612</td>
<td>467,66</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Maand 2004</th>
<th>Repatrieringen</th>
<th>Terug-Drijvingen</th>
<th>Vertrek IOM</th>
<th>Grensleidingen</th>
<th>Totaal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Januari</td>
<td>258</td>
<td>113</td>
<td>14</td>
<td>23</td>
<td>408</td>
</tr>
<tr>
<td>Februari</td>
<td>320</td>
<td>102</td>
<td>11</td>
<td>28</td>
<td>461</td>
</tr>
<tr>
<td>Maart</td>
<td>545</td>
<td>75</td>
<td>12</td>
<td>27</td>
<td>659</td>
</tr>
<tr>
<td>April</td>
<td>330</td>
<td>84</td>
<td>15</td>
<td>17</td>
<td>446</td>
</tr>
<tr>
<td>Mei</td>
<td>353</td>
<td>69</td>
<td>12</td>
<td>22</td>
<td>456</td>
</tr>
<tr>
<td>Juni</td>
<td>391</td>
<td>52</td>
<td>21</td>
<td>34</td>
<td>498</td>
</tr>
<tr>
<td>Juli</td>
<td>253</td>
<td>66</td>
<td>14</td>
<td>30</td>
<td>363</td>
</tr>
<tr>
<td>Augustus</td>
<td>247</td>
<td>70</td>
<td>22</td>
<td>35</td>
<td>374</td>
</tr>
<tr>
<td>September</td>
<td>314</td>
<td>88</td>
<td>19</td>
<td>32</td>
<td>453</td>
</tr>
<tr>
<td>Oktober</td>
<td>397</td>
<td>111</td>
<td>24</td>
<td>35</td>
<td>567</td>
</tr>
<tr>
<td>November</td>
<td>300</td>
<td>82</td>
<td>22</td>
<td>38</td>
<td>442</td>
</tr>
<tr>
<td>December</td>
<td>357</td>
<td>77</td>
<td>24</td>
<td>27</td>
<td>485</td>
</tr>
<tr>
<td>TOTAAL</td>
<td>4.065</td>
<td>989</td>
<td>210</td>
<td>348</td>
<td>5.612</td>
</tr>
</tbody>
</table>

Country Report Belgium
READ
Return and Emigration of Asylum Seekers ex Belgium

Statistical Data
Year 2004
### Statistical data

#### Total Voluntary Returns in 2004

<table>
<thead>
<tr>
<th>REAB Destination Country</th>
<th>Registered for Voluntary Return</th>
<th>Cancellation Prior Departure</th>
<th>Departures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kazakhstan</td>
<td>67</td>
<td>7</td>
<td>60</td>
</tr>
<tr>
<td>Kenya</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kosovo (Yugoslavia)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>184</td>
<td>46</td>
<td>136</td>
</tr>
<tr>
<td>Latvia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lebanon</td>
<td>80</td>
<td>11</td>
<td>69</td>
</tr>
<tr>
<td>Lebanon</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liberia</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Lithuania</td>
<td>49</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>Mali</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Mauritania</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mauritius</td>
<td>7</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Mexico</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Moldova Republic</td>
<td>130</td>
<td>41</td>
<td>123</td>
</tr>
<tr>
<td>Mongolia</td>
<td>91</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Morocco</td>
<td>22</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Nepal</td>
<td>8</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Niger</td>
<td>42</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Nigeria</td>
<td>10</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Pakistan</td>
<td>27</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Palestinian Terr</td>
<td>19</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>Panama</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Peru</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>11</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>74</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Russian Federation</td>
<td>251</td>
<td>46</td>
<td>205</td>
</tr>
<tr>
<td>Rwanda</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senegal</td>
<td>5</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Serbia-Montenegro</td>
<td>64</td>
<td>30</td>
<td>34</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>4</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>264</td>
<td>98</td>
<td>166</td>
</tr>
<tr>
<td>Slovenia</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Somalia</td>
<td>21</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>7</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Sudan</td>
<td>9</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Syria</td>
<td>15</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Tajikistan</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tanzania</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Togo</td>
<td>7</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Tunisia</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>59</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Uganda</td>
<td>5</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Ukraine</td>
<td>252</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>9</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Uzbekistan</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Venezuela</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yemen</td>
<td>5</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Zambia</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Grand Total</td>
<td>4153</td>
<td>878</td>
<td>3275</td>
</tr>
</tbody>
</table>

Country Report Belgium
Voluntary Returns per Continent the past 5 years

<table>
<thead>
<tr>
<th>Continent</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>114</td>
<td>84</td>
<td>120</td>
<td>171</td>
<td>270</td>
</tr>
<tr>
<td>Asia</td>
<td>514</td>
<td>824</td>
<td>578</td>
<td>553</td>
<td>663</td>
</tr>
<tr>
<td>Europe</td>
<td>2398</td>
<td>2309</td>
<td>2208</td>
<td>1446</td>
<td>1430</td>
</tr>
<tr>
<td>Latin America and the Carribean</td>
<td>110</td>
<td>227</td>
<td>260</td>
<td>612</td>
<td>878</td>
</tr>
<tr>
<td>North America</td>
<td>39</td>
<td>98</td>
<td>36</td>
<td>30</td>
<td>25</td>
</tr>
<tr>
<td>Oceania</td>
<td>7</td>
<td>4</td>
<td>19</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>3182</td>
<td>3546</td>
<td>3221</td>
<td>2814</td>
<td>3275</td>
</tr>
</tbody>
</table>

Referrals to the REAB per Type of Partner in 2004

<table>
<thead>
<tr>
<th>REAB Partner</th>
<th>Returnees</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>FEDERAL CENTRES</td>
<td>409</td>
<td>12%</td>
</tr>
<tr>
<td>CITIES</td>
<td>191</td>
<td>6%</td>
</tr>
<tr>
<td>NGO</td>
<td>2407</td>
<td>73%</td>
</tr>
<tr>
<td>IOM</td>
<td>36</td>
<td>1%</td>
</tr>
<tr>
<td>RED CROSS CENTRES</td>
<td>232</td>
<td>7%</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>3275</strong></td>
<td></td>
</tr>
</tbody>
</table>

Voluntary Returns in 2004 per REAB Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum Request Stopped</td>
<td>256</td>
</tr>
<tr>
<td>Rejected Asylum seekers</td>
<td>1303</td>
</tr>
<tr>
<td>Non Asylum Seekers</td>
<td>1716</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>3275</strong></td>
</tr>
</tbody>
</table>

Voluntary Returns in 2004 per Gender

<table>
<thead>
<tr>
<th></th>
<th>Female</th>
<th>Male</th>
<th>Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>1270</td>
<td>205</td>
<td>3275</td>
</tr>
<tr>
<td>%</td>
<td>39%</td>
<td>61%</td>
<td></td>
</tr>
</tbody>
</table>
Voluntary Returns in 2004 per Age Group and Family Status

<table>
<thead>
<tr>
<th>Age breakdown</th>
<th>Family</th>
<th>Single</th>
<th>Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 11</td>
<td>173</td>
<td>3</td>
<td>176</td>
</tr>
<tr>
<td>12 - 17</td>
<td>71</td>
<td>28</td>
<td>99</td>
</tr>
<tr>
<td>18 - 25</td>
<td>254</td>
<td>437</td>
<td>691</td>
</tr>
<tr>
<td>26 - 35</td>
<td>582</td>
<td>728</td>
<td>1310</td>
</tr>
<tr>
<td>36 - 50</td>
<td>260</td>
<td>526</td>
<td>786</td>
</tr>
<tr>
<td>51 - 65</td>
<td>57</td>
<td>111</td>
<td>168</td>
</tr>
<tr>
<td>over 65</td>
<td>25</td>
<td>20</td>
<td>45</td>
</tr>
<tr>
<td>Grand Total</td>
<td>1422</td>
<td>1853</td>
<td>3275</td>
</tr>
</tbody>
</table>

Voluntary Returns in 2004 per Province of Residence

<table>
<thead>
<tr>
<th>Province of Residence</th>
<th>Total 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANTWERPEN</td>
<td>656</td>
</tr>
<tr>
<td>BRABANT WALLON</td>
<td>21</td>
</tr>
<tr>
<td>BRUSSELS</td>
<td>1626</td>
</tr>
<tr>
<td>HAINAUT</td>
<td>101</td>
</tr>
<tr>
<td>LIEGE</td>
<td>146</td>
</tr>
<tr>
<td>LIMBURG</td>
<td>106</td>
</tr>
<tr>
<td>LUXEMBOURG</td>
<td>36</td>
</tr>
<tr>
<td>NAMUR</td>
<td>58</td>
</tr>
<tr>
<td>OOST-VLAANDEREN</td>
<td>178</td>
</tr>
<tr>
<td>VLAAMS BRABANT</td>
<td>202</td>
</tr>
<tr>
<td>WEST-VLAANDEREN</td>
<td>146</td>
</tr>
<tr>
<td>Grand Total</td>
<td>3275</td>
</tr>
</tbody>
</table>

Voluntary Returns in 2004 per Month

<table>
<thead>
<tr>
<th>Month of Departure</th>
<th>Departures</th>
<th>Cancellations</th>
<th>Registrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>274</td>
<td>59</td>
<td>333</td>
</tr>
<tr>
<td>February</td>
<td>237</td>
<td>53</td>
<td>290</td>
</tr>
<tr>
<td>March</td>
<td>265</td>
<td>46</td>
<td>311</td>
</tr>
<tr>
<td>April</td>
<td>324</td>
<td>43</td>
<td>367</td>
</tr>
<tr>
<td>May</td>
<td>240</td>
<td>45</td>
<td>285</td>
</tr>
<tr>
<td>June</td>
<td>258</td>
<td>125</td>
<td>383</td>
</tr>
<tr>
<td>July</td>
<td>258</td>
<td>49</td>
<td>307</td>
</tr>
<tr>
<td>August</td>
<td>270</td>
<td>123</td>
<td>393</td>
</tr>
<tr>
<td>September</td>
<td>268</td>
<td>118</td>
<td>386</td>
</tr>
<tr>
<td>October</td>
<td>253</td>
<td>74</td>
<td>327</td>
</tr>
<tr>
<td>November</td>
<td>306</td>
<td>41</td>
<td>347</td>
</tr>
<tr>
<td>December</td>
<td>322</td>
<td>102</td>
<td>424</td>
</tr>
<tr>
<td>Grand Total</td>
<td>3275</td>
<td>878</td>
<td>4153</td>
</tr>
</tbody>
</table>
Reasons for non departures in 2004

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not present at the Airport</td>
<td>205</td>
<td>23%</td>
</tr>
<tr>
<td>Other individual reasons</td>
<td>215</td>
<td>24%</td>
</tr>
<tr>
<td>No Travel Document</td>
<td>163</td>
<td>19%</td>
</tr>
<tr>
<td>No second appointment with Partner or left the reception center</td>
<td>112</td>
<td>13%</td>
</tr>
<tr>
<td>No more willing to return</td>
<td>68</td>
<td>8%</td>
</tr>
<tr>
<td>Returned by own means</td>
<td>36</td>
<td>4%</td>
</tr>
<tr>
<td>Return operationally not possible</td>
<td>31</td>
<td>4%</td>
</tr>
<tr>
<td>Medical Reasons</td>
<td>20</td>
<td>2%</td>
</tr>
<tr>
<td>Continuing the asylum procedure</td>
<td>18</td>
<td>2%</td>
</tr>
<tr>
<td>Return by Aliens Office</td>
<td>10</td>
<td>1%</td>
</tr>
<tr>
<td>Grand Total</td>
<td>878</td>
<td></td>
</tr>
</tbody>
</table>

Average Stay in Belgium before returning the past 5 years

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>12 months</td>
<td>2000</td>
<td>11.7 months</td>
<td>13.5 months</td>
<td>18.9 months</td>
<td>23 months</td>
</tr>
</tbody>
</table>
- CHAPTER III -

COUNTRY REPORT DENMARK

(no report received yet due to illness)
- CHAPTER IV -

COUNTRY REPORT FINLAND

by
Eeva Nykänen,
University of Turku
Study on Refugee Status and Return

Country report:

FINLAND

1 Introduction

The Finnish system is based on the idea that persons who are found not to be in need of international protection and who don’t have any other grounds for staying in the country have to leave the country, and that if the persons concerned don’t leave voluntarily they are removed involuntarily. As the numbers of asylum seekers and other foreigners entering the country have remained rather low, it has been possible to follow this policy rather consistently.

The claim for need of international protection and the other possible grounds for residence, as well as the question of removal from the country, are examined in one single procedure. If the application for international protection is rejected and there are no other grounds for residence, the applicant is issued with a decision on removal. The decision on removal can be enforced as soon as it becomes final unless it has been taken in an accelerated asylum procedure. The decision on removal may be enforced immediately, i.e. before it has become final, if the asylum application is decided on the basis of the Dublin II regulation or if the person still in Finland files a new asylum application after receiving a negative decision on his earlier asylum application. The decision on removal may be enforced at the earliest on the eighth day after serving the decision on the applicant, if the asylum application has been rejected as manifestly unfounded on basis of a safe country of asylum or a safe country of origin. The appeals court may decide on its own initiative or on the application of
the appellant on the suspension of the enforcement until it has decided on the appeal.\textsuperscript{279} No separate removal order is issued in the Finnish system.

It is the responsibility of the police to either make sure that a person who has been issued with a decision on removal leaves the country voluntarily, or if that does not happen, enforce the decision on removal. If the decision on removal cannot be enforced for practical reasons or for temporary reasons of health, the person concerned is issued with a temporary residence permit under section 52 of the Aliens Act 301/2004.\textsuperscript{280}

2 The number and status of foreigners obliged to return to their home country

In 2003 a decision on removal was issued to 3221 asylum seekers whose applications had been rejected. The number of decisions on removal issued for non-asylum seekers during the same period was 6546. 49 rejected asylum-seekers returned voluntarily. 568 removal decisions concerning rejected asylum-seekers were enforced by the police so that the returnee’s documents were sent to the Border Guard Authority and the Border Guard Authority monitored the exit from the country. The police escorted 641 rejected asylum seekers. No statistical information is available concerning the removals/returns after termination of protected status. Such situations are very rare.

In 2002 decision on removal was issued to 3443 asylum-seekers whose applications had been rejected. In the same year the number of decisions on removal issued for

\textsuperscript{279} Note also section 202 of the Aliens Act according to which “A decision on refusal of entry or deportation may be enforced before the decision becomes final if the person refused entry or ordered to be deported gives, in the presence of two competent witnesses, his or her consent to the enforcement of the decision and signs the corresponding entry made in the decision.”

\textsuperscript{280} Section 51 of the Aliens Act 301/2004: “1) Aliens residing in Finland are issued with a temporary residence permit if they cannot be returned to their home country or country of permanent residence for temporary reasons of health or if they cannot actually be removed from the country.”
non-asylum seekers was 8256. 33 rejected asylum-seekers returned voluntarily. 364 removal decisions concerning rejected asylum-seekers were enforced by the police so that the returnee’s documents were sent to the Border Guard Authority and the Border Guard Authority monitored the exit from the country. The police escorted 909 rejected asylum seekers.

The rejected asylum seekers are allowed to stay in the reception centre until they return voluntarily or until the decision on removal is enforced by the police. The persons concerned are entitled to the basic social security during that time.

3 Regularisation of clandestine immigrants

In Finland there is no policy of regularisation of clandestine immigrants. As the number of clandestine immigrants is estimated to be rather low, there is no pressure to regularise. Those who don’t have a right to stay in the country under the Aliens Act are removed. If removing is not possible, the person concerned is issued with a temporary residence permit.

4 Legal and administrative arrangements concerning return and repatriation

4.1. Taking the decision on removal

The directorate of Immigration decides on removal of rejected asylum seekers, of foreign nationals who have resided in Finland with residence permit, as well as of those foreigners without residence permit who have entered Finland more than three
months earlier. In other situations the local police or the Boarder Guard Authority decide on removal.

According to the Aliens Act, when considering the decision on removal, i.e. refusal of entry or deportation, all relevant matters and circumstances have to be taken into account in their entirety. Special attention has to be given to the interest of a child and respect for family life. Since the decision on removal is normally connected to a rejection of the application for asylum or residence permit, all grounds presented by the applicant and the other circumstances are examined thoroughly. The principle of non-refoulement must be respected when taking a decision on removal. No one may be returned to an area where he may be subjected to death penalty, torture, persecution or other inhuman or degrading treatment or to an area from which he could be further sent to such an area. Furthermore, according to section 6 of the Aliens Act, when taking decisions concerning a child under eighteen years of age special attention shall be paid to the best interest of the child and to circumstances related to the child’s development and health. Unaccompanied minors are removed from the country only seldom.

4.2. Enforcement of the decisions on removal

---

281 Aliens Act 152 §.
282 Aliens Act 151 §.
283 Section 142 of the Aliens Act 301/2004: “For the purposes of this Act, refusal of entry means: 1) preventing an alien from entering the country at the border when he or she holds a) a visa; b) no visa; c) no residence permit; or d) a residence permit issued abroad and he or she is about to enter the country for the first time during the validity of the residence permit; or 2) removing from the country an alien who did not hold a residence permit upon entry into the country if he or she has not been issued with a residence permit or residence card after his or her entry into the country or if his or her right of residence has not been registered after his or her entry into the country as provided in this Act.”
Section 143 of the Aliens Act: “For the purposes of this Act, deportation means removing from the country an alien who 1) resides in the country under a fixed-term or permanent residence permit issued by Finnish authorities; 2) resides in the country and whose residence has been registered as provided in this act 3) continues to reside in the country after his or her residence permit, registered residence or residence card has expired.”
284 Aliens Act 146 §.
285 Aliens Act 147 §.
The enforcement of the decisions on removal is guided by the Aliens Act and other legislation as well as by the “Guidelines on enforcement of decision on refusal of entry and deportation” (Käännytättömisen ja maasta karkottamisen täytäntöönpanoa koskeva ohje SM-2003-03682/Tu-41) and administrative practice. The provisions in the legislation and in the administrative guidelines concerning the enforcement of the decisions on removal are not exhaustive. For example the question of the use of force is not sufficiently covered. There are therefore plans to amend the Aliens Act in this respect in the near future and to add in it detailed provisions concerning the enforcement of the decisions on removal and in particular the use of force in these cases.

The police are responsible for making sure that a person who has been issued with a decision on removal leaves the country voluntarily, or if that does not happen, enforce the decision on removal. The enforcement of the decisions on removal is nationally coordinated by the Helsinki police.

The police are responsible for organising the return journey in cases of involuntary returns and for acquiring or issuing the required travel documents. The police also inform the authorities of the country of origin and the countries of transit of the removal. The authorities of the country of origin are not informed of the fact that the returnee has applied for asylum in Finland. The expenses of the returns are covered by the state unless it is the responsibility of the carrier to cover them.

When notifying the decision on removal, the police inform the person concerned that she or he may leave the country voluntarily. No time limit is, however, foreseen for the voluntarily departure; this is up to the discretion of the police. If the person concerned does not leave voluntarily, the police enforce the decision of removal. Both in cases of voluntary and involuntary return, the returnee should be given some time (normally up to two weeks) to prepare her- or himself for the return, unless there is a risk that the person concerned will hamper the enforcement of the decision on removal. Section 5 of the Aliens Act, according to which the application of the Aliens
Country Report Finland

Act may not restrict alien’s rights any more than necessary, is applicable also in situations of removal. Furthermore, the principle of the family unity shall be respected in these situations as well. Thus, in situations in which the returnee has a family in Finland, she or he is left with more time for the practical arrangements.

The police or the Border Guard Authority may order a necessary number of escorts if there is a risk that the returnee causes security problems during the journey, if the enforcement of the decision on the removal so requires, or if the carrier requires it. The escorted returnees are handed to the authorities of the country where she or he is returned to. The authorities are, however, not told that the person concerned had applied for asylum in Finland. If the returnee resists physically during the escorted return, the escort may use handcuffs. Furthermore, when such is needed, a physician may prescribe tranquillisers. However, section 5 of the Aliens Act according to which the application of the Aliens Act may not restrict alien’s rights any more than necessary has to be applied also when availing to these methods.

In case no escorts are used, the police send the person’s passport or travel documents to the Border Guard Authority, who is responsible for exit control. If a person fails to report at the border crossing point where her or his passport or travel documents are sent, the border guard informs the police immediately so that a warrant for apprehension can be issued. Alternatively the police may take the person concerned to the Finnish border (this happens in particular in case of persons returned to Russia) or the other Schengen external border.

286 Section 177 of the Aliens Act: "1) Upon enforcing the removal of an alien from the country, police or border check authorities may order a necessary number of escorts if the security of the vehicle or the enforcement of the decision on the alien’s removal so requires. An escort may also be ordered if an alien leaves the country voluntarily without a decision on removal. The carrier responsible for transporting the alien may submit a request for ordering an escort. 2) The authorities’ decision on ordering an escort may not be appealed separately.”
To secure the enforcement of the decision on removal, the returnee may be required to report to the police or to the border guard at stipulated intervals. For this purpose she or he may also be ordered by the police or the Border Guard Authority to hand over her or his travel document and tickets or to give the authorities the address at which he/she may be reached. Alternatively, a foreigner may be obliged to give a security set by the police or the Border Guard Authority for the expenses related to her or his residence and return. Instead of the other interim measures, foreigner may be placed in detention if there are reasonable grounds, taking account of the foreigner’s personal and other circumstances, to believe that she or he will prevent or considerably hinder the issue of a decision concerning her or him or the enforcement of a decision on removing her or him from the country by hiding or in some other way. The detained alien shall be placed in the detention unit as referred to in the Act on the treatment of Aliens Placed in Detention and on Detention Units (116/2002). The detention unit is located near Helsinki. There is no maximum limit for the duration of the detention. There is, however, a regular court control; a District Court rehears the matter concerning the detention every two weeks and the person concerned has to be released if there are no grounds to continue the detention.

Removals are normally carried out by regular flights. If the number of persons to be returned to a certain country is high, charter flights may be used. This has happened occasionally during the past couple of years. Russian nationals who do not return voluntarily or regarding whom there is reasonable cause to believe that they would commit crimes in Finland if allowed to return voluntarily are returned by car to the Russian border.

---

287 Aliens Act 118 §.
288 Aliens Act 119 §.
289 Aliens Act 120 §.
290 Aliens Act 121 §.
5 The impact of EU-directives, regulations and measures on return or repatriation policies

Even though the EU policy on return issues hasn’t so far had any major impact in Finland, EU’s efforts in this respect have been received by the Government positively.

In particular instruments such as Community readmission agreements are regarded useful. So far there is, however, still a need for bilateral readmission agreements, as well. Instruments such as Eurodac and SIS and in particular VIS may have positive impact on solving the problems related to identification of asylum seekers, which is one of the major obstacles for enforcement of consistent return policy. Efforts of further enhancing the exchange of information concerning e.g. decisions on removal are welcomed, as efficient exchange of information is regarded as one of the corner stones of the whole system. Exchange of information on removal decisions is for example regarded as the prerequisite for the application of the directive on mutual recognition of return decisions.

6 Dublin II and Eurodac

The number of Dublin-cases is rather high in Finland: in 2004 about 33 % of all the asylum cases were Dublin-cases i.e. cases in which the applicant had already applied for asylum in another Dublin-state and where that state was thus responsible for the applicant. Of all negative decisions on asylum applications taken in Finland, 47 % concerned Dublin-cases. Thus, after Eurodac was started to be used, the number of asylum applications examined materially in Finland and also the number of rejected asylum seekers to be returned to her or his country of origin (and not to another Dub-

291 See Aliens Act 123 § - 129 §.
lin-state) has decreased. It may be argued that this has eased the situation from the
Finland’s perspective as often the returns are easier to enforce if the country where
the person concerned is returned to is another EU State or a Nordic country and not
the asylum seeker’s country of origin. The Dublin-returns are normally escorted by
the police.

It may also be argued that the Dublin II and the Eurodac boost the pressure to im-
plement the decisions on removal as in the current situation the country responsible
for the asylum seeker and for the return of a failed asylum seeker is responsible for
this also in relation to the other Dublin-states. It is, however, questionable whether
this has so far had any practical implications in the situation in Finland.

7 Main legal and administrative schemes for voluntary return – incentives for
voluntary return

Currently there are no specific legal or administrative schemes for voluntary return
of those issued with a decision on removal or those who reside in the country by vir-
tue of permit but who would still like to return. During the period of 2000-2002 the
Finnish Government financed both alone and together with the European Refugee
Fund several return programmes run by the IOM and the experiences of these were
rather positive. Currently no such return programmes are run.

When notifying a removal order, a police officer informs the person concerned of the
possibility of voluntary return. The travel costs caused by the voluntary return are
covered if the person concerned is without means of her or his own. Furthermore,
repatriation assistance is available according to the discretion of the authorities for
Country Report Finland

those receiving temporary protection and for refugees, who would like to return to their country of origin.\(^{292}\)

Rejected asylum seekers who return voluntarily can, if they so wish, contact the IOM and get from the organisation both practical and financial assistance for return. The IOM has published information brochures concerning the possibility of voluntary return, which are available at reception centers in Finland.

No monitoring in the home countries after returning there is organised by the Finnish authorities.

8 Legal and administrative barriers for enforcement of return

The main barriers for enforcement of return are of practical nature. Problems are mainly caused by issues such as absence of documents and false identity. Due to these reasons the receiving countries don’t readmit the returnees. Even in cases in which problems related to documents and false identity don’t exist the receiving countries are sometimes reluctant to readmit persons who don’t return voluntarily.

\(^{292}\) See section 8 a of the Act on Integration of Immigrants and Reception of Asylum Seekers (Laki maahanmuuttajien kotouttamisesta ja turvapaakanhakijoiden vastaanotosta 493/1999) and sections 6 and 6 a of the Decree on Integration of Immigrants and Reception of Asylum Seekers (Asetus maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta 511/1999).
- CHAPTER V -

COUNTRY REPORT FRANCE

by
Prof. Francois Julien-Laferrière/
Dr. Emmanuelle Neraudau-d’Unienville,
Université Paris-Sud
"Refugee status in the EU Members States and return policies“ : the legislation and the implementation of return policies

« Statut des réfugiés dans les États membres de l’UE et politiques de retour » : législation et mise en œuvre des politiques de retour.

FRANCE

SOMMAIRE

1. Faits et chiffres p.1

1.1 Statistiques – asile et immigration p.1

1.1.1 Une mise en cohérence progressive des statistiques officielles p.1
1.1.2 Les chiffres de l’asile p.4
1.1.3 Les chiffres du départ des étrangers p.8
1.1.4 Synthèse p.12

1.2 Débat général sur le retour et l’éloignement p.13

2. Instruments légaux du retour et de l’éloignement p.16

2.1 Statut légal des demandeurs d’asile déboutés et des personnes demandant la protection subsidiaire p.16

2.2 Personnes dont le titre ou le permis de résidence pour raisons humanitaires ou la protection temporaire n’est plus valable p.19

2.3 Programmes de régularisations ; autres possibilités pour l’obtention d’une « tolérance » ou d’une autorisation pour rester p.19

2.4 Les recours juridictionnels contre les décisions refusant l’asile p.20
3. **Procédures administratives pour l’exécution ou le retour** p.23

3.1 *Compétences et procédures des décisions d’expulsion* p.23

3.2 *Mesures administratives encadrant le retour forcé* p.25

3.3 *Obstacles légaux à l’expulsion* p.27

3.4 *Obstacles “de fait” à l’expulsion* p.29

3.5 *Exigences relatives aux conditions dans le pays d’origine* p.31

4. **Coopération européenne et mesures de l’UE** p.32

4.1 *Coopération européenne en matière d’asile :*
  
  « *Dublin II* » et *Eurodac* p.32

  4.1.1 La circulation « réglementée » des demandeurs d’asile au sein de l’UE p.32
  4.1.2 La détermination de l’État responsable : le règlement « Dublin II » p.33
  4.1.3 La coopération administrative et le système « Eurodac » p.36
  4.1.4 Mise en œuvre et point de vue de la DLPAJ p.40
  4.1.5 Mise en œuvre et point de vue des ONG p.41

4.2 *Coopération européenne et politique de retour* p.45

  4.2.1 Reconnaissance des décisions d’éloignement des ressortissants de pays tiers p.46
  4.2.2 L’organisation d’opérations communes de retour p.54
  4.2.3 Les retours volontaires p.58
  4.2.4 Les accords ou clauses de réadmission p.60
  4.2.5 Projets européens et politique de retour p.62
5. **Procédures spéciales**  

5.1 *Éloignement par voie aérienne*  

5.2 *Éloignement par voie terrestre*  

5.3 *Expulsion par voie maritime*  

5.4 *Problèmes des mineurs non accompagnés et des personnes particulièrement vulnérables*  

p.69  

p.71  

p.71  

p.72
"Refugee status in the EU Members States and return policies":
the legislation and the implementation of return policies

FRANCE

François JULIEN-LAFERRIÈRE,
Professeur à l’Université Paris Sud,
Directeur de l’Institut d’études de droit public,
et Emmanuelle NERAUĐAU-D’UNIENVILLE,
Docteur en droit de l’Université Paris Sud,
Membre de l’Institut d’études de droit public.
1. Faits et chiffres:

1.1 Statistiques – asile et immigration:

1.1.1 Une mise en cohérence progressive des statistiques officielles:


Sur le plan législatif, ce constat s’est traduit, en 1998, par l’obligation faite au ministère de l’Intérieur de remettre chaque année au Parlement un « rapport retraçant le

293 Entretiens et contacts pour la réalisation de ce rapport national : la Sous-direction des étrangers et de la circulation transfrontalière (Bureaux n°4 et 5 - Direction des Libertés Publiques et des Affaires Juridiques - Ministère de l’Intérieur), la Cimade (Association d’aide et de défense des étrangers), le GISTI (Groupe d’Information et de Soutien des Immigrés). Nous remercions plus particulièrement : Julie DELAGE (Sous-direction des étrangers - DLPAJ), Caroline INTRAND (Défense des étrangers reconduits – Cimade Paris), Claire RODIER (Juriste, permanente au GISTI).


295 Office des Migrations Internationales.

296 Office Français de Protection des Réfugiés et Apatrides.

297 Direction de la Population et des Migrations (ministère de l’emploi et de la solidarité).

nombre de titres délivrés »

299, mais la portée de cette obligation demeurait limitée à l’entrée des étrangers en France


Le premier rapport annuel du gouvernement, pour 2004, sera présenté au Parlement dans les jours à venir 304; il comporte trois parties 305. Dans la première partie, sont

---


300 Le rapport annuel, prévu par la loi du 11 mai 1998, reprenant les données recueillies pour la délivrance des titres de séjour délivrés par le ministère de l’Intérieur.


prononcées et commentées les données permettant d’évaluer la présence d’étrangers sur le territoire national, selon les différents modes d’entrée en France (demandes de titres de séjours, regroupement familial, statut de réfugié ou protection subsidiaire, attestation d’accueil) ; des indicateurs portant sur une tentative d’évaluation du nombre d’étrangers en situation irrégulière y sont également présentés, conformément à la loi. Toutefois, le rapport précise immédiatement que « par définition, les étrangers se trouvant en situation irrégulière ne font l’objet d’aucun enregistrement administratif. Ils ne peuvent donc pas être directement dénombrés. Il ne s’agit donc pas d’indiquer des données quantitatives précises ni même de relever des tendances réellement significatives ». Cette réserve faite, certains « indicateurs de flux » et « indicateurs de stocks » sont proposés comme permettant d’estimer la présence d’étrangers en situation irrégulière en France.

Parallèlement, la Commission européenne a demandé aux Etats membres de l’Union de répondre à un questionnaire annuel sur les flux migratoires, ce que le HCI a entrepris au printemps 2003. Le « groupe permanent statistiques » a également rendu son nouveau rapport 2002-2003 qui mentionne les évolutions réalisées mais précise que plusieurs difficultés de comptage demeurent, notamment en matière de sorties: « l’estimation des sorties du territoire national, même si la connaissance du nombre des mesures d’éloignement effectivement exécutées a été améliorée, reste encore très aléatoire ». Depuis, le HCI a mis en place en juillet 2004, en son sein,  


\[307\] « Indicateurs de flux » : 1) indicateurs de pression à l’entrée du territoire (nombre de placements en zone d’attente, refus d’admission sur le territoire, demandes d’asile à la frontière) ; 2) indicateurs de pression migratoire au séjour (nombre de déboutés du droit d’asile, nombre d’arrêtés préfectoraux de reconduite à al frontière (APRF) non exécutés, nombre de refus de titre) ; 3) indicateurs de flux de sortie (délivrances de titres aux étrangers déclarant être entrés de manière irrégulière, APRF exécutés). Rapport au Parlement 2004, *Les orientations de la politique d’immigration : premier rapport établi en application de la loi 2003*, mars 2005, p.32 et s.


1.1.2 Les chiffres de l’asile :

(1.1.2.1) La demande d’asile :

D’après le rapport 2004 du Haut Commissariat pour les réfugiés (HCR)³¹¹, publié le 1er mars 2005, le nombre de requérants arrivés dans les pays industrialisés en 2004 est tombé à son niveau le plus bas depuis 16 ans, après avoir baissé pour la troisième année consécutive³¹². En revanche, le rapport précise que la France a été le premier pays industrialisé d'accueil de demandeurs d'asile en 2004³¹³ et avance le chiffre de

³¹¹ Asylum levels and trends in industrialized countries, 2004, UNHCR, 1er mars 2005.
³¹² D’après le HCR, environ 368.000 personnes ont cherché asile dans 38 pays en Europe, en Amérique du Nord et dans certaines régions de l’Asie. Le nombre complet de demandes d'asile est tombé de 22% l'année dernière, venant s'ajouter à une baisse semblable observée en 2003. (Asylum levels and trends in industrialized countries, 2004, UNHCR, 1er mars 2005).
³¹³ « La France est ainsi au premier rang des pays industrialisés accueillant des demandeurs d'asile, supplantant les Etats-Unis qui en ont accueilli 52.400, selon le HCR. Elle était jusqu'en 2003 devancée par la Grande-Bretagne, où leur nombre a chuté de 61% en deux ans (40.200 en 2004), selon le HCR, et l'Allemagne, qui a atteint son niveau le plus bas depuis 20 ans avec 35.600 demandeurs.», La France, premier pays de demandes d'asile, Nouvel Observateur, 4 mars 2005.
Country Report France

61.600 demandes\textsuperscript{314} (en hausse par rapport à 2003 où l'on comptait 59.768 « primo demandeurs », dont 7.564 mineurs accompagnants\textsuperscript{315}). Les Turcs et les Chinois sont les plus nombreux à solliciter la protection de la France, sauf à considérer que les ressortissants de l'ex-URSS appartiennent à une même entité\textsuperscript{316}.

Pour 2003, il faudrait également prendre en compte les 27.741 demandeurs d'asile territorial (aujourd’hui supprimé et remplacé par la protection subsidiaire\textsuperscript{317}) qui ne peuvent être ajoutés au total précédent car nombre de demandeurs figurent dans les deux catégories\textsuperscript{318}. Or, ces doubles ne sont distingués dans aucune statistique officielle\textsuperscript{319}. En revanche, l’institution d’une procédure unique d’examen des demandes d’asile (OFPRA), à compter du 1er janvier 2004, devrait clarifier la situation statistique.

\textsuperscript{314} Le bilan du HCR a été établi d’après des estimations provisoires de l'OFPRA (Office français de protection de demandeurs d'asile) qui publiera à la mi-avril les données officielles pour 2004 ; données qui devraient aller dans le sens de celles du HCR. 

\textsuperscript{315} L’enregistrement informatique du nombre de demandes émanant de mineurs accompagnant a été mis en place progressivement à partir de mai 2002. Ainsi, l’année 2003 est la première année pour laquelle l’OFPRA dispose de séries statistiques informatisées complètes. 

\textsuperscript{316} Voir Annexe I, Tableau 2. 

\textsuperscript{317} La loi du 10 décembre 2003 a supprimé l'asile territorial, instauré par la loi du 11 mai 1998, qui était accordé par le ministère de l'Intérieur (concernant essentiellement des ressortissants algériens, près de 62%). La nouvelle loi créer la protection subsidiaire définie en référence aux textes européens. 

\textsuperscript{318} Pour des précisions : Anicet Le Pors, \textit{Le droit d'asile}, Que sais-je, PUF, 2005, p.101 et s.

L’année 2004 a été celle de l'application de la nouvelle loi sur l'asile promulguée le 10 décembre 2003^320 et de la réorganisation de l'OFPRA^321. L’OFPRA est aujourd’hui compétent en matière d’asile conventionnel et de protection subsidiaire (cette dernière ayant remplacé « l’asile territorial »). Cette réforme s’inscrit dans le cadre européen et devrait favoriser une plus grande efficacité des procédures et une

---


réduction des délais d’instruction: les délais accordés pour présenter la demande ont été réduits de 10 jours ; la diminution du temps d'examen de l’OFPRA (de deux ans à deux mois, en moyenne, actuellement) vise à décourager les filières d'immigration clandestine.

L’augmentation du nombre de demandeurs, en 2004, peut s’expliquer par un report d'anciens demandeurs de l'asile territorial, mais aussi par l'explosion des demandes de réexamen de dossiers, motivées par les nouvelles dispositions légales ; elles ont triplé en 2004, passant de 2.225 en 2003 à plus de 6.000 selon l’OFPRA. Toute-fois, le nombre de demandeurs d'asile, après cette augmentation, pourrait commencer à diminuer en 2005, à l’instar des autres pays européens.

(1.1.2.2) Les décisions rendues en matière d’asile (OFPRA, CRR):

En 2003, l’OFPRA et la Commission de recours des réfugiés (CRR) ont pris 66.344 décisions dont 9.790 ont débouché sur un accord, soit un taux global d’admission de 14,8%.

Les décisions directes de l’OFPRA (hors mineurs) correspondent très majoritairement aux motifs de l’asile conventionnel. Pour 2003, les décisions négatives d’asile conventionnel se sont élevées à 56.554. Sur cette base, parmi les quelque  

322 En effet, l’instruction par l’OFPRA de la demande d’asile est unique et permet d’éviter le dépôt de demandes multiples sur des fondements juridiques différents. Rapport 2002-2003 du Groupe perma-
323 nent chargé des statistiques, OSII, HCI, 2004, p.41.
325 Voir Annexe I, Tableau 1.
326 Voir Annexe II.
327 Voir Annexe III.
61.600 demandeurs avancés par le HCR pour 2004, on peut estimer que près de 80% ont été ou seront déboutés, un taux récurrent ces dernières années, et qu’un grand nombre devrait rester en France en situation irrégulière\textsuperscript{328}. A propos des décisions de l’OFPRA, les associations françaises et internationales de défense des étrangers regrettent que 50% des demandes rejetées l’aient été sans entretien. Il faut préciser que la dernière modification de la loi relative au droit d’asile\textsuperscript{329} affirme le principe de la convocation « à une audition » à l’OFPRA mais prévoit quatre exceptions (dont la notion « d’éléments manifestement infondés » fournis à l’appui de la demande). Dans ce cas, les requérants verront leur demande refusée sans possibilité d’explications orales\textsuperscript{330}.

Ainsi, pour l’année 2003 : 100.838 réfugiés seraient inscrits sur les registres de l’OFPRA\textsuperscript{331}.

\textsuperscript{328} Voir infra.

\textsuperscript{329} La loi n°52-893 du 25 juillet 1952 relative au droit d’asile (modifiée en dernier lieu par la loi n°2003-1176 du 10 décembre 2003) est désormais intégrée à un Code de l’entrée et du séjour des étrangers et de l’asile (CESEDA), en vigueur depuis le 1\textsuperscript{er} mars 2005.

\textsuperscript{330} Amnesty International-France évoque « qu’il est à craindre que nombre de demandes soient considérées comme « manifestement infondées » (« fraude avérée à l’identité, demande dénuée de toute substance ou hors champ ou dépourvue de toute crédibilité »). En effet, le demandeur doit envoyer son dossier complet à l’OFPRA « en français » dans les 21 jours ; le risque étant que les demandeurs n’aient pas le temps de préparer correctement le dossier, perdant ainsi la chance d’être entendus. Or, malgré les moyens supplémentaires reçus ces dernières années, l’Office ne pouvait recevoir tous les demandeurs. Pourtant, comme le précise le rapport de la Commission des lois de l’Assemblée nationale, « les entretiens de l’OFPRA sont essentiels pour la suite de la procédure, ils permettent aux demandeurs de présenter un récit plus facilement qu’ils ne le font parfois à l’écrit ». France, patrie des droits humains ?, Rapport AIFS, mai 2004, p.73.

\textsuperscript{331} L’asile en France et en Europe, Etat des lieux 2004,4\textsuperscript{e} Rapport annuel de Forum Réfugiés, p.143, Tableau 4.
La question des déboutés du droit d’asile est rendue très sensible pour diverses raisons.

D’une part, du point de vue du statut, une personne déboutée de sa demande reçoit une invitation à quitter la France : soit elle quitte le territoire (définitivement ou provisoirement), soit elle ne se plie pas à la décision de refus et demeure en France. Or, dans ce dernier cas, sa présence devient clandestine, puisqu’elle s’est mise en infrac- tion avec la loi sur le séjour des étrangers. Les déboutés se retrouvent donc majoritairement en séjour irrégulier, dans une situation très précaire avec presque pour seul

Source : Rapport d’activité 2003, OFPRA.
espoir de bénéficier d’une régularisation\textsuperscript{332}. Le Rapport du gouvernement (2004) révèle que 80.000 illégaux auraient été régularisés entre 1999 et 2003, c’est-à-dire presque autant que lors de l’opération de régularisation de 1997, avec une marge de réserve liée à l’incertitude qui entoure les enregistrements effectués dans les préfectures\textsuperscript{333}.

D’autre part, il est difficile d’évaluer le nombre de déboutés du droit d’asile qui quittent le territoire français ou qui s’y maintiennent. Il est possible de constater que, sur une longue période, le nombre de déboutés est beaucoup plus élevé que le nombre de réfugiés statutaires\textsuperscript{334}. Un rapport de l’Inspection générale des affaires sociales évaluait à quelque 250.000 le nombre de demandeurs déboutés du droit d’asile entre 1998 et la fin de l’année 2002\textsuperscript{335}. Le rapport du gouvernement (2004) confirme « qu’une forte proportion des étrangers demandeurs d’asile reste sur le territoire français après s’être vu opposer un refus par l’OFPRA (…) mais que cette part dans les flux illégaux n’est pas quantifiable\textsuperscript{336} ». En revanche, il n’existe pas de statistiques des demandeurs d’asile définitivement déboutés et expulsés\textsuperscript{337}. On se retrouve face au problème plus général du manque de précision des statistiques sur le retour ou le départ des étrangers.

\begin{footnotes}
\footnotetext[332]{La loi du 11 mai 1998 a notamment prévu des cas de régularisation pour les étrangers en situation irrégulière après 10 années de présence sur le territoire français ou au titre du droit au respect de la vie privée et familiale ou encore en cas de maladie grave et sérieuse. « Ce dispositif, sans équivalent en Europe, bénéficie à 20.000 personnes qui sont automatiquement régularisées chaque année », Maxime TANDONNET, Migrations. La nouvelle vague, L’Harmattan, 2003, p.82.}
\footnotetext[334]{Michel GEVREY (Rapp.), Rapport de la Commission spéciale du Plan, octobre 2003, p.93.}
\footnotetext[335]{« En 2003 et 2004, l’OFPRA a rejeté chaque année quelque 60.000 demandes. En 2005, avec l’accélération du traitement des dossiers, ce sont quelque 80.000 étrangers qui devraient essayer un refus au cours des douze prochains mois », M.-C. TABET, Immigration : le rapport bête sur les clandestins, Le Figaro, lundi 21 février 2005, p.8.}
\footnotetext[337]{Pour des précisions : Anicet Le Pors, Le droit d’asile, Que sais-je, PUF, 2005, p.101 et s.}
\end{footnotes}
1.1.3 Les chiffres du départ des étrangers :

Le HCI relève que les flux migratoires, en France, ne sont souvent appréhendés que sous l’angle de l’immigration sur le territoire. Certains étrangers établis en France peuvent quitter le territoire sans que l’on puisse en avoir connaissance : les seules données disponibles se limitent aux départs qui sont la conséquence d’un acte administratif accompli soit par le ministère de l’Intérieur pour les retours contraints (voir ci-dessous, Tableau 2), soit par l’Office des migrations internationales (OMI) pour les retours aidés (voir ci-dessous, Tableau 1).

Toutefois, ces départs « comptabilisés » ne concernent qu’un nombre très limité de personnes :

<table>
<thead>
<tr>
<th>Tableau I</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Estimation des « retours aidés »</strong>[^338] (2003) :</td>
</tr>
<tr>
<td>- aide publique à la réinsertion des étrangers en situation irrégulière (APR) : environ 15 bénéficiaires.</td>
</tr>
<tr>
<td>- aide publique à la réinsertion des étrangers invités à quitter le territoire (IQF) : 947 bénéficiaires, dont 770 après avoir été déboutés du droit d’asile.</td>
</tr>
<tr>
<td>- rapatriement humanitaire (RH) : 642 bénéficiaires en 2001 (variable).</td>
</tr>
</tbody>
</table>


- aides exceptionnelles et temporaires : variables.

TOTAL RETOUR AIDES (2003) : près de 2.000.

<table>
<thead>
<tr>
<th>Tableau 2</th>
</tr>
</thead>
</table>

**Estimation des « retours contraints »** 

(2003) :

a) Mesures d’éloignement prononcées :

- les interdictions du territoire : 6.536.
- les arrêtés préfectoraux de reconduite à la frontière (APRF) : 49.017.
- les expulsions : 385.


b) Mesures d’éloignement exécutées :

- les interdictions du territoire : 2.098.
- les arrêtés préfectoraux de reconduite à la frontière (APRF) : 9.352.
- les expulsions : 242.


Ainsi, le nombre cumulé des « retours contraints » exécutés et des « retours aidés » comptabilisés, comprenant d’autres catégories d’étrangers que les seuls déboutés du droit d’asile, est loin de correspondre au nombre de personnes qui se sont vu refuser


Country Report France
le statut de réfugié au cours d’une année\textsuperscript{340}. En 2003, si l’on peut estimer à près de 15.000 le nombre de sorties de ce type (contraintes exécutées et aidées comptabilisées), le nombre de déboutés du droit d’asile était de 56.554\textsuperscript{341}. Le nombre total des départs des étrangers de France n’est donc pas connu et les statistiques du ministère de l’Intérieur ne distinguent pas les déboutés de l’asile des autres étrangers « irréguliers ». Toutefois, le rapport du gouvernement (2004) propose deux « indicateurs de flux de sortie » :

- les délivrances de titres de séjour aux étrangers déclarant être entrés de manière irrégulière sur le territoire : 20.296 titres de ce type, dont 5.539 ont obtenu le statut de réfugié en 2003\textsuperscript{342}.
- le nombre d’arrêtés de reconduite à la frontière exécutés : 9.532 en 2003 (voir supra).

Ces pistes pourraient permettre d’établir des évaluations un peu plus précises sur le départ des étrangers, il n’en reste pas moins qu’il s’agit d’estimations et qu’aucun chiffre global n’est avancé. De manière plus générale, ces estimations chiffrées du retour des étrangers confirment à la fois « l’échec des dispositifs français d’aide publique au retour en France »\textsuperscript{343}, les difficultés pour dénombrer les étrangers entrés dans la clandestinité en France, ainsi que le faible taux d’exécution des mesures d’éloignement, malgré une progression récente. En effet, le nombre total des mesures d’éloignement (hors réadmissions) a augmenté entre 2001 et 2003, même s’il faut prendre en compte le fait qu’une même personne puisse faire l’objet de plusieurs

\textsuperscript{340} Michel GEVREY (Rapp.), Rapport de la Commission spéciale du Plan, octobre 2003, p.91.
\textsuperscript{341} Voir Annexe III.
\textsuperscript{342} Ces chiffres, qui représentent 12.3% des premiers titres délivrés (hors EEE) sont en forte de croissance sur les quatre dernières années. Ils permettent de dénombrer les étrangers ayant déclaré être entrés irrégulièrement et dont la présence en France devient « régulière ».
procédures. « Il ressort du bilan de l’éloignement de ces dernières années, une forte croissance du nombre de mesures exécutées à partir de 2003 et surtout de 2004. »


<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Interdictions du territoire</td>
<td>5089</td>
<td>2360</td>
<td>6198</td>
</tr>
<tr>
<td>Arrêtés préfectoraux de reconduite à la frontière</td>
<td>64 221</td>
<td>13069</td>
<td>42 485</td>
</tr>
<tr>
<td>Arrêtés d’expulsions</td>
<td>292</td>
<td>231</td>
<td>7 611</td>
</tr>
<tr>
<td>Total des mesures d’éloignement</td>
<td>69 602</td>
<td>15560</td>
<td>49 124</td>
</tr>
</tbody>
</table>


Cette tendance traduit la volonté du gouvernement d’accroître l’efficacité des procédures d’éloignement. Un pôle de compétences DLPAJ\textsuperscript{346}-DCPAF\textsuperscript{347} est mis en place au profit des préfectures, en vue d’améliorer l’exécution effective des décisions d’éloignement\textsuperscript{348}. Il s’agit de structures créées par les préfets regroupant les bureaux d’étrangers des préfectures, les services de police départementaux et les unités de gendarmerie départementale, visant à coordonner l’action de ces acteurs dans le domaine de la lutte contre l’immigration irrégulière. Les parquets peuvent être associés à ces structures, auxquelles peuvent aussi participer d’autres services comme l’administration pénitentiaire ou le service des douanes. Les départements les plus importants se sont dotés de tels pôles ; d’autres ont suivi dans le courant 2004. Ainsi, le dernier rapport du gouvernement relève que cette forte mobilisation et la meilleure organisation des acteurs permettent une plus grande efficacité en matière d’éloignement. En revanche, il souligne que « l’exécution des mesures d’éloignement prononcées se heurte à un certain nombre de difficultés majeures sur lesquelles l’action des acteurs de l’éloignement n’a que peu d’effet\textsuperscript{349} ». Pour l’année 2004, près de 50.000 reconduites à la frontière ne sont pas exécutées\textsuperscript{350}.

1.1.4 Synthèse : nombre d’étrangers obligés de retourner dans leur pays d’origine (2003)\textsuperscript{351} :
- après le rejet d’une demande d’asile ou de la protection subsidiaire :
décisions négatives d’asile conventionnel = 56.554.

\textsuperscript{346} Direction des Libertés Publiques et des Affaires Juridiques (Ministère de l’Intérieur).
\textsuperscript{347} Direction Centrale de la Police aux frontières (Direction générale de la police nationale - Ministère de l’Intérieur).
\textsuperscript{350} Voir Tableau supra.
- **fin d’un statut protecteur (fin de protection temporaire, retrait d’un statut de réfugié) :**
  pas de chiffre spécifique\(^{352}\).

- **entrée et séjour illégaux et/ou ordre définitif de quitter le territoire:**
  refus d’admission sur le territoire français aux frontières = 32.223.
  mesures d’éloignement prononcées = 55.938.
  mesures d’éloignement exécutées = 11.692.

- **départs volontaires vers le pays d’origine\(^{353} \):**
  retours aidés = près de 2.000.
  autres retours volontaires = non mesurables\(^{354}\).

Sur la faiblesse de l’appareil statistique français, la Cour des comptes a récemment insisté sur l’urgence de la situation qui constitue « un handicap majeur pour la conduite d’une politique publique efficace\(^{355} \) » en matière d’immigration et d’asile. Or, dans son premier bilan établi en application de la loi de 2003\(^{356}\), le ministère de l’Intérieur n’avance pas de chiffre sur le nombre total de départs ou d’étrangers en situation irrégulière. Or, « c’est pourtant sur ce sujet particulièrement sensible que les parlementaires et l’Élysée attendent les réponses les plus précises\(^{357} \).”


Dans le contexte actuel, les Ministres de l’Intérieur qui se sont succédé avancent des objectifs de fermeté en matière d’éloignement : « La France a la politique d’éloignement la plus faible de toute l’Europe. Nous avons reconduit 7.500 clandestins à la frontière en 2002 sur 40.000 décisions prises. Nous faisons à peu près autant de reconduites que la Belgique et moins que la Suède tandis que l’Allemagne et l’Espagne procèdent à 30 000 reconduites par an ». Ainsi, les dernières modifications législatives prennent en compte cette orientation. Dans le même sens, une circulaire du 22 octobre 2003, sur l’amélioration des mesures de reconduite à la frontière, rappelle que « la maîtrise de l’immigration et le respect des règles de droit qui fixent les conditions dans lesquelles les ressortissants de pays étrangers sont admis à entrer et à séjourner sur le territoire national reposent sur l’efficacité et la crédibilité de l’exécution des décisions, judiciaires ou administratives, d’éloignement (…). Sans attendre l’adoption définitive de la nouvelle loi (…), la présente circulaire a pour but de mettre en place un dispositif de nature à améliorer, à droit constant, le taux d’exécution de ces mesures en créant des outils et des procédures ». Certains observateurs rappellent aussi que « le défi n’est donc pas tant d’interdire à l’un d’entrer chez l’autre, mais d’offrir à chacun la liberté de rester chez soi ». Le ministre de l’Intérieur, Nicolas Sarkozy, prônait un examen des dossiers des clandestins « au cas

358 Voir l’intervention de M. Nicolas SARKOZY (Ministre de l’Intérieur en 2003) : « Par ailleurs, je ne conteste absolument pas le droit, ni même le devoir, pour un pays comme le nôtre, d’éloigner de son territoire les étrangers qui n’y sont venus que pour y commettre des actes de délinquance. La peine d’interdiction du territoire et le régime de l’expulsion sont des instruments efficaces pour écarter de notre pays des étrangers indésirables ; nous ne les changeons pas davantage. Lorsqu’un tel étranger commet un délit, qu’il soit en situation irrégulière ou régulière, il est normal, qu’après avoir effectué sa peine de prison, il soit expulsé », Débats parlementaires (Assemblée nationale), Session extraordinaire de 2002-2003, 2ème séance du jeudi 3 juillet 2003, Présidence de M. Marc-Philippe DAUBRESS, (Compte rendu sur le site Internet : www.assemblee-nat.fr).

359 Circulaire du 22 octobre 2003, relative à l’amélioration de l’exécution des mesures de reconduites à la frontière (NOR/INT/D/03/00105/C).


361 Claude-Valentin MARIE, L’Union européenne face aux déplacements de populations. Logiques d’État face aux droits des personnes, REMI, 1996, p. 207.
par cas », avec pour mot d’ordre « l’humanité et le réalisme », manifestant la volonté de « construire une nouvelle politique d’immigration et de coopération avec les pays sources : ce que j’appelle des "filières positives"362 ». Sur ce point, il rappelle que « cette politique passe aussi par une absolue harmonisation européenne », car « il y a tout lieu de penser que les pressions migratoires subsisteront, voire s’amplifieront, tant que les différences de niveau se maintiendront ou s’accroîtront. Seule la recherche d’un meilleur équilibre économique sera de nature à les faire disparaître. En attendant, les moyens juridiques n’ont qu’une effectivité relative363 ».

Son successeur, Dominique de Villepin, a annoncé récemment son intention de créer « une véritable police de l’immigration » et un « service central » regroupant toutes les administrations concernées par la lutte contre l’immigration irrégulière. Ces propositions feront l’objet d’un rapport et seront présentées au Président de la République et au Premier ministre dans quelques semaines364. Pour l’heure, le dernier rapport au Parlement rappelle les grands axes de la politique « volontariste » du gouvernement visant « à promouvoir l’attractivité du territoire national au bénéfice de professionnels, dont l’économie a besoin, et d’étudiants, futures élites de leurs nations, ainsi qu’à renforcer la lutte contre l’immigration irrégulière, indispensable pour mener à bien l’intégration des étrangers en situation régulière »365. Le gouvernement énonce les mesures qui ont été renforcées en 2004, « afin que l’évolution positive qui se dessine depuis trois ans en matière de lutte contre l’immigration clandestine se poursuive » :

2. Création d’un pôle de compétence début 2004 (Centre national d’animation et de ressources – CNAR) pour le soutien logistique aux préfectures dans la conduite des procédures d’éloignement, l’évaluation de l’activité des préfectures, la participation à la formation des personnes chargées de mettre en œuvre les procédures d’éloignement, le conseil et l’expertise juridique aux services chargés de l’éloignement.
3. Interventions du Ministère des Affaires étrangères auprès des ambassades pour améliorer le taux de laissez-passer consulaires.
4. Programme national de construction de centres de rétention (2006 ouverture de 700 places supplémentaires, portant à 1.814 le nombre total de places disponibles).

En revanche, la question des étrangers en situation irrégulière demeure préoccupante. Les ONG françaises relèvent que « la situation est explosive, il y a plus de 200.000 déboutés en France et on ne va pas tous les expulser ». A la fin de l’année 2004,


« c’est le ministre des Affaires étrangères lui-même qui avait tiré la sonnette d’alarme ». Face à ce constat, les États membres de l’UE se trouvent confrontés au même problème ; la dernière régularisation opérée par l’Espagne, en février 2005, a replacé la question au cœur du débat national et européen. Dans les rangs de la majorité, on redoute que le nombre croissant de déboutés du droit d’asile qui demeurent en France et qui entrent dans la clandestinité n’apparaisse « comme un échec de la politique gouvernementale de lutte contre l’immigration illégale ».

Monsieur Dominique de Villepin préconise une vision globale de la politique d’immigration pour la rendre plus efficace, avec pour priorité la lutte contre l’immigration irrégulière : « C’est le grand enjeu, pour moi, de 2005 ; faire en sorte que l’immigration irrégulière recule considérablement dans notre pays parce que, si nous voulons faire vivre notre pacte républicain, c’est le point de départ absolu ».


370 Pour la France, pas question de régularisation massive : « voilà deux ans que le gouvernement français répète à l’envi son credo. Les régularisations doivent se faire de façon continue grâce aux dispositifs de la loi Sarkozy sur l’immigration, qui permet à un étranger d’obtenir des papiers en cas de mariage avec un(e) Français(e), de naissance d’un enfant ou si l’étranger peut prouver qu’il réside sur le territoire depuis dix ans au moins. Les régularisations sont possibles seulement pour régler un certain nombre de cas individuels. En 2004, 23 000 étrangers ont été régularisés. Selon le ministère de l’intérieur, les sans-papiers seraient environ 150 000 à 200 000 à entrer sur le territoire chaque année », Thomas FERENCZI, Des pays européens critiquent la régularisation de sans-papiers en Espagne, Le Monde, 8 février 2005.


373 Dominique de VILLEPIN, « Le 8 heures-9 heures », France Inter, 24 février 2005.
2. **Instruments légaux du retour et de l’éloignement** :

2.4 **Statut légal des demandeurs d’asile déboutés et des personnes demandant la protection subsidiaire**

2.1.1 Les demandeurs d’asile qui n’ont obtenu ni le statut de réfugié ni la protection subsidiaire doivent, en principe, quitter le territoire français. En effet, les articles L. 742-3 et L. 742-7 du code de l’entrée et du séjour des étrangers et du droit d’asile (CESEDA)\(^{374}\) disposent :

*Article L. 742-3.* – « L’étranger admis à séjourner en France bénéficie du droit de s’y maintenir jusqu’à la notification de la décision de l’Office français de protection des réfugiés et apatrides ou, si un recours a été formé, jusqu’à la notification de la décision de la commission des recours. Il dispose d’un délai d’un mois à compter de la notification du refus de renouvellement ou du retrait de son autorisation de séjour pour quitter volontairement le territoire français ».

*Article L. 742-7.* – « L’étranger auquel la reconnaissance de la qualité de réfugié ou le bénéfice de la protection subsidiaire a été définitivement refusé et qui ne peut être autorisé à demeurer sur le territoire à un autre titre, doit quitter le territoire français, sous peine de faire l’objet d’une mesure d’éloignement […] ».

---

La mesure d’éloignement dont l’intéressé peut faire l’objet, s’il n’a pas quitté volontairement le territoire français, est la reconduite à la frontière. Elle est prononcée par le préfet (représentant du gouvernement dans le département) en application de l’article L. 511-1, 3°, du CESEDA qui vise « l’étranger auquel la délivrance ou le renouvellement d’un titre de séjour a été refusé, ou dont le titre de séjour a été retiré, [et qui] s’est maintenu sur le territoire au-delà du délai d’un mois à compter de la date de notification du refus ou du retrait ».

2.1.2 Cependant, si le demandeur d’asile débouté peut être admis à séjourner en France à un autre titre que l’asile, il peut demander une carte de séjour. C’est le cas lorsque l’intéressé appartient à l’une des catégories d’étrangers auxquels une carte de séjour est délivrée « de plein droit » en application de l’article L 313-11 pour la carte de séjour temporaire, valable un an et renouvelable si, à chaque échéance, les conditions exigées pour une première délivrance sont encore réunies, et de l’article L. 314-11 pour la carte de résident, valable dix ans et renouvelée de plein droit.

2.1.3 Parmi les demandeurs d’asile déboutés qui peuvent obtenir de plein droit la carte de séjour temporaire (article L. 313-11), « sauf si [leur] présence [sur le territoire français] constitue une menace pour l’ordre public », figure notamment :

---

375 En droit français, le mot « expulsion » désigne la mesure d’éloignement d’un étranger, prononcée par l’autorité administrative (préfet ou ministre de l’intérieur, selon les cas) en cas de « menace grave de l’ordre public » ou de « nécessité impérieuse pour la sûreté de l’État ou la sécurité publique ». La mesure d’éloignement prise en cas de situation irrégulière (entrée ou séjour irrégulier en France) s’appelle la « reconduite à la frontière ».

376 CESEDA, article L. 311-6 : « Lorsqu’une demande d’asile a été définitivement rejetée, l’étranger qui sollicite la délivrance d’une carte de séjour doit justifier, pour obtenir ce titre, qu’il remplit l’ensemble des conditions prévues par le présent code ».

377 CESEDA, article L. 313-11 : « Sauf si sa présence constitue une menace pour l’ordre public, la carte de séjour temporaire portant la mention “vie privée et familiale” est délivrée de plein droit » à tout étranger qui entre dans l’une des 11 catégories d’étrangers qui ont des liens particuliers avec la France en raison de leurs attaches familiales ou de la durée de leur séjour, même irrégulier.

378 CESEDA, article L. 314-11 énumère 10 catégories d’étrangers à qui « la carte de résident est délivrée de plein droit, sous réserve de la régularité [de leur] séjour » et « sauf si [leur] présence constitue
- l’étranger marié avec un ressortissant français, à condition qu’il soit entré régulièrement en France, que la communauté de vie entre lui et son conjoint français n’ait pas cessé et que le conjoint ait conservé la nationalité française ;

- l’étranger qui est père ou mère d’un enfant français mineur résidant en France, à la condition qu’il contribue effectivement à l’entretien et à l’éducation de l’enfant depuis au moins un an 379 ;

- l’étranger qui n’entre pas dans les catégories précédentes, dont les liens personnels et familiaux en France sont tels que le refus d’autoriser son séjour porterait une atteinte excessive à son droit au respect de sa vie privée et familiale 380 ;

- l’étranger dont l’état de santé nécessite une prise en charge médicale dont le défaut pourrait entraîner pour lui des conséquences d’une exceptionnelle gravité, sous réserve qu’il ne puisse effectivement bénéficier d’un traitement approprié dans le pays dont il est originaire 381.

2.1.4 Quant aux demandeurs d’asile déboutés qui peuvent obtenir la carte de résident de plein droit (article L. 314-11), « sauf si [leur] présence [sur le territoire français] constitue une menace pour l’ordre public », il s’agit essentiellement de ceux qui sont mariés depuis au moins deux ans avec un ressortissant français, à condition que la

379 Il est précisé que l’étranger concerné doit contribuer effectivement à l’entretien et à l’éducation de l’enfant dans les conditions prévues par l’article 371-2 du code civil aux termes duquel : « L’autorité appartient au père et à la mère pour protéger l’enfant dans sa sécurité, sa santé et sa moralité ».

380 Cette disposition est une application directe de l’article 8 de la convention européenne des droits de l’homme en droit interne français.

381 Cette disposition constitue une application de la jurisprudence de la Cour européenne des droits de l’homme relative à l’article 3 de la convention qui prohbi les peines ou traitements inhumains ou dégradants, notamment depuis l’arrêt D. c/ Royaume-Uni, du 2 mai 1997 (Rec. 1997-III).
communauté de vie entre les époux n’ait pas cessé et que le conjoint ait conservé la nationalité française.

2.1.5 Enfin, le préfet peut toujours régulariser la situation d’un demandeur d’asile débouté, même s’il ne remplit pas les conditions légales pour obtenir une carte de séjour temporaire ou de résident, dès lors qu’il ne vit pas en état de polygamie, car la délivrance d’une telle carte est alors interdite\textsuperscript{382}. C’est le cas, notamment, quand le demandeur d’asile débouté, malgré le rejet de sa demande de statut de réfugié ou de protection subsidiaire, ne peut être renvoyé ni dans son pays d’origine, car il y courrait des risques pour sa vie ou sa liberté qui n’entrent pas dans le champ d’application de la convention de Genève de 1951 ou de la directive sur la protection subsidiaire, ni dans aucun autre pays, car il ne remplit pas les conditions pour y être admissible.

2.5 Personnes dont le titre ou le permis de résidence pour raisons humanitaires ou la protection temporaire n’est plus valable (clause de cessation, directive sur la protection temporaire)

2.2.1 En France, il n’existe pas de régime spécifique de séjour « pour raisons humanitaires » ; les raisons humanitaires sont incluses dans les conditions permettant d’obtenir une carte de séjour temporaire : étranger dont les liens personnels et familiaux en France sont tels que le refus d’autoriser son séjour porterait une atteinte excessive à son droit au respect de sa vie privée et familiale\textsuperscript{383} ; étranger dont l’état de santé nécessite une prise en charge médicale dont il ne pourrait pas bénéficier dans son pays d’origine\textsuperscript{384}, étranger titulaire d’une rente d’accident de travail ou de maladie

\textsuperscript{382} CESEDA, article L. 314-5 : « La carte de résident ne peut être délivrée à un ressortissant étranger qui vit en état de polygamie ni aux conjoints d’un tel ressortissant. Une carte de résident délivrée en méconnaissance de ces dispositions doit être retirée ».

\textsuperscript{383} CESEDA, article L. 313-11, 7°.

\textsuperscript{384} CESEDA, article L. 313-11, 11°.
professionnelle versée par un organisme français, dont le taux d’incapacité permanente est d’au moins à 20 %.  

2.2.2 Quant à l’étranger qui cesse de bénéficier de la protection temporaire, il se trouve dans la même situation que le demandeur d’asile débouté. N’étant plus titulaire d’une carte de séjour, il entre dans le champ d’application de l’article L. 511-1 du CESEDA et le préfet peut donc prononcer sa reconduite à la frontière s’il n’a pas quitté la France un mois après le non-renouvellement de sa carte de séjour. Cependant, comme pour le demandeur d’asile débouté, le préfet peut également régulariser sa situation, à condition qu’il ne vive pas en état de polygamie, si l’intéressé ne peut être renvoyé dans son pays d’origine ni dans aucun autre pays.  

2.6 Programmes de régularisations ; autres possibilités pour l’obtention d’une « tolérance » ou d’une autorisation pour rester.  

2.3.1 Depuis cinq ans, il n’y a pas eu de nouvelle opération de régularisation. En revanche, diverses modifications de la législation ont apporté des nouveautés quant aux possibilités de régularisation permanente :  

- l’âge maximum auquel un jeune mineur étranger doit être entré en France, même irrégulièrement, pour bénéficier d’une carte de séjour a été porté de dix à treize ans  

__________________________________________  

385 CESEDA, article L. 313-11, 9° et article L. 314-11, 3°.  
386 CESEDA, article L. 313-11, 2° : « Sauf si sa présence constitue une menace pour l’ordre public, la carte de séjour temporaire portant la mention “vie privée et familiale” est délivrée de plein droit : 2° à l’étranger mineur, ou dans l’année qui suit son dix-huitième anniversaire, qui justifie par tout moyen avoir sa résidence habituelle en France depuis qu’il a atteint au plus l’âge de treize ans ».  

326
- la durée de présence habituelle, qui peut être irrégulière, en France exigée pour avoir droit à une carte de séjour a été réduite de quinze ans à dix ans.\textsuperscript{387}

2.3.2 Les étrangers en situation irrégulière peuvent faire l’objet d’une mesure d’éloignement. Il s’agit d’un arrêté préfectoral de reconduite à la frontière pris en application de l’article L. 511-1 du CESEDA qui vise les étrangers entrés irrégulièrement en France et ceux qui sont restés sur le territoire français après l’expiration du visa sous couvert duquel ils sont entrés.\textsuperscript{388}

Aucune disposition nouvelle n’a été prise au cours des cinq dernières années pour régler la situation des étrangers se trouvant irrégulièrement en France.

2.4 Les recours juridictionnels contre les décisions refusant l’asile

Les décisions administratives prises à l’égard des demandeurs d’asile peuvent toujours être contestées devant une instance juridictionnelle, en application du principe général du droit, élevé au rang de principe de valeur constitutionnelle.

\textsuperscript{387} CESEDA, article L. 313-11, 2° : « Sauf si sa présence constitue une menace pour l’ordre public, la carte de séjour temporaire portant la mention “vie privée et familiale” est délivrée de plein droit : 3° à l’étranger ne vivant pas en état de polygamie, qui justifie par tout moyen résider en France habituellement depuis plus de dix ans ou plus de quinze ans si, au cours de cette période, il a séjourné en qualité d’étudiant ».

\textsuperscript{388} CESEDA, article L. 511-1 : « L’autorité administrative compétente peut, par arrêté motivé, décider qu’un étranger sera reconduit à la frontière dans les cas suivants : 1° Si l’étranger ne peut justifier être entré régulièrement en France, à moins qu’il ne soit titulaire d’un titre de séjour en cours de validité ; 2° Si l’étranger s’est maintenu sur le territoire français au-delà de la durée de validité de son visa ou, s’il n’est pas soumis à l’obligation du visa, à l’expiration d’un délai de trois mois à compter de son entrée en France sans être titulaire d’un premier titre de séjour régulièrement délivré ».

\textsuperscript{389} Conseil d’État 17 février 1950, Dame Lamotte, Rec. CE p. 110.
nelle selon lequel un recours est toujours possible même si aucun texte ne le prévoit expressément.

2.4.1 La décision refusant l’entrée du territoire français à la frontière, qui peut être prise si la demande d’asile est « manifestement infondée » (dans près de 98% des cas à l’aéroport de Roissy-Charles de Gaulle), ne peut pas être exécutée contre le gré de l’étranger pendant un délai d’un jour franc, c’est-à-dire le surlendemain, à 0 heure, du jour de sa notification. Pendant ce délai, dont l’étranger doit demander à bénéficier, il peut avertir « la personne chez laquelle il a indiqué qu’il devait se rendre [en France], son consulat ou un conseil de son choix (avocat, association, etc.) ».

Il existe deux voies de recours contre le refus d’entrée :

2.4.1.1 - Devant le juge des référés du tribunal administratif (procédure d’urgence), le demandeur d’asile à qui l’entrée en France a été refusée peut présenter une requête en « référé-suspension », en application de l’article L. 521-1 du code de justice administrative (CJA), ou une requête en « référé-liberté » en application de l’article L. 521-2 du même code.

391 Selon l’article L. 221-1 du CESEDA, le demandeur d’asile qui arrive en France par l’avion, le bateau ou le train, est retenu en zone d’attente « pendant le temps strictement nécessaire à un examen tendant à déterminer si sa demande n’est pas manifestement infondée ». Si sa demande est déclarée « manifestement infondée », l’entrée en France lui est refusée et il est renvoyé vers son pays de provenance.
393 Il est bien évident que les demandeurs d’asile ne demandent pas à avertir le consulat de leur pays.
394 CESEDA, article L. 213-2 : « Tout refus d’entrée en France […] est notifié à l’intéressé avec mention de son droit d’avertir ou de faire avertir la personne chez laquelle il a indiqué qu’il devait se rendre, son consulat ou le conseil de son choix, et de refuser d’être rapatrié avant l’expiration du délai d’un jour franc ».
395 CJA, article L. 521-1 : « Quand une décision administrative, même de rejet, fait l’objet d’une requête en annulation ou en réformation, le juge des référés, saisi d’une demande en ce sens, peut ordonner la suspension de l’exécution de cette décision, ou de certains de ses effets, lorsque
Si le refus d’entrée est illégal, le juge administratif des référés peut, soit suspendre l’exécution (référé-suspension), soit prendre toute mesure pour sauvegarder le droit de l’étranger à demander l’asile, qui constitue « un droit fondamental » selon le Conseil constitutionnel\(^{397}\) et le Conseil d’État\(^{398}\), et pour lui donner accès à l’OFPRA en vue d’y demander la qualité de réfugié\(^{399}\) ou la protection subsidiaire (référé-liberté).

2.4.1.2 - Devant le tribunal administratif également, mais hors procédure d’urgence, le recours en annulation (ou recours pour excès de pouvoir) contre la décision de refus d’entrée. Ce recours doit obligatoirement avoir été formé pour que puisse être introduite une requête en référé-suspension (article L. 521-1), mais non en référé-liberté (article L. 521-2).

Le recours en annulation, qui doit être formé dans les deux mois de la notification du refus d’entrée\(^{400}\) (quatre mois si l’étranger a effectivement été renvoyé vers son pays d’origine ou un autre pays et se trouve donc hors de France\(^{401}\)), n’est pas suspensif\(^{402}\). Il est donc peu efficace, sauf s’il est accompagné d’une requête en référé-suspension.

l’urgence le justifie et qu’il est fait état d’un moyen propre à créer, en l’état de l’instruction, un doute sérieux quant à la légalité de la décision ».

\(^{396}\) CJA, article L. 521-2 : « Saisi d’une demande en ce sens justifiée par l’urgence, le juge des référés peut ordonner toutes mesures nécessaires à la sauvegarde d’une liberté fondamentale à laquelle une personne morale de droit public ou un organisme de droit privé chargé de la gestion d’un service public aurait porté, dans l’exercice d’un de ses pouvoirs, une atteinte grave et manifestement illégale. Le juge des référés se prononce dans un délai de quarante-huit heures ».


\(^{398}\) Conseil d’État, référé, 12 janvier 2001, Mme Hyacinthe, Rec. CE p. 12.

\(^{399}\) Le Conseil d’État a en effet déclaré que « le droit constitutionnel d’asile a pour corollaire le droit de solliciter le statut de réfugié » (12 janvier 2001, Mme Hyacinthe, précité).

\(^{400}\) Code de justice administrative (CJA), article R. 421-1 : « la juridiction [administrative] ne peut être saisie que par voie de recours formé contre une décision, et ce, dans le délai de deux mois à partir de la notification ou de la publication de la décision attaquée ».

\(^{401}\) CJA, article R. 421-7 (renvoyant à l’article 643 du nouveau code de procédure civile), selon lequel le délai est « augmenté de deux mois » pour les personnes « qui demeurent à l’étranger ».

\(^{402}\) CJA, article L. 4 : « Sauf dispositions législatives spéciales, les requêtes n’ont pas d’effet suspensif ».

329
Le juge administratif peut annuler le refus d’entrée s’il est illégal, mais cette annulation n’a pas d’effet concret puisque l’étranger est généralement déjà hors de France et devra donc y revenir pour pouvoir faire valoir les droits que cette annulation lui confère.

2.4.2 Les décisions de l’OFPRA (Office français de protection des réfugiés et apatrides) qui refusent de reconnaître la qualité de réfugié ou d’accorder la protection subsidiaire peuvent faire l’objet d’un recours devant la commission des recours des réfugiés (CRR)\(^{403}\), juridiction administrative spécialisée\(^{404}\). Ce recours doit être formé dans le délai d’un mois à compter de date de notification de la décision de l’OFPRA\(^{405}\).

Les décisions de la CRR sont, à leur tour, susceptibles de recours devant le Conseil d’Etat\(^{406}\) qui, en sa qualité de juge de cassation, ne réexamine pas les faits de l’espèce, mais vérifie seulement que la CRR a fait une correcte application de la convention de Genève de 1951 ou de la législation relative à la protection subsidiaire.

2.4.3 L’arrêté de reconduite à la frontière peut faire l’objet d’un recours devant le tribunal administratif, juridiction administrative ordinaire\(^{407}\), qui l’annule s’il viole la convention européenne des droits de l’homme, en particulier l’article 3

\(^{403}\) CESEDA, article L. 731-2 : « La Commission des recours des réfugiés statue sur les recours formés contre les décisions de l’Office français de protection des réfugiés et apatrides

\(^{404}\) CESEDA, article L. 731-1 : « La Commission des recours des réfugiés est une juridiction administrative, placée sous l’autorité d’un président, membre du Conseil d’Etat, désigné par le vice-président du Conseil d’Etat. »

\(^{405}\) Décret n° 2004-814 du 14 août 2004 relatif à l’Office français de protection des réfugiés et apatrides et à la Commission des recours des réfugiés, article 19 : « Le recours doit, à peine d’irrecevabilité, être exercé dans le délai d’un mois à compter de la notification de la décision de l’office ».


\(^{407}\) Voir ci-dessous, § 3.1.2.
au cas où l'étranger est exposé à des traitements inhumains ou dégradants dans son pays d'origine, ou l'article 8 si l'éloignement de la France porte une atteinte excessive au droit au respect de la vie familiale

3. **Procédures administratives pour l'exécution ou le retour** :

3.1 **Compétences et procédures des décisions d'expulsion**

La mesure d’éloignement prise contre les demandeurs d’asile déboutés s’appelle la reconduite à la frontière.\(^{408}\)

3.1.1 L’autorité compétente pour prononcer la reconduite à la frontière est le préfet, représentant du gouvernement dans le département.

Quand il est informé du rejet de la demande d’asile par l’OFPRA ou, en cas de recours, par la CRR, le préfet adresse à l’étranger une « invitation à quitter le territoire français » qui lui donne un délai d’un mois pour quitter volontairement la France. À l’expiration de ce délai, si l’étranger se trouve toujours en France, le préfet prend contre lui un arrêté de reconduite à la frontière.\(^{409}\)

Toutefois, la procédure de reconduite à la frontière peut être engagée dès la décision de l’OFPRA, sans que le recours à la CRR soit suspensif, dans les cas suivants :

\(^{408}\) CESEDA, articles L. 742-7 et L. 511-1 combinés (voir ci-dessus, § 2.1.1).

\(^{409}\) CESEDA, article L. 511-1, 3°
Country Report France

- si le demandeur d’asile débouté a la nationalité d’un pays pour lequel ont été mises en œuvre les stipulations du 5 du C de l’article 1er de la convention de Genève de 1951 (c’est-à-dire un pays qui, à la suite d’un changement de circonstances, est à nouveau en mesure d’accorder sa protection à ses nationaux), ou d’un pays considéré comme un pays d’origine sûr410 ;

- si sa présence en France constitue une menace grave pour l’ordre public, la sécurité publique ou la sûreté de l’Etat411 ;

- si la demande d’asile repose sur une fraude délibérée, si elle constitue un recours abusif aux procédures d’asile ou si elle n’est présentée que pour empêcher la prise ou l’exécution d’une mesure d’éloignement412.

Le préfet est également compétent pour prendre la décision qui désigne « le pays de destination », c’est-à-dire le pays vers lequel le demandeur d’asile débouté sera renvoyé.

3.1.2 La procédure contentieuse de l’arrêté de reconduite à la frontière est caractérisée par la rapidité et la suspensivité des recours.

L’arrêté de reconduite à la frontière ne peut pas être exécuté (donc l’étranger ne peut pas être expulsé de force) pendant la durée du délai de recours devant le tribunal administratif (TA). Ce délai est de 48 heures si l’arrêté est notifié « par voie administrative », c’est-à-dire directement remis à l’étranger par un fonctionnaire de police ou de la préfecture ; le délai est de 7 jours si la notification est faite « par voie post-

410 CESEDA, article L. 741-4, 2°.
411 CESEDA, article L. 741-4, 3°.
412 CESEDA, article L. 741-4, 4°. Cet article précise : « Constitue, en particulier, un recours abusif aux procédures d’asile la présentation frauduleuse de plusieurs demandes d’admission au séjour au titre de l’asile sous des identités différentes. Constitue également un recours abusif aux procédures
La notification par voie postale a pour effet que l’étranger est prévenu de la mesure d’éloignement prise contre lui et, puisqu’il n’est pas à la disposition des autorités de police, il peut y échapper en quittant son domicile et en versant dans la « clandestinité ». Ceci explique pour partie le faible pourcentage des arrêtés de reconduite à la frontière réellement exécutés

Quand le délai de recours est expiré, le préfet peut procéder à l’exécution de l’arrêté de reconduite à la frontière, sauf si l’étranger a formé un recours devant le TA pour demander l’annulation de cet arrêté (et éventuellement aussi l’annulation de la décision désignant le pays de destination). Le recours étant suspensif, l’exécution de l’arrêté ne peut avoir lieu avant que le TA statue.

Le recours est jugé par un juge unique, c’est-à-dire siégeant seul (et non par une formation de trois juges comme c’est la règle habituelle). Le juge doit, en principe, rendre sa décision dans un délai de 72 heures, mais ce délai est indicatif et non impératif : le juge peut le dépasser sans que son jugement soit irrégulier.

d’asile la demande d’asile présentée dans une collectivité d’outre-mer s’il apparaît qu’une même demande est en cours d’instruction dans un autre État membre de l’Union européenne.

L’article L. 512-3 du CESEDA dispose que l’arrêté de reconduite à la frontière « ne peut être exécuté avant l’expiration d’un délai de quarante-huit heures suivant sa notification, lorsque l’arrêté est notifié par voie administrative, ou de sept jours, lorsqu’il est notifié par voie postale » ou, si le président du tribunal administratif ou son délégué est saisi, avant qu’il n’ait statué.


L’article L. 512-3 du CESEDA dispose que l’arrêté de reconduite à la frontière « ne peut être exécuté, […] si le tribunal administratif est saisi, avant qu’il n’ait statué » (Voir ci-dessus § 1 1.3).

Le juge compétent est le président du tribunal administratif ou un membre du tribunal désigné par lui (CESEDA, article L. 512-2)
Le jugement du TA peut être attaqué devant la cour administrative d’appel (CAA)\textsuperscript{418} ; le délai d’appel est d’un mois\textsuperscript{419} ; contrairement au délai du recours devant le TA, il n’est pas suspensif et aucun délai n’est fixé à la CAA pour rendre son arrêt. Enfin, l’arrêt de la CAA peut faire l’objet d’un pourvoi en cassation devant le Conseil d’Etat ; ce pourvoi n’est pas suspensif.

3.2 \textit{Mesures administratives encadrant le retour forcé (restrictions à la liberté d’aller et venir, détention, réduction des aides sociales)}

3.2.1 Jusqu’à ce que l’arrêté de reconduite puisse être exécuté (en raison du caractère suspensif du recours devant le tribunal administratif, d’un problème de documents d’identité et de voyage, du refus d’embarquer dans l’avion, etc.), le demandeur d’asile débouté peut être placé en « rétention administrative »\textsuperscript{420}. La rétention a lieu « dans des locaux ne dépendant pas de l’administration pénitentiaire », c’est-à-dire qu’il ne peut pas s’agir d’une prison. Les lieux de rétention sont placés sous la responsabilité de la police. La rétention peut s’effectuer dans un commissariat de police mais, le plus souvent, elle a lieu dans des « centres de rétention » spécialement aménagés à cet effet.

Le placement en rétention ne peut durer que le temps nécessaire au départ de l’étranger. La décision de placement en rétention est prise par le préfet pour une durée de 48 heures. Au-delà de ce délai, la rétention ne peut être prolongée que par le

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{417} CESEDA, article L. 512-2 : « Le président ou son délégué statue dans un délai de soixante-douze heures à compter de sa saisine ».
  \item \textsuperscript{418} CJA, article R. 222-33. C’est alors le président de la CAA ou un magistrat désigné par lui qui statue.
  \item \textsuperscript{419} CJA, article R. 776-20.
  \item \textsuperscript{420} CESEDA, article L. 551-1, 3° : « Le placement en rétention d’un étranger dans des locaux ne relevant pas de l’administration pénitentiaire peut être ordonné lorsque cet étranger : 3° faisant l’objet d’un arrêté de reconduite à la frontière […] , ne peut quitter immédiatement le territoire français ».
\end{itemize}
\end{footnotesize}
« juge des libertés et de la détention » et pour une durée de quinze jours renouvelable une fois.\footnote{421}{CESEDA, article L. 552-1 : « Quand un délai de quarante-huit heures s’est écoulé depuis la décision de placement en détention, le juge des libertés et de la détention est saisi aux fins de prolongation de la détention ».

Si l’étranger dispose de « garanties de représentation » (présence en France de membres de sa famille, par exemple), le juge peut mettre fin à sa détention et l’assigner à résidence dans un lieu qu’il désigne, moyennant présentation périodique au commissariat de police ou à la gendarmerie.\footnote{423}{CESEDA, article L. 552-5.}

Les décisions de prolongation prises par le juge peuvent être contestées devant la cour d’appel, mais cet appel n’est pas suspensif, sauf s’il est formé par le ministère public.\footnote{424}{CESEDA, article L. 552-7.}

3.2.2. Pendant la détention administrative ou l’assignation à résidence, l’étranger n’a le droit d’exercer aucune activité professionnelle et ne bénéficie de l’aide médicale d’urgence que si son état de santé nécessite un traitement ou une hospitalisation sans lequel le pronostic vital serait compromis.

3.2.3 A l’expiration du délai de détention (qui est de 32 jours maximum), si le départ du demandeur d’asile ne peut toujours pas être réalisé, l’étranger doit être libéré. Mais sa situation n’est pas nécessairement régularisée. Il se retrouve alors dans


Ce délai a été porté à 32 jours par la loi « Sarkozy » du 26 novembre 2003. Il était auparavant de 12 jours. L’allongement de la durée maximum de la détention a été justifiée par la double considération, d’une part, qu’il était plus court que dans tous les autres États membres de l’Union européenne et, d’autre part, qu’il ne permettait pas d’assurer l’éloignement effectif des étrangers. Ce dernier argument semble peu pertinent puisqu’en 2004, première année d’application du nouveau délai de 32...}
l’illégalité et, dans la plupart des cas, il « disparaît dans la nature ». C’est l’une des explications du faible nombre d’arrêts de reconduite à la frontière effectivement exécutés. Si le préfet le décide – mais il n’y est pas obligé –, l’étranger peut aussi, soit recevoir une autorisation provisoire de séjour, soit être assigné à résidence par décision du préfet jusqu’à ce que son départ puisse être effectif.

L’étranger ainsi admis au séjour provisoire ou assigné à résidence n’a aucun droit à travailler ni aucune assurance sociale, à la seule exception de l’aide médicale d’urgence. Cependant, s’il l’estime opportun, par exemple parce qu’il n’y a aucune possibilité de faire quitter le territoire français au demandeur d’asile débouté, celui-ci peut alors être régularisé et recevoir une carte de séjour d’une validité d’un an et donnant droit de travailler.

3.3 Obstacles légaux à l’expulsion (interprétation des règles internationales ou nationales liées à l’expulsion comme le principe du traitement inhumain)

Le demandeur d’asile débouté ne peut pas être reconduit vers n’importe quel pays.

3.3.1 En effet, si le principe est que « l’étranger qui doit être reconduit à la frontière est éloigné à destination du pays dont il a la nationalité, ou à destination du pays qui lui a délivré un document de voyage en cours de validité, ou à destination de tout autre pays dans lequel il est légalement admissible » , ce principe souffre deux exceptions :

_____________________

jous, le pourcentage d’exécution des arrêtés de reconduite n’a pas sensiblement augmenté (20,35 % en 2004 au lieu de 19 % en 2003).

426 Voir ci-dessus § 1.1.3.

427 CESEDA, article L. 513-2.
- l’étranger à qui la qualité de réfugié a été reconnue ou la protection subsidiaire accordée ne pas peut être éloigné vers le pays dont il a la nationalité ;

- aucun étranger ne peut être éloigné à destination d’un pays où il serait « exposé à des traitements contraires aux stipulations de l’article 3 de la convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales ».

Le demandeur d’asile débouté ne peut pas invoquer la première exception puisque, par hypothèse même, il n’a pas été reconnu réfugié et n’a pas obtenu la protection subsidiaire. Mais il peut invoquer la seconde exception s’il risque des traitements inhumains ou dégradants dans son pays d’origine, bien que sa demande d’asile ait été rejetée et que ni la qualité de réfugié, ni la protection subsidiaire ne lui ait été accordée. Cette hypothèse ne devrait se rencontrer que de façon exceptionnelle puisque la protection subsidiaire est accordée au demandeur d’asile « qui ne remplit pas les conditions pour se voir reconnaître la qualité de réfugié » mais qui démontre qu’il est exposée dans son pays, notamment, à « la torture ou à des peines ou traitements inhumains ou dégradants »428. Donc, partant de ce principe, un demandeur d’asile débouté ne craint pas, dans son pays d’origine, des traitements contraires à l’article 3 de la convention européenne des droits de l’homme et doit pouvoir être éloigné vers ce pays.

Mais la difficulté vient de ce que la demande d’asile est examinée par l’OFPRA et, en cas de recours, la CRR429, alors que le recours contre l’arrêté de reconduite à la frontière et la décision désignant le pays de destination est formé devant le TA430. Il n’est pas exclu que l’OFPRA et la CRR, d’une part, et le TA, d’autre part, portent une appréciation différente sur les risques courus par le demandeur d’asile dans son pays d’origine. Entre 1998 et 2004, quand existait « l’asile territorial » pour les

428 CESEDA, article L. 712-1.
429 Voir ci-dessus, § 2.3.3.
étrangers dont « la vie ou la liberté était menacée dans leur pays ou qui y étaient exposées à des traitements contraires à l’article 3 de la convention européenne des droits de l’homme »\textsuperscript{431}, les TA annulaient environ 10 % des arrêtés de reconduite à la frontière pris contre des demandeurs d’asile territorial déboutés.

3.3.2 Le demandeur d’asile débouté peut aussi invoquer l’article 8 de la convention européenne des droits de l’homme si sa reconduite à la frontière porte atteinte à sa vie privée ou familiale, notamment si les membres de sa famille sont en France et s’il n’a plus d’attache familiale dans son pays d’origine.

Mais cette situation ne se présente que rarement. En effet, le demandeur d’asile est en général arrivé récemment en France (la procédure d’asile dure entre un an et deux ans) et n’a pas eu le temps de s’intégrer, même familairement en France entre la date de son arrivée et la date du rejet de sa demande d’asile. L’article 8 de la convention n’est donc presque jamais retenu par le juge administratif pour annuler l’arrêté de reconduite à la frontière. Le Conseil d’Etat considère généralement que, « eu égard à la durée et aux conditions du séjour de l’intéressé », qui n’a été admis à entrer et rester en France qu’au titre de l’asile, et « eu égard aux effets d’une mesure de reconduite à la frontière », qui n’empêche pas l’étranger de revenir en France, « l’arrêté de reconduite à la frontière n’a pas porté au droit de l’intéressé au respect de sa vie familiale une atteinte disproportionnée au but en vue duquel il a été pris »\textsuperscript{432}.

3.3.3 Les conséquences à tirer de l’impossibilité d’éloigner le demandeur d’asile débouté dépendent de la raison pour laquelle cette impossibilité existe.

\textsuperscript{430} Voir ci-dessus, § 3.1.2.
\textsuperscript{431} Article 13 de la loi du 25 juillet 1952 relative à l’asile, abrogé par la loi du 10 décembre 2003.
- Si le demandeur d’asile ne peut quitter la France parce qu’il est exposé dans son pays à des traitements contraires à l’article 3 de la convention européenne des droits de l’homme, le préfet peut l’assigner à résidence jusqu’à ce qu’il trouve (ou que l’administration trouve pour lui) un pays vers lequel il sera expulsable sans y courir de risque. En attendant, le demandeur d’asile débouté pourra être assigné à résidence sur le fondement de l’article L. 513-4 du CESEDA.

Cette assignation à résidence pourra durer aussi longtemps que le demandeur d’asile débouté ne pourra pas être renvoyé vers un pays où il ne court aucun risque. Pendant son assignation à résidence, il n’a en principe aucun droit, ni à travailler, ni à une protection sociale puisqu’il est susceptible de quitter la France à tout moment.

- Si l’impossibilité de quitter la France résulte de l’article 8 de la convention européenne des droits de l’homme, cela signifie que le demandeur d’asile débouté ne peut être renvoyé vers aucun pays, sous peine de violer son droit à la vie privée ou familiale. Il doit donc être régularisé pour pouvoir rester en France, ce qui oblige le préfet à lui délivrer une carte de séjour.


433 En principe, la charge de la recherche d’un pays d’accueil repose sur l’étranger. Mais une circulaire du ministre de l’intérieur adressée aux préfets indique que le ministère de l’intérieur peut, lui aussi, procéder à cette recherche, « en liaison avec le ministère des affaires étrangères ».

434 CESEDA, article L. 513-4 : « L’étranger qui doit être reconduit à la frontière et qui justifie être dans l’impossibilité de quitter le territoire français en établissant qu’il ne peut ni regagner son pays d’origine, ni se rendre dans aucun autre pays peut […] être astreint à résider dans les lieux qui lui sont fixés, dans lesquels il doit se présenter périodiquement aux services de police et de gendarmerie ».

435 La circulaire du ministre de l’intérieur du 17 septembre 1986 précise aux préfets : « Lorsque vous proposerez de prononcer une assignation à résidence, il doit s’agir normalement d’une mesure provisoire destinée à permettre à l’intéressé de trouver par lui-même un pays d’accueil. Il conviendra donc que vous le convoquiez régulièrement afin de vérifier l’état de ses démarches et, si celles-ci tardent trop ou n’aboutissent pas, vous m’en rendez compte ». 
3.4 Obstacles “de fait” à l’expulsion (destruction de documents, fausse identité ; absence de coopération dans la délivrance des documents de voyage)

3.4.1 Le premier obstacle de fait à l’éloignement des demandeurs d’asile déboutés est la destruction des documents d’identité ou l’usage d’une fausse identité. Mais ces hypothèses ne sont pas les plus fréquentes puisque, en général, le demandeur d’asile débouté a déposé une demande d’asile qui a été examinée par l’OFPRA et, éventuellement, par la CRR. Son identité est donc généralement établie.

Le problème de l’absence d’identité certaine ou de la fausse identité se pose surtout à la frontière (le plus souvent aérienne) et il donne lieu immédiatement à un refus d’entrée en France. Mais cette décision de refus d’entrée ne peut pas être immédiatement exécutée, puisqu’il n’est pas possible de renvoyer vers son pays (ou vers un autre pays) une personne sans document de voyage. L’étranger peut alors être placé en rétention\(^{436}\). De plus, l’absence ou la destruction des documents d’identité ou de voyage, rendant impossible l’exécution du refus d’entrée en France, est punie de trois ans de prison par l’article L. 624-1, alinéa 2, du CESEDA\(^{437}\).

3.4.2 Le cas le plus fréquent d’obstacle matériel à l’expulsion est l’absence de document de voyage permettant au demandeur d’asile débouté de rentrer dans son pays d’origine ou, le cas échéant, dans un autre pays. Souvent, le pays d’origine ne met aucune bonne volonté pour reconnaître le demandeur d’asile débouté comme son ressortissant et lui établir un passeport ou un sauf-conduit.

---

\(^{436}\) Voir ci-dessus, § 3.2.

\(^{437}\) CESEDA, article L. 624-1, alinéa 2 : « Tout étranger qui n’aura pas présenté à l’autorité administrative compétente les documents de voyage permettant l’exécution de l’une des mesures mentionnées au premier alinéa ou qui, à défaut de ceux-ci, n’aura pas communiqué les renseignements permettant cette exécution ou aura communiqué des renseignements inexacts sur son identité » sera puni d’une peine de trois ans d’emprisonnement.
Il en a été ainsi, en particulier, des ressortissants algériens à qui l’asile territorial avait été refusé : les autorités algériennes ne faisaient preuve d’aucune bonne volonté pour leur délivrer des documents d’identité et de voyage. Pour trouver une solution, au moins partielle, à ce problème, il a fallu qu’un accord conclu entre la France et l’Algérie institue, dans certains cas, une présomption de nationalité algérienne.

3.4.3 Une autre difficulté est constituée par le refus des demandeurs d’asile débou-tés d’embarquer dans l’avion qui doit les conduire dans leur pays de destination.

Le refus d’embarquement est sanctionné de trois ans de prison par l’article L. 624-1, alinéa 1, du CESEDA. Mais plus souvent, puisqu’il empêche de faire quitter la France à l’intéressé, il donne plutôt lieu à une nouvelle rétention administrative en application de l’article L. 551 -1, 5°, du CESEDA.

La peine de prison peut être complétée, en application de l’article L. 624-2 du CESEDA, par une « interdiction du territoire français » d’une durée maximale de dix ans qui vaut reconduite à la frontière d’office. En général, quand un étranger refuse d’embarquer, il est conduit devant un juge pénal qui ne prononce pas une peine de prison, mais seulement une interdiction du territoire français. Cela permet à la

438 Protocole du 28 avril 1994 portant coopération entre le gouvernement de la République française et le gouvernement de la République algérienne démocratique et populaire en matière de délivrance des laissez-passer consulaires

439 CESEDA, article L. 624-1, alinéa 1 : « Tout étranger qui se sera soustrait ou qui aura tenté de se soustraire à l’exécution d’une mesure de refus d’entrée en France, d’un arrêté d’expulsion ou d’une mesure de reconduite à la frontière ou qui, expulsé ou ayant fait l’objet d’une interdiction du territoire, aura pénétré de nouveau sans autorisation en France, sera puni d’une peine de trois ans d’emprisonnement ».

440 CESEDA, article L. 551-1, 5° : « Le placement en rétention d’un étranger dans des locaux ne relevant pas de l’administration pénitentiaire peut être ordonné lorsque cet étranger : 5° ayant fait l’objet d’une décision de placement au titre de l’un des cas précédents, n’a pas déféré à la mesure d’éloignement dont il est l’objet dans un délai de sept jours suivant le terme du précédent placement ou, y ayant déféré, est revenue en France alors que cette mesure est toujours exécutoire ».

441 CESEDA, article L. 624-2 : « Le tribunal [qui a prononcé la peine d’emprisonnement] pourra, en outre, prononcer à l’encontre de l’étranger condamné l’interdiction du territoire pour une durée
police d’essayer de procéder à nouveau à son éloignement en employant la force si besoin 442.

3.5  *Exigences relatives aux conditions dans le pays d’origine*

Pour qu’un demandeur d’asile puisse être renvoyé dans son pays d’origine ou dans tout autre pays, il faut :

- qu’il ne soit pas « exposé à des traitements contraires aux stipulations de l’article 3 de la convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales » dans le pays de destination 443. C’est l’application, à la fois, de l’article 3 de la convention européenne et du principe de non-refoulement énoncé à l’article 33 de la convention de Genève de 1951 444 ;

- qu’il soit légalement admissible dans le pays de destination, c’est-à-dire qu’il remplit les conditions requises pour entrer dans ce pays. Ceci implique :

  - que l’identité du demandeur d’asile débouté est établie et qu’il lui a été délivré un titre de voyage lui permettant non seulement de quitter la France, mais aussi d’entrer dans le pays vers lequel il est renvoyé ;

n’excédant pas dix ans.— L’interdiction du territoire emporte de plein droit reconduite à la frontière de l’étranger condamné, le cas échéant, à l’expiration de sa peine d’emprisonnement ».

442 Voir ci-dessous § 5.1.
443 CESEDA, article L. 513-2.
444 Convention de Genève du 28 juillet 1951 relative au statut des réfugiés, article 33, alinéa 1 : « Aucun des Etats contractants n’expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié vers les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques ». 342
- que le pays de destination, surtout si ce n’est pas le pays dont il a la nationalité, ait donné son accord pour le prendre en charge.

Seules sont prises en considération, pour apprécier si le demandeur d’asile débouté peut craindre en cas de renvoi dans le pays de destination, les risques de traitements ou de peines inhumains ou dégradants. Ni l’autorité administrative, ni le juge administratif n’examine si l’intéressé aura la possibilité d’exercer une activité professionnelle, de trouver un logement, etc.

4. **Coopération européenne et mesures de l’UE : impact des règlements, directives et mesures sur les procédures de retour.**

4.1 **Coopération européenne en matière d’asile : « Dublin II » et « Eurodac ».

4.1.1 La circulation « réglementée » des demandeurs d’asile au sein de l’UE\(^{445}\).

Les États membres de l’UE sont confrontés à un objectif double en matière d’asile : poursuivre leurs efforts pour assurer une protection internationale aux réfugiés, dans le cadre de la Convention de Genève sur le statut des réfugiés du 28 juillet 1951 ; rendre effectif le principe de libre circulation des personnes dans l’espace européen. D’un côté, le traitement de la question de l’asile par les États membres est marqué par une diversité qui se traduit de différentes manières : dans la procédure aboutissant à l’octroi du statut de réfugié, dans la reconnaissance ou le refus du statut de réfugié, à travers les droits offerts au demandeur d’asile\(^{446}\) (la Convention de Genève


accordant aux Etats une certaine marge de manœuvre). De l’autre côté, l’affirmation du principe de libre circulation au sein du territoire européen aboutit à ce que toute personne entrant sur le territoire de l’UE puisse y circuler librement. Les Etats membres ont donc redouté certains phénomènes susceptibles d’entraîner, notamment, des déséquilibres entre pays d’accueil447 : la multiplication des demandes dans plusieurs Etats pour augmenter les chances de succès (demandes d’asile multiples, parfois simultanées) ou pour tenter de rester sur le territoire européen en situation régulière le plus longtemps possible (réfugiés sur orbite) ; les risques de déplacements secondaires vers les pays offrant la meilleure protection.


449 Article 36, point 1, a) à d) TCE.
Country Report France


4.1.2 La détermination de l’État responsable : le règlement « Dublin II ».

Le règlement dit « Dublin II » 452, adopté en février 2003 et applicable à toute demande d’asile présentée à partir du 18 septembre 2003 453, remplace et rénove la Convention de Dublin du 15 juin 1990 454 par un instrument de droit communautaire. Fondé sur les mêmes principes que la Convention de Dublin, notamment ceux relatifs à la détermination d’un Etat responsable de l’examen d’une demande d’asile, il a pour objectif d’améliorer le dispositif existant en tirant les enseignements des dysfonctionnements passés 455 (délais de procédure plus courts, responsabilité de l’État membre laissant perdurer des situations de séjour irrégulier sur son territoire, disposi-

451 Article 36, point 1, a) à d) TCE.

454 La Convention de Dublin, adoptée en 1990 et entrée en vigueur le 1er septembre 1997, consacre le principe de l’unicité de l’État compétent à traiter une demande d’asile. Elle pose des critères de définition de l’État responsable et comprend une clause « humanitaire » permettant à un Etat non compétent d’examiner, de manière dérogatoire, une demande d’asile pour des motifs « familiaux ou culturels ». 
Country Report France

tions nouvelles visant à mieux assurer l’unité familiale et la protection des mineurs non accompagnés).

En dépit des améliorations apportées, on peut s’interroger sur la pertinence de cet instrument. Un Rapport d’information de l’Assemblée nationale (avril 2003), s’appuyant sur un document de travail de la Commission 456, relève la faible efficacité du dispositif 457 :

- seuls 6% des demandes d’asile présentées au sein de l’UE (plus de 650.000 en 1998 et 1999) ont donné lieu à une demande de prise en charge par un autre Etat membre.

- près de 70% de ces demandes sont acceptées mais, compte tenu de la faible proportion de demandes présentées, dans plus de 95% des cas c’est l’Etat membre saisi de la demande d’asile qui assume la responsabilité de son examen.

- 1.7% du total des demandes d’asile sont des transferts effectifs vers un autre Etat membre.


________________________________________

455 La Convention de Dublin n’a pas eu les résultats escomptés : méthodes d’évitement (recours à la clandestinité, parcours complexe du demandeur etc.) ; procédures longues et peu efficaces ; atteinte à l’unité familiale des demandeurs d’asile.


457 Le rapport précise que ce constat incite certains acteurs à plaider pour une orientation plus tranchée (Commission européenne, mais également HCR, Conseil européen sur les réfugiés et les exilés ou Amnesty International) : faire dépendre la responsabilité exclusivement du lieu où la demande a été présentée. Or, en l’état de l’harmonisation de l’asile en Europe, la reprise des principes de Dublin, avec quelques correctifs, semblait être « la seule option réaliste à ce stade », La politique européenne d’asile, Rapport d’information de l’Assemblée nationale, n°817, Thierry Mariani, Avril 2003, p.201 et s.

458 Pour un état plus complet, voir Annexe IV.
DEMANDES PRESENTÉES PAR LA FRANCE :

- Demandes présentées par la France (à un autre Etat « Dublin ») = 685
- Demandes acceptées = 359
- Demandes refusées = 163
- Demandes pendantes = 180
- Renvois effectifs (sur les demandes présentées par la France) = 111

DEMANDES ADRESSEES A LA FRANCE :

- Demandes adressées par un autre Etat « Dublin » (à la France) = 1.861
- Demandes acceptées = 1.149
- Demandes refusées = 617
- Demandes pendantes en France = 17
- Renvois effectifs (sur les demandes adressées à la France) = 468

Source : Ministère de l’Intérieur.

Le tableau, ci-après, permet d’observer les demandes « Dublin » liant la France, ainsi que les renvois effectifs par pays. Il en ressort que les pourcentages varient en fonction des Etats concernés, laissant augurer que le fonctionnement du système dépend aussi des relations que les Etats entretiennent entre eux459.

459 Claire Rodier (GISTI) nous a précisé que le fonctionnement du système « Dublin » doit dépendre du pays de renvoi concerné et de la coopération entre les autorités étatiques. Pour sa part, le GISTI rencontre notamment des difficultés lors de l’accès aux dossiers en Préfecture des personnes « sous convocation Dublin ». Il n’est pas évident de savoir précisément où en sont les démarches avec le pays de renvoi.

La mise en œuvre du dispositif engendre des coûts non négligeables (dossier de prise en charge) et ajoute une étape procédurale supplémentaire lors de la détermination de l’État responsable⁴⁶⁰ :

- **Procédure de détermination** : Après un entretien, la préfecture va saisir les autorités nationales présumées responsables du traitement de la demande d'asile (au regard de l’ensemble des preuves ou indices recueillis auprès du demandeur)⁴⁶¹.

- **Transfert du demandeur** : La France doit effectuer la demande de transfert dans un délai de 3 mois après dépôt de la demande d'asile. L’État saisi dispose de 2 mois pour répondre à la demande de transfert. En cas de réponse positive ou d’absence de

⁴⁶⁰ Sur toutes ces questions de procédure, se reporter au site Internet de France Terre d’asile : www.france-terre-asile.org.
réponse de ce dernier, le transfert devra s'effectuer dans un délai de 6 mois maximum\footnote{Pour cela, des listes permettent d'aider les autorités à reconstituer l'itinéraire : la liste A (moyens de preuve objectifs : titres de séjour en cours de validité, titres de transport…) et la liste B (moyens de preuves subjectifs : déclarations du demandeur…).}

- \textit{Modalités de transfert} : Soit un départ volontaire : après notification de l'acceptation de l'Etat « responsable », le demandeur dispose d'un mois pour se présenter aux autorités de cet Etat) ; Soit un départ forcé : le demandeur d'asile est alors placé en rétention jusqu'à son départ et conduit, sous escorte, à la frontière où une escorte des autorités étatiques responsables l'attend (il s’agit de la grande majorité des cas en pratique : si le demandeur d'asile n'a pas quitté le territoire dans le délai imparti, s'il refuse toute coopération, s'il présente des signes de non-présentation à l'Etat « responsable »).

4.1.3 La coopération administrative et le système « Eurodac ».

La détermination de l'Etat responsable implique une coopération entre Etats membres pour échanger les informations utiles (obligation de la Convention de Dublin). Or, dans la mise en œuvre de ce dispositif, outre le coût généré, les Etats membres de l'UE sont confrontés à la difficulté d'identifier et de prouver le point d'entrée des demandeurs d’asile en Europe. Ainsi, le Conseil a adopté, le 11 septembre 2000, un règlement dit « Eurodac » (pour Europe et Dactyloscopie)\footnote{Trois cas sont alors ouverts :}

1) Refus de la demande de transfert : la préfecture délivre une APS et le formulaire OFPRA.
2) Absence de réponse : le silence vaut acceptation implicite au bout de 2 mois.

l’occasion d’un franchissement irrégulier d’une frontière extérieure, seront enregis-
trées systématiquement\textsuperscript{464}. L’objectif de cet outil étant de permettre aux Etats de
consulter la base de données centrale afin de déceler les demandes d’asile multiples,
les migrations secondaires et, partant, de déterminer l’Etat responsable.

En France, les échanges bilatéraux d’informations, entre l’OFPRA et ses homologues
de l’UE, ont été marqués par l’entrée en vigueur du Règlement « Dublin II » (sep-
tembre 2003), mais ces échanges sont restés relativement stables d’après le Rapport
d’activité de l’Office\textsuperscript{465} :

- Comme les années précédentes, la plupart des échanges bilatéraux ont eu trait à des
données d’ordre nominatif. Les demandes reçues à l’OFPRA visaient dans leur
quasi-totalité à la détermination de l’Etat responsable. Celles émises par l’Office ont	
tendu uniquement à faciliter l’examen de la demande d’asile. Les personnes concern-
ées étaient en majorité demandeurs d’asile dans le pays en quête d’information
(plus fréquemment qu’auparavant des mineurs non accompagnés).

- La masse de ces échanges est demeurée relativement stable (autour d’un millier de
requêtes), avec le même déséquilibre (l’OFPRA étant nettement plus demandeur
qu’interrogé) et le même taux de réponses positives aux demandes formulées par
l’Office (proche de 50%). La Belgique est devenue le premier interlocuteur en vo-
lume, devant l’Allemagne (baisse d’activité à rapprocher de la fin de la mission de
liaison du BAFL de l’Office, en cours d’année).

- Les échanges avec les Etats non membres de l’UE, dont ceux portant sur des infor-
mations d’ordre général (procédure, doctrine/jurisprudence, statistiques), sont restés
marginaux.

\textsuperscript{464} De plus, « selon la circulaire du 20 janvier 2004 relative à l’application de la loi du 26 novembre
2003 (NOR/INT/D/04/00006/C), le dispositif « Eurodac » sera bientôt appliqué aux étrangers « qui
feraient l’objet d’une mesure de placement en zone d’attente » (après intervention d’un décret en
Conseil d’Etat pris après avis de la CNIL) », France, patrie des droits humains ?, Rapport AISF, mai
2004, p.66.

\textsuperscript{465} Rapport d’activité 2003, Office Français de Protection des Réfugiés et des Apatrides, p.18.
- Les travaux du groupe Eurasil\textsuperscript{466} ont notamment permis d’examiner : les perspectives d’harmonisation en matière de visas délivrés au titre de l’asile, les méthodes d’établissement de l’identité et/ou la nationalité des demandeurs d’asile dépourvus de documents, (...) ainsi que la situation des demandeurs d’asile en provenance d’Afghanistan et de République Démocratique du Congo.

- Enfin, la participation au suivi des textes législatifs élaborés au sein de l’Union a essentiellement eu trait à la proposition de directive sur les normes minimales relatives aux procédures d’octroi et de retrait du statut de réfugié (notamment sur la question de l’entretien généralisé et celle des pays « sûrs »).

Selon le premier rapport annuel de la Commission sur le fonctionnement d’Eurodac, pour la période du 15 janvier 2003 au 15 janvier 2004, le système a effectué avec succès 271.573 échanges de données\textsuperscript{467} :

- 246.902 échanges concernant des demandes d’asile. Les demandeurs d’asile représenteraient 91% des personnes contrôlées et, dans 7% des cas, ils auraient fait plusieurs demandes au sein de l’UE ;
- 7.857 échanges concernant le franchissement illégal d’une frontière ;
- 16.814 échanges concernant des personnes appréhendées sur le territoire d’un Etat membre en situation irrégulière.

Ces chiffres et pourcentages seront amenés à augmenter à mesure de l’utilisation du fichier Eurodac par les Etats membres.

Pour la France, la soumission des empreintes des demandeurs d’asile aurait donné lieu à 1.443 réponses de demandes multiples du fichier européen\textsuperscript{468}, c’est-à-dire des


\textsuperscript{467} First annual report to the Council and the European parliament on the activities of the EURODAC central unit, Commission européenne, mai 2004.
Country Report France

demandes d’asile prématurément enregistrées dans un ou plusieurs autres États membres (l’Autriche pour 519 réponses ; l’Allemagne pour 281 réponses et la Belgique pour 209 réponses). À l’inverse, le système a identifié, à partir des autres États, 661 personnes ayant prématurément déposé une demande d’asile en France (dont 280 à partir du Royaume-Uni). À titre de comparaison, ces chiffres étaient en 2002, avant la mise en place d’Eurodac, de 761 (pour les demandes adressées par la France aux autres États) dont 251 ont été acceptées et de 2.749 (pour les demandes adressées par les autres États membres) dont 1.695 acceptées par la France. 

Il convient de préciser que ce système était en phase de lancement sur l’année 2003. Il a entraîné une baisse sensible du nombre des empreintes digitales habituellement transmises par des partenaires européens à l’OFPRA dans le cadre des dispositions de la Convention Dublin et du règlement Dublin II (6.604 pour 2003 contre 10.305). L’OFPRA précise d’ailleurs que, pour un certain temps, il devra continuer à interroger parallèlement les fichiers nationaux, car les données plus anciennes qu’ils contiennent n’ont pas été versées dans l’unité centrale d’Eurodac.

La mise en place d’Eurodac requiert de nombreux moyens et engendre une réorganisation non négligeable des services concernés ou des procédures existantes, notamment au moment de l’enregistrement de la demande d’asile. Une circulaire sur la mise en place de ce dispositif (Ministère de l’Intérieur, décembre 2002) expose les modifications à suivre en vue de se conformer aux normes d’Eurodac :

- Modifications du déroulement de l’enregistrement d’une demande d’asile : le relevé des empreintes devra comprendre, en plus du contrôle habituel, « les empreintes roulées de chaque doigt » contrairement au relevé habituel transmis à l’OFPRA s’effectuant « à plat » ; un relevé décadactylique permettra de

---

468 First annual report to the Council and the European parliament on the activities of the EURODAC central unit, Commission européenne, mai 2004.
diminuer le nombre de fiches inexploitables rejetées par le service chargé de
la comparaison ; les fiches dactyloscopiques ne seront plus transmises par les
préfectures directement à l’OFPRA mais au point d’accès national « Euro-
dac » (ministère de l’Intérieur - DLPAJ\textsuperscript{472}).

- Modifications des outils en place : dès janvier 2003, un système de relevé
numérique d’empreintes digitales (borne électronique) sera progressivement
installé dans les préfectures accueillant un grand nombre de demandeurs
d’asile (50.000 euros par borne) ; une formation technique sera délivrée aux
agents amenés à utiliser ces bornes.

Ainsi, le dispositif n’est pas disponible dans toutes les préfectures et une période
d’adaptation à ce nouveau fonctionnement est inévitable. Toutefois, dans la mesure
où les Etats membres l’alimentent correctement (augmentation et qualification des
données), la base de données devrait voir son efficience augmenter, ce qui devrait
permettre d’éviter les interrogations parallèles des fichiers nationaux.

D’autre part, toujours pour faciliter la mise en œuvre de « Dublin II », un dispositif
appelé « Dublinet » est entré en vigueur en septembre 2003\textsuperscript{473}. « Dublinet » est un
réseau électronique qui permet aux services nationaux chargés de l’examen des
demandes d’asile de s’échanger des informations afin de déterminer l’Etat responsable.
En France, une « cellule Dublinet » est créée au sein de la DLPAJ (ministère de
l’Intérieur) qui est chargée d’attribuer les dossiers provenant de pays de l’Union et de
traiter le flux sortant pour le compte des préfectures faiblement impliquées en ma-
tière de droit des étrangers.

En termes de compétences, le fichier « Eurodac » est consultable par les services
nationaux chargés de l’asile\textsuperscript{474} : lorsqu’un Etat membre de l’UE demande la reprise

---

\textsuperscript{472} Direction des Libertés Publiques et des Affaires Juridiques (Ministère de l’Intérieur).
\textsuperscript{473} Communiqué de presse de la Commission européenne, 19 septembre 2003 (289-003).
\textsuperscript{474} Toutefois, « plusieurs Etats demandent que ces données soient également consultables par les ser-
vices de police et le Conseil a demandé à la Commission de proposer d’accroître les interactions entre
le Système d’Information Schengen (SIS), le futur Visa Information Schengen (VIS) et Eurodac »,
Country Report France

en charge par la France d’un demandeur d’asile, seule la DLPAJ (ministère de l’Intérieur) est compétente pour examiner cette requête ; dans le cas inverse, le préfet pourra saisir, via « Dublinet », les autorités compétentes du pays concerné par la demande d’asile. Un document préparatoire du ministère de l’Intérieur (2004) reconnaît que toutes « ces procédures peuvent se révéler consommatrices de moyens, mais elles sont de nature à harmoniser le fonctionnement des différents Etats de l’Union européenne et à dissuader les auteurs de demandes multiples ou dilatoires ».

Enfin, il convient d’ajouter que ces dispositifs jouent un rôle conséquent dans le déroulement de la procédure d’asile. En effet, la loi du 12 juillet 1952, modifiée par la loi du 10 décembre 2003 et désormais intégrée dans un Code de l’entrée et du séjour en France (CESEEDA) consacre le rôle du préfet pour la recevabilité de la demande d’asile et énonce comme motif de refus toute demande d’asile multiple. Dans ce cas, la demande peut être rejetée sans consultation de l’OFPRA ou de la CRR.

4.1.4 Mise en œuvre et point de vue de la DLPAJ :

La France, comme l’ensemble de ses partenaires européens, est confrontée à des difficultés liées à des demandes d’asile multiples déposées par une même personne dans différents États de l’Union. Pour éviter d’une part, qu’une de-


478 Article L.741-4, 1° du CESEDA (ancien article 8).

479 Article L.723-1 du CESEDA (ancien article 8).

480 Les éléments rapportés ici sont extraits de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les Règlements Dublin II et Eurodac pour ce rapport.
mande d’asile d’un ressortissant d’un pays tiers ne soit jamais instruite par un Etat membre et, d’autre part, des détournements de procédure, le Règlement « Dublin II » vise à établir des critères et des mécanismes de l’Etat membre responsable de l’examen d’une demande d’asile présentée dans l’un des Etats membres par un ressortissant d’un pays tiers. Eurodac est donc un facilitateur de l’application du Règlement Dublin II.

Ces deux instruments communautaires n’ont pas pour objectif d’influencer ni de faciliter le retour des candidats déboutés de l’asile vers leurs pays d’origine : le Règlement Dublin II et le Règlement Eurodac permettent d’identifier clairement l’Etat qui est responsable de l’examen d’une demande d’asile (reprise en charge au titre de l’article 16-1 du Règlement Dublin II).

Par ailleurs, il convient de ne pas confondre la procédure de transfert d’un demandeur d’asile en application du Règlement Dublin II et la procédure d’éloignement d’un étranger débouté vers son pays d’origine. La procédure de transfert vise à permettre au demandeur d’asile de rejoindre l’Etat membre de l’Union européenne responsable de sa demande. Cette mesure doit lui permettre de pouvoir répondre aux questions de la structure en charge de se prononcer sur sa demande ou de lui fournir des éléments complémentaires utiles pour faire valoir ses intérêts.

En conclusion, il n’est pas possible d’affirmer que ces deux instruments communautaires facilitent le retour des déboutés de l’asile vers leur pays d’origine. En effet, l’efficacité des politiques de retour dépend de facteurs exogènes aux Règlements Dublin II et Eurodac : elle est liée, en particulier à la possibilité d’obtenir la délivrance de laissez-passer consulaires pour mettre en œuvre la procédure d’éloignement. Par ailleurs, pour ce qui concerne la France, lorsqu’un étranger est débouté de l’asile, il voit sa situation personnelle examinée sur le plan du séjour à tous les autres titres prévus par le code de l’entrée et du séjour des étrangers et du droit d’asile.
En conséquence, la reprise en charge d’un demandeur d’asile ne signifie pas automatiquement la mise en œuvre effective d’une procédure d’éloignement.

4.1.5 Mise en œuvre et point de vue des ONG :

Si les ONG françaises s’inquiètent de la lenteur de l’harmonisation européenne en matière d’asile et des risques d’un « nivelllement par le bas » des normes minimales communes\(^\text{481}\), elles reconnaissent que le fichier « Eurodac » fonctionne pour les enregistrements récents\(^\text{482}\). De l’avis de Forum Réfugiés, « le système Eurodac se révèle particulièrement efficace dans la mise en œuvre de la détermination du pays responsable de l’examen de la demande d’asile (Dublin)\(^\text{483}\) ». Les autorités françaises ont, notamment, fait appel au fichier européen pour plusieurs demandeurs d’asile tchèques, dont les empreintes avaient été relevées par l’Autriche (transit ou dépôt de demande d’asile). Dans les deux cas, ils peuvent être renvoyés vers ce pays qui est jugé « responsable » de leur demande d’asile au regard du système « Dublin II ».

En revanche, certaines associations d’aide aux réfugiés reprochent une application mécanique du principe de l’Etat responsable qui irait à l’encontre des tentatives d’harmonisation européenne : normes minimales sur les conditions d’accueil des réfugiés, définition du statut de réfugié, procédures d’examen des dossiers etc. Ainsi, lorsque le pays considéré comme responsable de la demande d’asile présente des

\(^{481}\) Voir, notamment, les travaux de la Coordination française pour le droit d’asile (CFDA) regroupant diverses associations, qui dénoncent « une situation critique de l’asile en France » : « Une nécessaire amélioration de l’asile en France ne peut se faire en marge des travaux menés au sein de l’Union européenne. Un chantier important est lancé sur les procédures d’asile, sur les conditions d’accueil des demandeurs, mais aussi sur une interprétation commune de la définition de réfugié. Les travaux des Quinze (...) ne doivent pas déboucher sur l’abaissement des garanties prévues par les propositions de la Commission européenne », Lourdes menaces sur le droit d’asile en Europe : un bilan de quatre ans de rapprochement des politiques d’asile, Coordination française pour le droit d’asile (CFDA), Février 2004.

\(^{482}\) Voir supra : les premiers résultats encourageants d’Eurodac.

\(^{483}\) L’asile en France et en Europe, Etat des lieux 2004, 4\(^\text{e}\) Rapport annuel de Forum réfugiés, p.74.
conditions d’accueil ou de procédures insuffisantes au regard des normes minimales, les associations s’interrogent sur le bien-fondé du transfert (certaines ONG déplorent, notamment, les conditions d’hébergement des camps d’accueil et le très faible taux de reconnaissance du statut de réfugié en Autriche484).

Dès les négociations relatives au Règlement « Dublin II », les associations avaient exprimé leur « déception » au regard des améliorations apportées.

Tout d’abord, les acteurs associatifs rappellent régulièrement que le renvoi vers un autre pays membre doit se faire dans le respect de l’unité familiale485. Le Règlement « Dublin II » avait justement pour objectif de mettre fin à des situations dramatiques suite à des arrivées décalées des conjoints ou enfants dans le pays d’accueil. Or, il semble que « des situations subsistent cependant qui doivent nécessiter une application plus souple de ces mesures au risque de se retrouver en contradiction avec les dispositions de la Convention Européenne des Droits de l’Homme et des Libertés Fondamentales486 ».

D’autre part, alors que la notion de « pays d’origine sûr » a été introduite dans la loi du 10 décembre 2003487, AISF a fait part de « ses inquiétudes concernant le dispositif de « pays tiers sûr » qui permet à l’Etat membre considéré comme « responsable » de renvoyer un demandeur d’asile vers un Etat tiers, sans mentionner aucune garantie quant aux liens « objectifs » entre le requérant et le pays en question ou l’obligation que ce dernier y bénéficie d’une protection effective488 ».

484 Dans le cas des téhetchénes, si l’Autriche ne leur reconnaît pas le statut de réfugié, ils risquent d’être expulsés en Pologne, puis renvoyés vers la Russie.

485 « Il est à craindre que davantage de personnes hésitent à se déclarer de peur que leur itinéraire au sein de l’Union soit dorénavant plus facilement identifié et que la conséquence soit le renvoi dans un autre Etat membre et la séparation avec des membres de la famille pouvant leur venir en aide en France », France, patrie des droits humains ?, Rapport AISF, mai 2004, p.66.


487 Article L.741-4, 2° du CESEDA (ancien article 8).

488 AISF souligne que la France discute de ces notions de « pays tiers sûr » avec les autres Etats membres de l’UE, notions qu’elle rejettait jusqu’alors : « Le 13 mars 2002, le secrétaire général au gouvernement indiquait d’ailleurs l’opposition de la France à ces notions. Il écrivait que les autorités françaises regrettaient la place importante réservée à ces « concepts étrangers à notre tradition juridique » en matière d’asile, des concepts « difficilement acceptables, surtout s’il s’agit d’établir des listes officiel-
Les ONG françaises regrettent également les hésitations des Etats membres, lors des négociations européennes sur les normes communes, qui ne favorisent pas une application homogène et protectrice du système « Dublin »489. Elles s’interrogent sur le principe même de l’Etat responsable qui deviendrait « de moins en moins légitime au fur et à mesure que les Etats membres divergent sur les normes communes en conservant leurs prérogatives nationales, ainsi qu’en atteste l’adoption (...) de la directive sur les procédures communes490. Il appartiendra aux tribunaux de se prononcer en considérant des questions aussi essentielles que celles de l’accès aux procédures, des situations de procédures prioritaires, de la notion de « pays tiers sûr » et de renouvellement d’asile. Sur ces notions la France n’a pas encore (encore) rejoint le niveau de beaucoup de ses voisins européens491 ». Or, en matière d’application de « Dublin II », la jurisprudence administrative française n’est pas encore très importante : « le Conseil d’Etat n’a rendu que 3 arrêts s’y référant (arrêts du 23 novembre 2003, 10 mai 2004 et 15 juin 2004). [Toutefois], ces décisions contentieuses ont eu pour intérêts de réaffirmer le principe d’unité des familles face aux demandes d’asile multiples et le principe de limitation à 6 mois du délai permettant les transferts d’un pays de l’Union vers l’autre492 ».

489 Lourdes menaces sur le droit d’asile en Europe : un bilan de quatre ans de rapprochement des politiques d’asile, Coordination française pour le droit d’asile (CFDA), Février 2004.
492 Antoine LOIDREAU, Quelles sont les politiques des institutions françaises face aux demandes d’asile multiples, Mémoire DESS, 2004-2005, p.5 (présentation).
Certaines associations évoquent aussi des pratiques, disparues depuis quelques années, qui seraient « de nouveau d’actualité dans certaines préfectures françaises », comme « une utilisation abusive » des procédures « prioritaires » ou encore des mesures d’éloignement du territoire prises en cours de procédure d’asile :

(a) Procédures « prioritaires » : Les notions de « fraude délibérée » et de « recours abusifs aux procédures d’asile » qui autorisent le traitement prioritaire d’une demande d’asile (sans admission au séjour, ni appel suspensif, l’OFPRA devant statuer dans des délais brefs), recevraient, dans certaines préfectures, une interprétation extensive.

(b) Mesures d’éloignement : Certaines mesures d’éloignement du territoire auraient été prises à l’encontre de demandeurs d’asile en cours de procédure.

Enfin, se pose la question de la capacité des dix nouveaux membres (pour la plupart en périphérie de l’UE) à traiter et accueillir dans les conditions requises des demandeurs d’asile qui risquent d’arriver en plus grand nombre sous l’effet du dispositif « Eurodac ».


494 « C’est ainsi qu’en novembre 2003, la préfecture de Haute-Savoie n’a pas hésité à appliquer la méthode simultanément à une douzaine de demandeurs d’asile qui finalement, à l’exception de deux d’entre eux, ont obtenu l’annulation de ces procédures devant le Tribunal administratif et ont pu déposer une demande d’asile selon une procédure normale », L’asile en France et en Europe, Etat des lieux 2004, 4e Rapport annuel de Forum réfugiés, p.73.


4.2 *Coopération européenne et politique de retour.*

La question du « retour » se trouve au cœur des préoccupations de la Commission européenne 498 et des Etats membres, dont la France 499. Evoquée comme élément de lutte contre l’immigration clandestine et comme contrepartie d’un régime d’asile commun, la politique de retour doit être partie intégrante de la politique européenne d’asile et d’immigration.


La mise en place d’une politique de retour implique l’élaboration de mesures européennes : sur le plan interne, l’Union européenne centre son action sur le retour « forcé » ; sur le plan externe, l’Union européenne développe une stratégie dans le domaine des relations extérieures. L’Union se concentre principalement sur l’élaboration de programmes de retour intégrés et d’accords de réadmission. Les avancées de la politique européenne de retour sont encore limitées, surtout d’un point de vue normatif, et se traduisent souvent par des mesures de coopération opérationnelle entre les États.

4.2.1 Reconnaissance des décisions d’éloignement des ressortissants de pays tiers :

(4.2.1.1) Transposition de la directive n°2001/40 du 28 mai 2001:

La directive relative à la reconnaissance mutuelle des décisions d’éloignement des ressortissants de pays tiers, sur initiative française, a fait l’objet d’une mesure de transposition en droit interne français par le biais de la loi n° 2003-1119 du 26 novembre 2003 qui a modifié à cet effet l’article 26 bis de l’ordonnance du 2 novembre 1945 relative aux conditions d’entrée et de séjour des étrangers en France. Cette transposition intervient avec près d’un an de retard ; la France étant l’un des Etats qui transpose avec le plus de retard les directives communautaires, la Commission lui a adressé fréquemment des observations en ce sens, menaçant parfois d’engager des procédures en manquement devant la Cour de Luxembourg. Pour la transposition de cette directive, aucune explication officielle du retard mis par la France n’a été donnée.


506 Devenu l’article L 523-1 CESEDA (ancien article 26 bis alinéa 1) et l’article L 531-3 (ancien article 26 bis alinéa 2 et 3).

507 L’article 8 de la directive ayant fixé le 2 décembre 2002 pour date limite.

508 On peut toutefois en avancer deux qui, au demeurant, pourraient se cumuler :

- La volonté politique de transposer la directive faisant défaut, aucune mesure n’a été prise pour la réaliser dans le délai. La mise en chantier, dans le courant de janvier 2002 – soit quelques semaines après la date limite de transposition –, de la réforme de l’ordonnance du 2 novembre 1945 a servi de «prétexxe » à la transposition de la directive « reconnaissance mutuelle des décisions d’éloignement », comme à celle des directives « protection temporaire » et « sanction des transporteurs » ;

- Pour procéder à la transposition groupée de trois directives, dont les dates limites étaient proches les unes des autres – le 31 décembre 2002 pour la directive « protection temporaire », le 2 décembre 2002 pour la directive « mesures d’éloignement » et le 11 février 2003 pour la directive « transporteurs » –, le gouvernement a préféré attendre la réalisation d’une modification en profondeur de l’ordonnance de 1945 dans laquelle les mesures de transposition s’intégreraient de façon cohérente.
L’article 26 bis de l’ordonnance de 1945 avait déjà été complété d’un alinéa\(^{509}\), par la loi n° 92-190 du 26 février 1992. Il s’agissait alors de mettre en œuvre l’obligation qui découle du signalement aux fins de non-admission d’un étranger dans le Système d’information Schengen (SIS) en application de l’article 96 de la convention de Schengen.

La loi du 26 novembre 2003 insère, à l’article 26 bis\(^ {510}\), un nouvel alinéa aux termes duquel : « Conformément à la directive 2001/40/CE du Conseil du 28 mai 2001 relative à la reconnaissance mutuelle des décisions d’éloignement des ressortissants de pays tiers, il en est de même [c’est-à-dire que le préfet, représentant de l’État dans le département, peut ordonner la reconduite à la frontière d’office] lorsqu’un étranger non ressortissant d’un État membre de l’Union européenne, qui se trouve sur le territoire français, a fait l’objet d’une décision d’éloignement exécutoire prise par l’un des autres États membres de l’Union européenne. Un décret en Conseil d’État fixe les conditions d’application du présent alinéa ». 

Cette disposition n’est que peu explicite et constitue ce qu’on pourrait qualifier de « degré minimum » de transposition de la directive du 28 mai 2001\(^ {511}\). Toutefois, la reconnaissance des décisions d’éloignement prises par les autres États membres prend la forme de ce qu’on appelle, dans le vocabulaire juridique français, la « reconduite à la frontière d’office » : décision prise par le préfet qui a pour effet d’obliger l’étranger

\(^{509}\) L’ancien article 26 bis de l’ordonnance de 1945 complété, par la loi n° 92-190 du 26 février 1992, d’un alinéa (ancien article 26 bis alinéa 2 devenu l’article L 531-3 CESEDA) disposant : « Lorsqu’un étranger non ressortissant d’un État membre de la Communauté économique européenne a fait l’objet d’un signalement aux fins de non-admission en vertu d’une décision exécutoire prise par l’un des autres États parties à la convention signée à Schengen le 19 juin 1990 et qu’il se trouve irrégulièrement sur le territoire métropolitain, le représentant de l’État dans le département et, à Paris, le préfet de police peuvent décider qu’il sera d’office reconduit à la frontière ».

\(^{510}\) Ancien article 26 bis alinéa 2 et 3 (devenu l’article L 531-3 CESEDA).

\(^{511}\) En effet, la loi du 26 novembre 2003 se borne à rappeler en termes très généraux l’objet de la directive tel que le définit son article 1° : « permettre la reconnaissance d’une décision d’éloignement prise par une autorité compétente d’un État membre […] à l’encontre d’un ressortissant d’un pays tiers qui se trouve sur le territoire d’un autre État membre […] ». Par ailleurs, elle contient, comme l’impose l’article 8, une référence à la directive puisqu’elle commence par les mots : « Conformément à la directive 2001/40/CE du Conseil du 28 mai 2001 […] ».
qui en est l’objet à quitter le territoire français et à se rendre dans le pays qui lui est désigné -qu’on appelle le « pays de renvoi » ou « pays de destination »-, l’administration ne laissant pas à l’étranger le choix du pays vers lequel il est éloigné (pour éviter qu’il ne soit retourné vers la France au cas où il ne serait pas admissible dans le pays qu’il aurait lui-même choisi).

(4.2.1.2) Conditions d’application de la directive n°2001/40 du 28 mai 2001 :

La directive a pour objectif d’assurer une plus grande efficacité dans l’exécution des mesures d’éloignement au sein de l’espace européen. Reposant sur la coopération\textsuperscript{512}, elle suppose que les Etats parties accordent leur confiance aux normes juridiques des autres Etats parties. C’est le principe de base qui fonde l’acquis Schengen. Toutefois, cette directive vise plus largement « une décision d’éloignement prise par une autorité compétente » et formalise les échanges d’information entre les Etats parties, notamment la transmission des documents attestant du caractère exécutoire de la décision d’éloignement. En revanche, le dispositif de la directive ne contient pas d’éléments contraignants pour les Etats parties ; il s’agit de permettre une reconnaissance des décisions d’éloignement.

Pour ce qui concerne les conditions d’application de cette disposition, il est renvoyé à un décret en Conseil d’Etat. Or, plusieurs questions restent en suspens concernant la reconnaissance de ces décisions par les autorités françaises :

1) Champ d’application et portée de la reconduite à la frontière :

Le décret devra apporter de nombreuses précisions relatives à la portée et au champ d’application de la reconduite à la frontière d’office prononcée en application l’article 26 bis alinéa 3 de l’ordonnance de 1945513.

En effet, cet alinéa ne définit pas les catégories d’étrangers qui peuvent être visés. Certes, la directive indique, d’une part, dans son article 2, qu’il faut entendre par « ressortissant d’un pays tiers, toute personne qui n’a pas la nationalité de l’un des États membres » et, d’autre part, dans son article 3, que les ressortissants de pays tiers visés sont ceux qui font l’objet d’une mesure d’éloignement soit parce qu’ils constituent une « menace grave et actuelle pour l’ordre public ou la sûreté et la sécurité nationales » résultant d’une condamnation pour une infraction passible d’une peine privative de liberté d’un an au moins ou de « raisons sérieuses de croire » qu’ils ont « commis des faits punissables graves ou « qu’il[es] envisage[nt] de commettre de tels faits », soit parce qu’ils n’ont pas respecté les « réglementations nationales relatives à l’entrée ou au séjour des étrangers ». Les premiers de ces motifs, tirés de la menace pour l’ordre public, correspondent aux motifs qui, en droit français, peuvent justifier que soit prononcée l’expulsion ; le second, tiré de l’irrégularité de la situation de l’intéressé recouvre les hypothèses de reconduite à la frontière visées à l’article 22 de l’ordonnance de 1945514.

Mais cette énumération de l’article 2 de la directive pose deux problèmes au regard du droit français actuel :

- Le lien entre « menace pour l’ordre public » et condamnation pénale :

513 Devenu l’article L 531-3 CESEDA.
514 Devenu l’article L 511-1 à 3 CESEDA.
Country Report France

Selon la jurisprudence du Conseil d’État\(^{515}\), l’expulsion d’un étranger ne peut être prononcée au seul motif que l’étranger a commis des infractions pénales, mais doit être fondée sur l’ensemble du comportement de l’intéressé (CE 25 janv. 1977, Min. de l’intérieur c/ Dridi, Rec. CE p. 38). Or, la directive adopte une logique différente puisqu’elle lie la menace pour l’ordre public à la condamnation pénale de l’étranger ou à la supposition de faits punissables commis ou à venir (article 3)\(^{516}\). De manière plus générale, cette première question renvoie à la question de la définition que chaque État donne à la « menace pour l’ordre public ».

En effet, cette directive joue dans le sens de l’affirmation d’un espace commun dans lequel les États doivent coopérer et cela concerne, parfois, des questions touchant à l’ordre public. Toutefois, le texte confirme que l’éloignement est toujours de la compétence des États membres, de leurs législations et les mesures d’ordre public susceptibles de reconnaissance ne sont que peu précisées\(^{517}\). Quelques orientations ressortent de la directive : la formulation de la menace donne une indication générale (une menace grave et actuelle pour l’ordre public) mais « allégée » par rapport à celle retenue pour les bénéficiaires de la libre circulation\(^{518}\); de plus, le seuil fixé (condamnation à, au moins, un an de prison) semble relativisé par l’ajout d’une for-


\(^{516}\) Le décret en Conseil d’État pourrait donc, soit exclure cette hypothèse du champ de l’article 26 bis de l’ordonnance de 1945 (devenu L. 531-3 CESEDA), au prix d’une entorse à la directive, soit déroger à la règle posée par la jurisprudence Dridi, au prix d’une entorse à la logique puisque cette jurisprudence resterait applicable aux mesures d’éloignement prononcée par les autorités françaises, mais ne le serait pas aux mesures d’éloignement prises par les autres États membres.

\(^{517}\) L’article 3 de la directive précise que l’éloignement doit être fondé sur « une menace grave et actuelle pour l’ordre public ou la sécurité et sûreté nationales » et prise dans certains cas (condamnation pour une infraction passible d’une peine de prison d’au moins un an ; existence de raisons sérieuses de croire à la commission de faits punissables graves ou existence d’indices réels qu’il envisage de commettre de tels faits).

mule extensive : "l’existence de raisons sérieuses de croire à la commission de faits punissables".

Or, les concepts nationaux d’ordre public, s’ils tendent à se rapprocher au rythme de la construction européenne, peuvent varier d’un Etat partie à l’autre et poser des problèmes en termes de reconnaissance d’une mesure d’éloignement prise sur leur fondement (motifs variables, gravité des faits…). Ainsi, quelles qu’en soient les interprétations nationales, si l’on peut y voir les premiers signes d’une « réflexion commune » sur l’éloignement de ressortissants tiers pour des raisons d’ordre public, la prudence est de rigueur. L’objectif énoncé étant « d’assurer une plus grande efficacité dans l’exécution des décisions d’éloignement » (préambule, cons.3), moins de poser les prémises d’une approche convergente de la menace pour l’ordre public à l’égard des ressortissants des pays tiers. Cette tendance se confirmera par la suite (voir infra, 4.2.5.2).


également la directive n°2004/38, relative au droit des citoyens de l’Union et des membres de leurs familles de circuler et de séjourner librement (JOCE, L.229/35 du 29 juin 2004).


521 Les Etats restent en mesure d’appliquer une conception plus ou moins restrictive aux ressortissants tiers (sauf, a priori, dans les cas où la législation communautaire exige un traitement identique entre ressortissant communautaire et non-communautaire : par exemple pour les résidents de longue durée ayant obtenu le statut).

522 L’ancien article 25 : devenu l’article L 521-2 CESEDA ; l’ancien article 26 : devenu L 521-3 et 511-4 + 521-4 (mineurs) CESEDA.
Country Report France

protections comparables à celle qui figurent dans le CESEDA, mais les bénéficiaires et l’étendue de cette protection varient d’un Etat à un autre. Sur ce point encore, sauf à instituer un « régime à deux vitesses » selon que la mesure d’éloignement exécutée par la France aura été prise par les autorités françaises ou celles d’un autre Etat membre, il conviendra d’harmoniser le champ d’application respectif des deux types de mesures, ce qui ne va pas sans risque de contradiction entre la législation française et la directive.

2) Application de la Convention Schengen et utilisation du fichier SIS :

L’alinéa 2 de l’article 26 de l’ordonnance de 1945523 prévoit donc, depuis 1995, une procédure de reconduite à la frontière d’office (sans le recours suspensif de l’article 22 bis524) pour les étrangers signalés aux fins de non-admission (SIS). Le nouvel alinéa 3 (« reconnaissance mutuelle ») étend le champ d’application de cette reconduite d’office aux étrangers ayant fait l’objet d’une mesure d’éloignement (exécutoire) prononcée par un autre Etat membre. Or, la directive concernée (article 1er) précise que la reconnaissance mutuelle s’exercera sans préjudice de l’article 96 de la Convention Schengen, mais le texte ne prévoit pas de mécanisme spécifique pour reconnaître une décision (seulement une référence à la coopération et à l’échange d’informations). Ainsi, les Etats membres pourraient s’appuyer sur le SIS pour reconnaître ces mesures d’éloignement.

Or, la directive n’a pas exactement le même champ et la même portée que la Convention Schengen525 :

- la directive s’applique au Royaume-Uni : pas l’article 96 de la Convention Schengen.

523 Devenu l’article L 531-3 CESEDA.
524 Devenu l’article L 512-2 à 5 CESEDA.
- la définition des infractions donnant lieu à reconnaissance mutuelle : la directive apporte un critère cumulatif (menace pour l’ordre public et condamnation pénale, voir supra) ; la directive mentionne la « menace grave et actuelle pour l’ordre public » (pas la Convention Schengen) ; la directive fait notamment référence aux décisions d’éloignement fondées sur le non-respect des réglementations nationales (alors que la Convention Schengen fait référence à des mesures d’éloignement comprenant ou assortie d’une interdiction du territoire).

- l’utilisation du fichier SIS : à l’heure actuelle, le fichier SIS ne comprend pas les arrêtés préfectoraux de reconduite à la frontière (APRF - pris en application de l’article 22 de l’ordonnance de 1945526 et non assortis d’une interdiction du territoire). On peut se demander, à l’instar de la Cimade, si une évolution de l’interprétation française de la Convention Schengen (principalement sur l’article 96) n’est pas rendue nécessaire par la directive et, partant, si les APRF seront appréhendés comme une nouvelle catégorie de mesures pouvant être directement exécutées par un autre Etat membre. A l’heure actuelle, l’utilisation du SIS semble encore restreinte527, mais, « au regard des réflexions européennes sur la question (voir notes de la présidence irlandaise de l’Union européenne sur la politique européenne de retour de janvier 2004), il est envisageable que les préfectures soient avisées de renforcer leur utilisation du SIS528 ».

526 Devenu l’article L 511-1 à 3 CESEDA.


528 Le Conseil européen des 28 et 29 mai 2001 a confirmé la priorité accordée au développement du SIS II. Il devra voir le jour en 2006. Le Parlement le considère déjà comme « la plus vaste base de données en Europe ». Le développement du SIS II a pour objectif : d’effectuer une remise à niveau technique (modernisation informatique), notamment du fait de l’élargissement ; d’étendre le fichier pour le développement non plus d’un système d’information mais d’un système d’enquête. Le SIS II sera utile à plusieurs fins : notamment pour garantir l’authenticité des documents ou découvrir les personnes en séjour irrégulier. Cependant aucune autorité de contrôle ne devrait voir le jour avant 2006. Le SIS II a des nouvelles catégories de signalement (de personnes et d'objets) et de nouveaux domaines, une mise en relation des signalements, une modification de la durée de conservation des signalements, ainsi que le stockage et le transfert de données biométriques, notamment de photographies et d’empreintes digitales et d’un accès à ces données. Plusieurs problèmes se posent au regard de la protection des données personnelles des individus : la Convention de Schengen prévoit des garan-
3) Recours et contrôle :

Il convient de mentionner que, conformément à l’article 4 de la directive, la re-conduite à la frontière d’office, prononcée à l’encontre de l’étranger qui fait l’objet d’une mesure d’éloignement prise par un autre Etat membre, peut faire l’objet d’un recours en annulation devant le tribunal administratif. Ce recours, qui doit être formé dans les deux mois qui suivent la notification de la reconduite, n’est pas suspensif. Il peut toutefois être assorti d’une requête au juge des référés du tribunal administratif qui, en application de l’article L. 521-1 du code de justice administrative, peut en ordonner la suspension. Le juge des référés peut alors se prononcer dans un délai très bref, de l’ordre de quarante-huit heures à compter de sa saisine.

Enfin, les mesures d’éloignement visées par la directive doivent avoir un caractère exécutoire (article 4). Les autorités françaises devront donc procéder à cette vérification.

Or, la question du contrôle de légalité d’une décision prise par la juridiction d’un autre Etat partie se pose déjà dans le cadre du « renvoi Schengen » (article 26 bis alinéa 2 de l’ordonnance de 1945). Deux difficultés sont soulevées dans le rapport 2003 de la Cimade : le droit d’accès indirect aux données contenues dans le fichier SIS et le recours, en principe, non suspensif. La Cimade a relevé de « nombreux cas de personnes fichées indûment : signalement par l’Allemagne d’une personne... »

529 D’une part, « lorsque l’urgence le justifie » - compte tenu de la rapidité avec laquelle la reconduite peut être exécutée, la condition d’urgence doit être réputée satisfaite- et, d’autre part, s’il « est fait état d’un moyen propre à créer […] un doute sérieux quant à la légalité de la décision ».

530 Devenu l’article L 531-3 CESEDA.

531 « Les personnes faisant l’objet d’une reconduite d’office n’ont donc effectivement pas accès aux données contenues dans le fichier les concernant puisqu’elles sont renvoyées avant que la CNIL n’ait pu répondre. Elles ne peuvent donc pas exercer leurs droits d’information, de rectification, d’effacement ou de compensation financière comme cela est prévu par la Convention de Schengen. Il ne leur est pas laissé la possibilité de faire valoir correctement leur droit au recours car aucun contrôle de la légalité de l’éloignement ne peut être effectué sans une connaissance de la base du signalement ».
renvoyée en France par le biais d’une procédure « Dublin » (et interdiction du territoire allemand à vie) ; nombreux signalements par l’Italie et par l’Allemagne pour une simple interpellation en situation irrégulière (non prévue comme motif d’éloignement). Il est donc impératif que le décret d’application de l’article 26 bis alinéa 2 prévoit un recours suspensif contre cette mesure d’éloignement 532 ».

La jurisprudence du Conseil d’Etat, en matière de refus de visas pour « signalement Schengen », s’est développée et pourrait être transposable au contentieux sur l’éloignement fondé sur un signalement533. Le Conseil d’Etat s’était prononcé en faveur de la possibilité pour les juridictions françaises de vérifier la légalité du fichage au regard de son interprétation de l’article 96 de la Schengen (CE 9 juin 1999, Forabosco, n°190384). Suivant cette jurisprudence Forabosco, le Conseil d’Etat vérifie la légalité de la décision « étrangère » de signalement, mais il a précisé le champ d’application de ses vérifications :

- Le défaut de communication d’informations sur le signalement (CE, 6 décembre 2002, n° 200898, Boltatdemir534).


533 Fiche interne sur le Système d’information Schengen, Cimade, mai 2004.

534 Les éléments relatifs au signalement (allemand) n’ayant pas été communiqués au CE par le MAE suite à sa demande, le CE a estimé que « les affirmations du requérant selon lesquelles la décision du consul général de France à Genève repose sur une mesure de signalement injustifiée doivent être tenues pour établies ».

535 Le CE estime que faute de communication par le MAE des éléments justifiant le signalement (allemand), le signalement « aurait pu être consécutif au fait que le requerrant, réfugié politique en Allemagne, aurait quitté ce pays sans en informer les autorités, un tel motif n’est pas au nombre de ceux permettant de justifier légalement un signalement aux fins de non-admission. »
Country Report France

- La vérification se limite à l’article 96 (Convention Schengen) : le Conseil d’Etat est venu restreindre cette compétence des tribunaux français accordée par Forabosco (CE, 23 mai 2003, n° 237934, Catrina536).


4) Une disposition opérationnelle ?

L’introduction de la notion de « reconnaissance mutuelle des décisions d’éloignement » des autres Etats de l’UE, dans la loi française, ne suffit pas à rendre le dispositif opérationnel. D’une part, le décret d’application n’est toujours pas publié. D’autre part, il devra prendre en compte les différentes incertitudes soulevées en droit français (voir supra).

Sur ce point, la DLPAJ nous a précisé que « ce décret intégrera notamment la compensation des déséquilibres financiers induits par l’application de la directive, selon les critères et modalités définies par la décision du Conseil du 23 février 2004. Il doit également organiser les modalités de retrait du titre de séjour dont le ressortissant d’un pays tiers visé par une mesure d’éloignement pourrait éventuellement être en possession. [Il] doit prochainement être examiné par le Conseil d’Etat »538.

(4.2.1.3) Compensation financière liée à la reconnaissance mutuelle des décisions d’éloignement :

536 Le Conseil d’Etat a précisé qu’il vérifiait seulement si les décisions prises par des autorités étrangères sont bien au nombre de celles qui, « en application des stipulations de l’article 96 de la convention d’application de Schengen, justifient une inscription au « Système d’Information Schengen ».

537 Dans la mesure où le MAE ne donne aucune indication sur les motifs du signalement par l’Allemagne, et en l’absence de toute allégation sur la menace que représente l’intéressé sur le territoire français, le refus de visa a violé l’article 8 de la CEDH. Le requerrant venait de se marier à une française.

538 Extrait de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les politiques de « retour » pour ce rapport.
Comme la directive le prévoyait (article 7), une décision du 23 février 2004\(^{539}\) définit les critères et modalités pratiques de la compensation financière subie par l’ « Etat d’exécution » lors de l’application dudit texte.

4.2.2 L’organisation d’opérations communes de retour :

(4.2.2.1) L’assistance au transit dans le cadre des mesures d’éloignement :

1) Par voie aérienne :

La directive n°2003/110\(^{540}\) concernant l’assistance au transit a pour objectif d’harmoniser les mesures pouvant être prises par les autorités compétentes lorsqu’un éloignement, avec ou sans escorte, doit transiter par un aéroport d’un autre Etat membre (cas où pas de vol direct envisageable). Le texte prévoit plusieurs motifs de refus d’assistance (infractions pénales, menace pour l’ordre public…\(^{541}\)) Cet instrument devra être transposé avant le 6 décembre 2005.

Si cette directive permet de donner une base légale aux opérations de transit entre Etat membre, certaines ONG françaises constatent que le texte fait référence à la Convention de Genève, mais n’établit pas de responsabilité pour les Etats de contrôler sa bonne application \(^{542}\).

Pour sa part, le Conseil souligne l’importance de compléter le cadre établi par la directive 2003/110 (précitée) en renforçant la coopération opérationnelle entre les au-


\(^{542}\) Lourdes menaces sur le droit d’asile en Europe : un bilan de quatre ans de rapprochement des politiques d’asile, Coordination française pour le droit d’asile (CFDA), Février 2004, p.10.
torités nationales des États membres et rappelle que le transit par le territoire d'un autre État membre doit garder un caractère exceptionnel.

2) Par voie terrestre :

D'une part, les Règlements 693 et 694/2003 du Conseil du 24 avril 2003 n’ont pour objet que de faciliter le transit par voie terrestre des ressortissants des pays tiers qui doivent obligatoirement traverser le territoire d’un ou plusieurs États membres afin de circuler entre deux parties de son pays qui ne sont pas géographiquement contiguës (enclave de Kaliningrad).

D’autre part, une proposition de directive, déposée par la présidence italienne, prévoit une assistance au transit à travers le territoire d’un ou plusieurs États membres dans le cadre des mesures d’éloignement. Toutefois, compte tenu de sa situation géographique, la France s’est interrogée sur l’intérêt d’une telle disposition : « son assistance serait souvent sollicitée, alors qu’elle n’a pas de besoin, pour sa part, d’avoir recours au transit par voie terrestre à travers le territoire d’autres États membres. Cette position partagée par de nombreuses autres délégations, a conduit le

543 Le Conseil encourage les États membres à s'accorder afin de faciliter le transit à court terme et l'État membre « requis » à apporter des moyens matériels d'assistance afin de faciliter ces opérations.


547 Extrait de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les politiques de « retour » pour ce rapport.

548 JOUE, n°C223, 19 septembre 2003, p.5.
Conseil à s’orienter vers l’adoption de simples conclusions, sans valeur contrai-gnante, rendant cette proposition caduque\textsuperscript{549}.

\textbf{(4.2.2.2) Les vols communs ou « groupés »}:

Sur cette question, la Commission a souligné, dès fin 2002, que « les Etats doivent s’efforcer de mettre en place des vols charters communs pour les retours volontaires et forcés », dont la généralisation « non seulement présenterait des avantages financiers mais adresserait aussi un signal plus fort »\textsuperscript{550}.

Le gouvernement français a clairement affiché son intention, au cours de l’année 2003 confirmée en 2004, de placer comme priorité le retour des étrangers illégaux vers leur pays d’origine. Cette priorité s’est traduite, sur le plan national, par un renforcement des outils, des moyens et des objectifs en matière d’exécution des mesures d’éloignement (taux d’exécution de 34% sur 2004\textsuperscript{551}) ; sur le plan européen, la France s’est proposé d’être chef de file d’un projet visant à rationaliser les mesures d’éloignement au moyen de vols groupés\textsuperscript{552}. Plusieurs éloignements ont été organisés, par la France, dans ce cadre de coopération : avec les Pays-Bas (novembre 2002, vers la Bulgarie), le Royaume-Uni (mai 2003, vers l’Afghanistan), l’Allemagne (mars 2003, vers la Côte d’Ivoire et le Sénégal) et l’Espagne (mars 2003, vers la Roumanie).

\textsuperscript{549} « L’Europe forteresse » : mythe ou réalité ?, Rapport d’information de l’Assemblée nationale, n°1238, Thierry Mariani, novembre 2003, p.47.


La présidence italienne est venue compléter ce projet, en juillet 2003, et a présenté une proposition de décision du Conseil visant à préciser les modalités d’organisation de vols communs, ainsi qu’à coordonner l’action des États en la matière. La proposition prévoit, notamment, « un projet de manuel relatif à l’organisation conjointe de vols communs pour l’éloignement collectif de ressortissants de pays tiers séjournant illégalement sur le territoire de deux États membres ou plus » 553.

Il faut préciser que l’organisation de tels vols communs suscite de nombreuses interrogations, tant du point de vue juridique que politique. Les ONG, comme l’opinion publique, redoutent que de tels « charters » groupés aient pour seul objectif une meilleure exécution des mesures d’éloignement, au détriment des droits et libertés de la personne. « Alors que la Commission européenne a proposé, lors d’une réunion du 22 janvier 2004, de débloquer 30 millions d'euros sur deux ans pour financer les retours groupés, les organisations européennes des droits de l'homme en appellent au Parlement européen pour qu'il refuse d'entériner la proposition d'organiser des " vols communs pour l'éloignement" adoptée en conseil des ministres le 6 novembre 2003 554 ». Forum Réfugiés a relevé, pour l’année 2004, que « parallèlement aux vols commerciaux, des vols charters ont été mis en place afin de renvoyer des personnes non admises sur le territoire français. A ce propos, il est particulièrement inquiétant que ces vols aient concerné des ressortissants de pays dont la situation politique est catastrophique » 555. De même, le respect de la Convention européenne des droits de l’homme (article 4 du Protocole n°4) et de la Charte des droits fondamentaux de l’UE (article 19) exige que ces « opérations communes » d’éloignement ne

553 Les ONG précisent qu’à ce stade des négociations, « cette proposition (dans laquelle il n’est fait aucune référence à la garantie des droits des personnes éloignées) semble faire l’objet d’un consensus entre les États membres : un accord politique a été établi au Conseil JAI du 6 novembre 2003 », Lourdes menaces sur le droit d’asile en Europe : un bilan de quatre ans de rapprochement des politiques d’asile, Coordination française pour le droit d’asile (CFDA), Février 2004, p.9.

554 « Un appel contre "les charters de l’humiliation", lancé par la Cimade, a déjà récolté près de 2 000 signatures et l’appui de 369 organisations européennes et africaines. Une quarantaine de députés européens l’ont soutenu et s’apprêtent à relayer ses critiques dans l’Hémicycle lors de la séance plénière, fin février », Sylvia ZAPPI, La commission de déontologie de la sécurité critique cinq "charters" pour étrangers, Le Monde, 7 février 2004.
s’apparentent pas à des « expulsions collectives » interdites par les deux textes européens.\(^{556}\)

Enfin, ces opérations supposent une coopération étroite entre les États au moment de définir la répartition des compétences entre États, les conditions juridiques du transport etc. Ainsi, les États se sont entendus, le 29 avril 2004, sur une première décision portant sur l’organisation de vols communs pour l’éloignement collectif des ressortissants de pays tiers séjournant illégalement sur le territoire de deux États membres ou plus.\(^{557}\) Cette décision a pour objectif de poser le cadre réglementaire de la coordination des « opérations communes » et de la coopération des autorités nationales concernées. Une annexe -juridiquement non contraignante- contient plusieurs mesures de sécurité qu’il serait souhaitable que les États respectent lors des différentes phases de ces opérations, notamment les modalités du possible recours à la force.\(^{558}\)

Pour l’année 2004, le gouvernement français a confirmé que « l’administration développe (…) une approche pragmatique, qui prend la forme d’arrangements administratifs en vue de la reconduite par voie aérienne, ou encore de protocoles pour l’organisation conjointe de vols affrétés »\(^{559}\). Toutefois, tout comme la Commission

\(^{555}\) « Des dizaines de ressortissants ivoiriens ont ainsi pris place dans ces vols alors que la situation politique aurait prétexté, au moins, un examen plus approfondi de leur demande par l’OFPRA », L’asile en France et en Europe, État des lieux 2004, 4\(^{e}\) Rapport annuel de Forum Réfugié, p.21.

\(^{556}\) En janvier 2004, M. Vitorino appelait les États membres « à sensibiliser leurs citoyens au fait que les vols communs ne sont en rien des expulsions collectives ». La Cimade, pour sa part, soulignait dans un courrier adressé à M.Vitorino (5 février 2004), que si formellement chaque étranger éloigné fait l’objet d’une décision individuelle, il y a fort à craindre que la mise en place de ces vols n’impose une précipitation peu propice au nécessaire examen de chaque situation. Par ailleurs, certaines législations ne permettent pas d’effectuer cet examen dans des conditions satisfaisantes (en France, notamment, le recours contre une décision d’éloignement prise en zone d’attente n’a pas d’effet suspensif). Voir : Claudia CORTES-DIAZ, Consensus sur les charters, Plein droit n°59-60, mars 2004, p.58.


\(^{558}\) Les ressortissants de pays tiers concernés doivent être « dans un état de santé approprié », les membres de l’ « escorte ne doivent pas être armés », des « mesures coercitives » ne peuvent être utilisées qu’en cas de « refus ou de résistance », elles « ne doivent pas excéder une force raisonnable » ni « compromettre ou menacer la possibilité de respirer », l’usage de « sédatifs » est interdit, etc…

Country Report France

le constatait en 2003\textsuperscript{560}, le gouvernement précise que la principale cause d’échec, quant à l’exécution des mesures d’éloignement en France, n’est pas l’opération de retour en elle-même mais plutôt « l’absence de documents de voyage »\textsuperscript{561}. Ainsi, diverses réflexions sont en cours, au niveau national\textsuperscript{562} et européen\textsuperscript{563}, pour faciliter l’identification des personnes sans papiers. « Par ailleurs, la France, comme d’autres États membres, était d’avis que le réseau des officiers de liaison devrait aussi être impliqué dans l’organisation de ces vols\textsuperscript{564}. » Certains pays membres -comme la Belgique, les Pays-Bas, l’Allemagne, la Pologne ou l’Italie- sont plus réticents à la mise en place de tels projets car ils organisent déjà des charters communs entre eux.

---


Toutefois, fin 2004, la CNIL semblait émettre des réserves sur les conditions de réalisation de l’expérimentation portant sur les visas biométriques, envisagée par le gouvernement français, visant à autoriser sept consulats à relever les empreintes digitales des demandeurs de visas et les enregistrer dans une base centralisée.

\textsuperscript{563} La Commission estime que le VIS (Système d’information sur les visas) pourrait faciliter l’identification des personnes sans papiers, notamment grâce à l’utilisation d’éléments biométriques. Voir la Proposition de la Commission du 24 septembre 2003, concernant l’intégration d’éléments d’identification biométriques dans les visas et titres de séjour des ressortissants de pays tiers. La Commission a adopté et transmis au Conseil et au Parlement européen deux propositions en vue de la modification du Règlement (CE) n° 1030/2002 établissant un modèle uniforme de titre de séjour pour les ressortissants de pays tiers et du Règlement (CE) n° 1683/95 établissant un modèle type de visa. L’objectif est double : (1) Avancer de 2007 à 2005 la date butoir fixée pour la mise en œuvre de l’insertion de la photographie dans le modèle type de visa et le modèle uniforme de titre de séjour présentés sous la forme d’une vignette adhésive ; (2) Demander aux États membres de réaliser une intégration harmonisée des éléments d’identification biométriques dans le visa et le titre de séjour pour les ressortissants de pays tiers, de manière à assurer l’interopérabilité.
4.2.3 Les retours volontaires :

Lors du Sommet de Tampere (1999), le Conseil affichait sa volonté d’accroître l’aide aux pays d’origine et de transit afin de faciliter les retours volontaires. Dans son Livre vert (avril 2002), la Commission a confirmé que « pour des raisons d’ordre humanitaire, le retour volontaire est préférable au retour forcé ». Puis, progressivement, l’objectif d’« aide à la réinsertion » va se substituer à celui d’« aide au retour » avec pour finalité d’encourager le développement des zones de fortes émigrations et tenter de freiner les départs vers l’Europe. Toutefois, les moyens et efforts déployés par l’UE, notamment pour mettre en place une politique de co-développement, ne semblent que faiblement contribuer à susciter le retour volontaire.

(4.2.3.1) Encouragements pour le retour volontaire :

En France, les mécanismes d’aide au retour sont régis par la loi ou par voie de circulaire. Chaque instrument est spécifique : l’aide publique à la réinsertion (APR), l’aide à la réinsertion des personnes invitées à quitter le territoire (IQF), le rapatriement humanitaire, le programme de développement local (PDLM), les aides exceptionnelles et temporaires. En revanche, les autorités françaises reconnaissent le caractère contradictoire et la faiblesse de certains dispositifs prévus dans la perspective de

l’éventuel retour des étrangers dans leur pays d’origine. En pratique, ces instruments sont de moins en moins utilisés (voir supra 1.1).

Les étrangers qui se trouvent en situation irrégulière, notamment à la suite d’une décision négative définitive de rejet de leur demande de statut de réfugié, pourront accéder à l’aide à la réinsertion des personnes invitées à quitter le territoire (IQF). Ils sont invités par la préfecture à quitter le territoire dans un délai de un mois et informés de la possibilité d’un départ volontaire aidé. L’OMI (Office des Migrations Internationales) assure la diffusion de l’information, l’accueil des étrangers intéressés et apporte son appui pour les opérations de départ : aide administrative avant le départ, prise en charge des frais de voyage, versement d’un modeste pécule (152,45 euros par adulte et 45,75 euros par enfant), ainsi que parfois une aide à l’arrivée (logement, emploi…). Le délai de un mois est considéré comme trop court, notamment face au délai de recours de deux mois qui figure dans le dossier d’IQF, et semble freiner les effets de cette mesure qui est peu usitée (voir supra 1.1).

Dans le pays d’origine, les autorités diplomatiques françaises en place (aidées par l’OIM et UNHCR) évaluent la situation et observent si les conditions minimums requises sont remplies (stabilité et sécurité). Cette évaluation permet également de fournir des informations au candidat au retour sur la situation politique, économique et « médicale » du pays concerné.

Enfin, la France offre un dispositif particulier de rapatriement humanitaire pour tout étranger dont la situation personnelle et sociale le justifie. De l’avis des autorités françaises, le succès de tels programmes est assez limité. Le programme du Kosovo


567 De plus, les demandeurs d’asile ne pourront être « éligibles » qu’à la fin de la procédure d’asile et à l’épuisement des voies d’appel. L’Office des Migrations Internationales (OMI) vérifie que l’aide accordée n’est valable qu’une fois. Le candidat doit vivre en France au moment de sa mise en place et ne doit pas faire l’objet d’un arrêté d’expulsion ; l’étranger perd son permis de résidence dès qu’il quitte le territoire.
(1999), qui a connu un certain succès (3.057 Kosovars bénéficiaires), peut être mentionné comme une exception. Le dispositif prévu pour les ressortissants d’Afghanistan (2002-2003), créé à la suite d’un accord entre la France, le HCR et le gouvernement de l’Afghanistan, n’a bénéficié qu’à 36 adultes (assistance à la préparation du voyage (OMI), frais de voyage, dotation vestimentaire de première nécessité de 150 euros maximum, allocation de 2.000 euros par adulte et de 500 euros par enfant mineur, accueil local (HCR et OIM)).

(4.2.3.2) Expériences avec les programmes du Fonds européen aux réfugiés :

En septembre 2000, le Conseil de l’Union européenne a mis en place le Fonds européen aux réfugiés pour soutenir les efforts des Etats membres de l’Union dans les domaines de l’accueil des demandeurs d’asile, de l’intégration des réfugiés et de l’aide au rapatriement volontaire des demandeurs d’asile déboutés ou des personnes déplacées placées sous le régime de la protection temporaire. Doté d’un budget de 42 millions d’euros (2003), il permet de cofinancer les programmes nationaux qui lui seront présentés, au plus égal à 50 % du coût prévisionnel des projets. Le Fonds peut également financer en cas de besoin l’aide d’urgence nécessitée par un afflux massif et imprévu de personnes fuyant leur pays d’origine.

En France, c’est le ministère de l’emploi et de la solidarité, direction de la population et des migrations (DPM), qui a été désigné comme l’autorité responsable pour mettre en œuvre ce programme. Les dotations doivent être réparties chaque année sur les quatre types de mesures éligibles au cofinancement du FER : accueil des demandeurs d’asile (A), intégration des réfugiés (B), aide au retour volontaire (C), assistance technique (D).

Pour l’année 2002, 57 projets ont été soumis à la DPM et 24 projets ont été retenus, selon l’affectation suivante : 19 projets (A) ; 2 projets (B) ; 0 projet (C) ; 3 projets

4.2.4 Les accords ou clauses de réadmission : rapport entre les accords bilatéraux de réadmission et les efforts de l’UE.

Les Etats membres de l’UE, se basant sur le lien entre la crédibilité de la politique d’immigration et l’effectivité de l’éloignement des étrangers irréguliers, vont conclure entre eux des accords bilatéraux de réadmission pour tenter de dépasser les obstacles majeurs auxquels ils sont confrontés lors de l’éloignement (absence de documents d’identité ou de voyage, accord du pays d’origine…). A la suite du Sommet de Tampere, incités à renforcer la coopération avec les pays d’origine pour faciliter les retours, les Etats vont signer des accords de réadmission et insérer des clauses de réadmission dans les accords avec les pays tiers (association ou coopération).

Or, depuis le traité d’Amsterdam, la Communauté européenne est compétente pour conclure des accords de réadmission avec des pays tiers qui engagent l’ensemble des Etats membres : le pays tiers doit accepter la réadmission de ses propres ressortissants séjournant illégalement sur le territoire d’un Etat membre et des ressortissants tiers dont le transit par ce pays est établi. Sur ce fondement, 11 mandats de négociation ont été donnés à la Commission, sur lesquels seuls 4 accords ont été conclus (Macao, R.A.S. de Hong Kong, Sri Lanka, Albanie). En revanche, « ces accords ne sont pas encore au stade opérationnel même s’ils sont déjà signés et entrés en vigueur pour certains (comme les accords avec Hong Kong et Macao, bientôt avec le Sri Lanka). En effet, la mise en œuvre effective de ces accords suppose la négociation et

\[569\] La liste des projets sélectionnés (FER) pour l’année 2002 est disponible sur le site Internet du ministère de l’emploi, du travail et de la cohésion sociale : www.social.gouv.fr/htm/dossiers/fer/listproj.htm
la signature par chacun des États membres de protocoles bilatéraux d’application. Ces protocoles ne sont pas conclus à ce jour570 ».

Ce faible résultat s’explique, en partie, du fait que les États engagent eux-mêmes des négociations avec les pays tiers, mais également parce que les pays tiers ne trouvent pas un intérêt immédiat à signer de tels accords avec l’UE (voir l’exemple du Maroc). Les États membres tentent alors de proposer des « mesures incitatives » visant à encourager la coopération des pays tiers et des pays d’origine dans la conclusion de tels accords (souvent sous la forme d’un accompagnement financier). Toutefois, ces mesures d’accompagnement ne sont pas toujours bien accueillies571, notamment par les ONG qui redoutent les effets d’un « chantage » financier572 et le danger de défavoriser les États tiers qui n’y accèderaient pas (refus ou États à faible émigration).

D’une manière plus générale, les ONG françaises relèvent le peu de considération relative aux droits de l’homme dans ces accords ou clauses de réadmission : certaines références sont insérées, notamment à la Convention de Genève ou à la CEDH, mais elles sont générales et non assorties d’une clause suspensive pour les personnes ayant besoin d’une protection particulière.

Le gouvernement français, dans son rapport 2004, précise que « la politique volontariste de la France, trouve sa place dans un contexte international qui se caractérise par une nécessaire intensification des relations bilatérales et multilatérales573 » :

570 Extrait de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les politiques de « retour » pour ce rapport.
572 Le GISTI évoque le danger d’associer systématiquement l’aide au développement à la coopération du pays pour le retour.
Country Report France

- La France a ainsi signé des accords de réadmission avec 34 pays, dont 28 pays extérieurs à l’Union européenne, et en négocie 8 nouveaux 574.
- Elle s’efforce d’obtenir des services consulaires concernés la délivrance en temps utile des laissez-passer permettant de sécuriser la réadmission dans leur pays d’origine des ressortissants étrangers faisant l’objet d’une mesure d’éloignement.

4.2.5 Projets européens et politique de retour :

Comment sont accueillis les propositions et projets européens pour une politique communautaire de retour par le gouvernement, le public en général et les associations non gouvernementales ?

(4.2.5.1) Les réponses au Livre vert de la Commission :

Se reporter aux contributions des gouvernements, des organisations internationales et des organisations non gouvernementales 575 suite à la consultation de la Commission sur la base du Livre vert (précité).

Dans sa réponse, la Cimade s’est notamment interrogée sur l’origine du texte : la nécessité d’une politique de retour commune, en particulier pour garantir l’intégrité des systèmes d’admission sachant que ces systèmes sont loin d’être communautarisiés ; le mélange entre retour forcé et retour volontaire apparaissant comme un manque de transparence et une confusion dangereuse dans les intentions rédacteurs ; la volonté sous-jacente de vider l’Europe des "mauvais" immigrés pour la remplir des "bons".


575 Se reporter au site Internet de la Commission : http://www.europa.eu.int/comm/justice_home/unit/doc_asile_immigrat/hearing_160702.htm
« De plus, la Cimade a noté que le Livre Vert est très largement insuffisant en matière de protection des droits et libertés fondamentales dans le processus même de retour. La commission ne décline pas de catégories protégées de manière absolue contre l’éloignement. La double peine est affirmée comme fondement de l’éloignement. La durée de la rétention administrative en vue de l’éloignement n’est pas strictement limitée dans le temps et les contrôles judiciaires pas strictement définis576 ».

D’une manière plus générale, la CFDA regrette que la politique de retour s’établisse essentiellement par des mesures de coopération opérationnelle577 : « l’absence de contrôle démocratique sur ces mesures est un élément de grande préoccupation quant aux garanties pour les personnes soumises à des risques en cas de retour. En effet, ces mesures font rarement référence aux instruments de protection internationale des droits de l’homme ou à la Convention de Genève de 1951 ». D’autre part, elle précise que ses précédents bilans qui faisaient état d’une détérioration du droit d’asile en Europe578 n’ont pas été infirmés par l’évolution récente des négociations européennes, notamment sur l’adoption de normes communes susceptibles d’éléver le seuil de protection ou les garanties accordées aux demandeurs d’asile579.

(4.2.5.2) L’adoption de normes communes en matière de retour :

Le Conseil européen préconise que la politique de retour soit basée sur des « normes communes », afin que les personnes concernées soient rapatriées dans le respect de la dignité humaine et de leurs droits fondamentaux. Or, les négociations sur la mise en place de ces « normes communes » tardent à aboutir.

576 Caroline INTRAND, Europe et retour forcé, Causes communes, Cimade, novembre 2002.
Par exemple, la directive n°2001/40 (précitée) instituant un mécanisme de reconnaissance mutuelle des décisions d’éloignement est inspirée du souci de parvenir à une meilleure efficacité des décisions d’éloignement ; elle s’en tient à la mise en place d’« une reconnaissance mutuelle ». Toutefois, elle repose sur le principe d’une coopération des États et suppose que chaque partie accorde sa confiance aux normes juridiques des autres États parties. De ce fait, « la reconnaissance mutuelle est possible dans la mesure où les États garantissent le respect des droits de l’homme et des libertés fondamentales ». Dans la pratique, certains risques pour les droits fondamentaux pourraient pourtant voir le jour, si les États membres ne s’entendent pas en vue de la réalisation d’un cadre juridique commun par l’adoption de normes minimales en matière de retour.

Sur ce point, les ONG françaises s’inquiètent qu’il n’y ait pas de calendrier précis quant à l’élaboration de ces normes communes « protectrices », alors que certaines mesures opérationnelles ont déjà été mises en œuvre. Si la priorité a été donnée à la lutte contre l’immigration clandestine ces dernières années, l’UE ne peut pas se passer d’une approche équilibrée en matière de retour. D’autant qu’une telle perspective favoriserait l’harmonisation des législations et des pratiques en matière d’éloignement des ressortissants tiers et garantirait un cadre juridique commun respectueux des droits et principes fondamentaux des personnes éloignées, en principe sous la surveillance de la CJCE. Les États membres doivent alors s’entendre sur un ensemble de « standards communs » pour le retour des ressortissants de pays tiers.

582 Sous réserve des exceptions liées, notamment, aux clauses d’ordre public.
Une proposition de directive du Conseil, notamment discutée fin 2004\textsuperscript{583}, sur des standards communs pour les procédures de retour des ressortissants d’Etats tiers séjournant illégalement sur le territoire d’un Etat membre, est en cours de négociation. Cette proposition a pour objectif de poser un cadre standard commun aux procédures de retour des ressortissants de pays tiers séjournant illégalement dans l’UE, afin de structurer et d’harmoniser les pratiques nationales. Elle vise les différentes étapes de la procédure de retour pour séjour illégal : la fin du séjour illégal, l’éloignement du territoire, l’interdiction du territoire, la détention dans l’attente du retour, la coopération entre Etats membres (reconnaissance des décisions…). Ainsi, seules les mesures d’éloignement pour séjour irrégulier sont concernées par ce projet de directive, qui ne comporte pas de disposition spécifique sur les mesures d’éloignement fondées sur des raisons d’ordre public ou de sécurité nationale. En l’état actuel des négociations, plusieurs arguments peuvent être avancés pour justifier ce constat :

- Les Etats membres de l’UE peinent à s’entendre sur une définition ou approche commune de la notion d’ordre public et, partant, de la menace pour l’ordre public et/ou pour la sécurité nationale (voir supra 4.2.1.2).

- Le document de présentation\textsuperscript{584} du projet de directive mentionne trois arguments, qui sont plus ou moins directement liés au contexte particulier qui a suivi les événements du 11 septembre 2001 :

1) Les directives européennes adoptées en matière d’asile et d’immigration comportent toutes des clauses d’ordre public, par lesquelles les Etats membres sont en mesure de retirer un titre de séjour ou d’expulser un ressortissant de pays tiers. Or, il a été confirmé que la notion d’ordre public et de sécurité publique retenue dans ces textes englobe les cas de menace liée au terrorisme. De plus, en réponse au Parlement et suite aux événements du 11 septembre, la Commission a recommandé que les Etats appliquent « avec ri-

\textsuperscript{583} Proposal for a Council Directive, On common standards on procedures in Members States for returning illegally staying third country national, discussed in the october 2004 Immigration and Asylum Committee (MIGRAPOL 90).

387
Country Report France

gueur» ces dispositions d’ordre public\textsuperscript{585}, invoquant des impératifs de sécurité, plutôt que changer le fond des différents textes et propositions\textsuperscript{586}.

2) Un Etat membre n’a pas toujours intérêt à expulser un terrorisme présumé vers un pays tiers, mais parfois de le garder « sous surveillance » sur le territoire national.

3) Même si les Etats parvenaient à s’entendre sur un degré d’harmonisation plus poussée en matière d’expulsion fondée sur l’ordre et la sécurité publics, une telle disposition ne pourrait être proposée dans le cadre d’une directive sur la fin du séjour illégal (base juridique : article 63(3)(b)), mais plutôt dans celui d’une directive relative aux conditions d’entrée et de séjour -et de fin- du séjour légal (base juridique : article 63(3)(a) et autres).

Pour toutes ces raisons, la seule disposition relative à l’ordre public insérée dans cette proposition concerne la prolongation d’une interdiction de territoire (article 12, § 3). Le délai de transposition est fixé à deux ans à partir de la date d’adoption de la directive.

La DLPAJ précise que ce projet demeure susceptible de profonds remaniements. En l’état, ce projet a pour objet premier une harmonisation des textes laquelle suppose nécessairement des définitions communes en matière de retour. A ce jour, le projet n’est pas définitif et la Commission s’est réservée la possibilité d’en amender tant la forme que le fond\textsuperscript{587}.

\textsuperscript{584} Proposal for a Council Directive, On common standards on procedures in Members States for returning illegally staying third country national, discussed in the October 2004 Immigration and Asylum Committee (MIGRAPOL 90).
\textsuperscript{586} « It appears that scrupulous application of these clauses is a more appropriate way of enhancing security than to substantially change the different Proposals at stake », Document de travail de la Commission, sur la sauvegarde de la sécurité intérieure et le respect des obligations et des instruments internationaux en matière de protection, (COM(2001) 743 final du 5 décembre 2001).
Toutefois, les ONG françaises sont attentives à cette proposition de directive. Tout en reconnaissant que les discussions européennes sur le retour progressent, elles s’accordent sur l’urgence de mettre en place de tels standards communs en matière de retour\textsuperscript{588} et veillent à ce que ces dispositions assurent un niveau de protection minimum au moins égal au niveau français\textsuperscript{589}.

Dans ce sens, la Cimade évoque certains points qu’elle souhaiterait voir précisés dans le projet de directive, notamment sur :
- l’accès à une aide légale, à un interprète, à un avocat durant la procédure de renvoi ;
- la protection absolue de certaines catégories contre le renvoi (personnes vulnérables comme les mineurs ou les personnes malades, existence de liens familiaux, demandeurs d’asile, réfugiés) ;
- la distinction entre les différentes mesures d’éloignement ;
- l’examen individuel avant la décision d’éloignement ;
- le recours suspensif de la décision d’éloignement assorti d’un délai suffisant ;
- les conditions et la durée de détention dans l’attente du retour (12 mois au maximum dans le projet) ;
- le délai entre la décision d’éloignement et son exécution ; pas de mesures complémentaires (interdiction du territoire, enregistrement au SIS…).

\textsuperscript{587} Extrait de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les politiques de « retour » pour ce rapport.


\textsuperscript{589} Le GISTI considère que ces normes minimales en matière de retour sont un outil prioritaire si elles assurent un niveau de protection minimum au moins égal au niveau français (droit des mineurs, des malades etc.).
(4.2.5.3) **Orientations françaises en matière de retour**

Sur la politique en matière de retour, la DLPAJ rappelle que :

- La Recommandation du Conseil du 22/12/1995 relative à la concertation et à la coopération dans l’exécution des mesures d’éloignement de ressortissants des pays tiers prévoit des mesures de coopération et d’assistance mutuelle entre Etats membres. Cette assistance tient compte de l’objectif commun pour les Etats membres de la mise en œuvre d’un « programme d’action en matière de retour » dont la finalité première est de faciliter la coopération entre les services nationaux en charge des retours « forcés ».

- La politique de l’Union européenne en matière de retour des ressortissants des pays tiers en situation européenne s’oriente actuellement selon trois axes :
  - Coopération opérationnelle des autorités nationales ;
  - Reconnaissance mutuelle ;
  - Harmonisation législative.

Sur la mise en place d’une politique européenne de retour, la DLPAJ précise que « tous ces projets sont en cours d’élaboration, leur impact effectif ne saurait en conséquence être mesuré à ce jour. Aucun instrument n’est privilégié, la mise en œuvre d’une politique de retour efficace passe par les trois axes susvisés de coopération, d’harmonisation et de reconnaissance mutuelle auxquels participent les projets évoqués. Enfin, il importe de mentionner un quatrième axe de réflexion de la politique commune de lutte contre l’immigration irrégulière consistant en une approche plus politique de négociation et de coopération avec les pays tiers sources de cette immigration ».

(4.2.5.4) **Perspectives européennes en matière d’asile** :

590 Les éléments rapportés ici sont extraits de la réponse de la DLPAJ, du 30 mars 2005, aux questions posées sur les politiques de « retour » pour ce rapport.

390
Si « un nouveau contexte » peut émerger pour la politique européenne d’asile, les réflexions qui sont en cours portent notamment sur une double orientation : l’idée d’un traitement centralisé des dossiers des demandeurs d’asile arrivés sur le territoire de l’Union (1) et, parallèlement, d’un traitement « externalisé » pour certaines demandes d’asile qui pourraient être déposées dans la région d’origine (2).


---

591 Passage attendu à la majorité qualifiée, adoption du Traité constitutionnel…Se reporter à : L’asile en France et en Europe, État des lieux 2004, 4e Rapport annuel de Forum Réfugiés, p.27.
extérieures de l'UE. Cette proposition, destinée à désengorger un système d’asile débordé par le nombre de demandes, a été accueillie avec réserve par la Commission et avec hostilité par les organisations de défense des droits de l’homme. Elle a fait l’objet de nombreuses controverses entre les gouvernements de l’Union avant d’être rejetée par le Conseil européen de Thessalonique (juin 2003). « Approuvée par la Grande-Bretagne, l’Allemagne et l’Italie, l’idée est combattue notamment par la Suède et la France. Elle est aussi critiquée, au Parlement européen, par Jean-Louis Bourlanges, président (UDF) de la commission des libertés civiles, de la justice et des affaires intérieures, qui s’interroge sur les conditions auxquelles seraient soumis les candidats à l’immigration. « Il ne serait pas acceptable que ces conditions soient carcérales », dit-il. Il affirme également que « la gestion de ces centres ne peut pas être confiée à des États qui ne répondraient pas aux critères de l’Union européenne en matière de droits de l’homme ».

La France semble opposée à ce type de projet. M. Jacques Chirac a fait part de son opposition à la création de tels centres et au lancement de projets pilotes. Il s’est engagé à veiller personnellement à ce que les autorités françaises restent vigilantes car,

selon lui, « une telle procédure est étrangère aux traditions françaises en matière de droit d’asile » 594. Lors de la réunion du Conseil informel JAI du 1er octobre 2004, les ministres de l’intérieur des 25 Etats membres n’ont pu se mettre d’accord ni sur la création à moyen terme de « centre de transit » pour demandeurs d’asile dans des pays d’Afrique du Nord, ni sur la création à court terme de structures humanitaires permettant de recueillir les personnes en danger dans les eaux territoriales ou en haute mer. A cette occasion, M. Dominique de Villepin aurait confirmé que « c’est une erreur de mettre sur pied des centres d’accueil » 595 et qu’ « il est hors de question de garder les gens dans des centres », tout en précisant qu’ « il faut les renvoyer dans leurs pays d’origine et s’attaquer à la racine du problème de l’immigration avec l’ensemble des pays sources » 596.

5. **Procédures spéciales :**

5.1 *Eloignement par voie aérienne :*

Il n’existe pas de procédure spécialement applicable en cas d’éloignement par voie aérienne. En effet, l’article L. 551-1 du CESEDA prévoit le placement en rétentio administrative 597 de tout étranger « faisant l’objet d’un arrêté de reconduite à la frontière », sans distinguer selon le mode de transport utilisé pour l’exécution de la décision d’éloignement.

En France, les éloignements sont exécutés par avion ou par bateau (voir infra § 5.2). Les individus éloignés pourront être escortés par la police. La présence d’escorteurs

597 Voir ci-dessus, § 3.2.
est très fréquente sur les reconduites à la frontière (quelle que soit la mesure prononcée) et, en principe, il y a trois agents escorteurs (deux directement chargés de la maîtrise de la personne éloignée et un chef de mission qui doit jouer l’interface avec les passagers et le commandant de bord)598. Les services de polices sont autorisés à utiliser des mesures coercitives proportionnellement à la résistance passée par l’étranger, dans le respect du principe de proportionnalité et de la dignité humaine. Ainsi, lorsque le comportement de l’étranger rend l’éloignement impossible, l’escorte peut utiliser des menottes599 et, éventuellement, présenter l’étranger devant un juge qui pourra décider d’un emprisonnement ne pouvant excéder 3 ans (voir supra § 3.4.3). De telles escortes sont soumises à des « formations » spécifiques, adaptées à ce type de mesures600.

L’originalité de l’éloignement par voie aérienne est constituée par la pratique des « vols groupés » ou « vols communs », alors qu’en général cette exécution se fait individuellement. Il peut s’agir de vols à bord desquels sont regroupés des étrangers, d’une seule ou de plusieurs nationalités éloignées du seul territoire français, ou des étrangers éloignés par les autorités de deux ou plusieurs États membres de l’Union européenne.


600 « A Gif-sur-Yvette (centre de formation de la police), il existe une formation particulière comprenant deux volets : un volet psychologique pour mieux comprendre, appréhender et gérer les escorte, et un volet technique où il s’agit de maîtriser les gestes sûrs pour éviter les problèmes avec des mises en situation et des cas pratiques. La formation, qui dure environ quinze jours, est obligatoire pour les chefs de mission. C’est à la suite d’accidents dramatiques que ces formations ont été mises en place. Je dois dire que depuis deux ans, je n’ai à faire état d’aucun problème. De la même façon, la meilleure préparation des escorteurs a eu pour effet de quasiment faire disparaître les refus des commandants de bord d’embarquer des étrangers éloignés. Globalement, les embarquements se passent sereinement », Extrait des propos du Commissaire-chef de la PAF de Roissy-Charles de Gaulle, Yvon
La pratique des « vols groupés », souvent appelés « charters », est ancienne en France. Elle a été inaugurée, le 18 octobre 1986 par le ministre de l’intérieur de l’époque, Charles Pasqua, qui a fait affréter un avion pour procéder à l’expulsion de 101 Maliens vers leur pays d’origine. Elle a été poursuivie depuis, de façon sporadique et surtout par les gouvernements de droite. Une nouvelle étape a été franchie sous la forme des éloignements organisés en coopération avec d’autres États membres.

Ces pratiques trouvent maintenant un fondement, à l’échelle européenne, dans la décision du Conseil relative à l’organisation de vols communs pour l’éloignement, à partir du territoire de deux États membres ou plus, de ressortissants de pays tiers.

5.2 Éloignement par voie terrestre.

En France, l’éloignement par voie terrestre n’a présenté aucune particularité ni nouveauté au cours des dernières années (Voir supra 4.2.2.1).

5.3 Expulsion par voie maritime :


602 Sur les vols groupés (ou vols communs), voir aussi ci-dessus § 4.2.2.2.


Dans la très grande majorité des cas, l’éloignement du territoire français des étrangers se fait par avion, mais il arrive que le renvoi des ressortissants des pays du Maghreb se fasse par bateau. La reconduite par bateau concerne essentiellement les personnalités de nationalité algérienne, marocaine et tunisienne. La motivation du choix du moyen de transport varie en fonction de la distance qui sépare le centre de rétention du port ; le renvoi par bateau peut aussi être décidé après un refus d’embarquement en avion avéré qui n’aura pas donné lieu à des poursuites pénales.

Le taux de refus d’embarquement par bateau semble particulièrement bas (0.80%) tant le refus de monter en bateau est presque impossible : l’acheminement jusqu’au bateau se fait par escorte en voiture, et la police fait souvent monter le véhicule à bord. Le refus sera constaté lorsque l’étranger est particulièrement violent : soit il dégrade la voiture, soit il s’en prend physiquement aux policiers. Sur les bateaux des compagnies étrangères, la police du pays est présente à bord. Sur les bateaux français, les documents d’identité sont remis aux intéressés.

5.4 Problèmes des mineurs non accompagnés et des personnes particulièrement vulnérables

Selon Forum Réfugiés, le nombre de mineurs étrangers non accompagnés ne serait que d’un peu moins de 1000 par an, « trop peu pour décider d’une réelle politique d’accueil »605. Mais il semble que ce faible nombre n’a pas incité les autorités françaises à ouvrir largement le territoire à ces mineurs, même quand ils sont demandeurs d’asile. L’Anafé, ONG présente en zone d’attente, spécialement à l’aéroport de Roissy-Charles de Gaulle, a dénombré 1.067 mineurs non accompagnés demandeurs d’asile en 2001, 628 et 2002 et 514 en 2003. Ce nombre est en constante diminution,

comme celui des demandeurs d’asile majeurs, principalement en raison des mesures restrictives adoptées par le Parlement et de la pratique de la police aux frontières.\footnote{Anafé, *La zone des enfants perdus – Mineurs isolés en zone d’attente de Roissy*, novembre 2004, p. 4.}

5.4.1 La première difficulté à laquelle se heurten les mineurs non accompagnés est celle due à la suspicion des autorités de police quant à leur minorité, dès que leur aspect physique laisse penser qu’ils pourraient être majeurs et même quand ils peuvent produire un passeport ou un document d’état civil portant leur date de naissance. En effet, la police aux frontières met presque systématiquement en doute l’authenticité de ces documents ; elle saisit alors le procureur de la République afin qu’il soit procédé à un examen médico-judiciaire comprenant un examen physique (mensuration, relevé de l’évolution de la puberté, du développement de la dentition, etc.) et des radiographies osseuses\footnote{Ibidem.}. Au vu des résultats de ces examens, le juge décide si l’étranger qui se déclare mineur l’est effectivement. Pourtant, il est admis, même par le corps médical, que ces méthodes ne sont pas fiables scientifiquement et peuvent donner une marge d’erreur de dix-huit mois\footnote{Dr Odile Diamant-Berger, chef des urgences médico-judiciaires à l’Hôtel Dieu de Paris, *ProAsile*, Revue de France terre d’asile, février 2001.}. De plus, il est de principe, aux termes mêmes de l’article 47 du code civil, que « tout acte de l’état civil des Français et des étrangers, fait en pays étranger, fera foi s’il est rédigé dans les formes usitées dans ledit pays », ce qui devrait impliquer que l’acte d’état civil produit par le mineur et attestant de sa minorité prime sur l’expertise médicale tant que la preuve n’est pas apportée que cet acte d’état civil est faux\footnote{Cour d’appel de Paris, 13 novembre 2001, arrêt n° 441.}.\footnote{Cass., 2\textsuperscript{e} ch. Civ., 2 mai 2001, *Mille Iorere*, D. 2001, p. 2773, concl. R. Kessous et note F. Julien-Laferrière.}

5.4.2 Tirant les conséquences de décisions de jurisprudence contradictoires, aux- quelles la Cour de cassation n’a pas réussi à mettre fin\footnote{Cass., 2\textsuperscript{e} ch. Civ., 2 mai 2001, *Mille Iorere*, D. 2001, p. 2773, concl. R. Kessous et note F. Julien-Laferrière.}, la loi du 4 mars 2002 a modifié l’ordonnance du 2 novembre 1945 pour instituer un « administrateur ad
hoc » chargé d’assister les mineurs non accompagnés placés en zone d’attente611. Cette loi a été complétée par un décret du 2 septembre 2003.

L’administrateur ad hoc est désigné par le procureur de la République sur une liste de personnes, appartenant généralement à des associations de défense de l’enfance. L’administrateur ad hoc assiste et représente le mineur en lieu et place de son représentant légal (père ou mère) dans les procédures administratives et judiciaires pendant toute la durée de son placement en zone d’attente. Dans la pratique, il semble qu’il n’est que très rarement présent en zone d’attente ou lorsque des décisions sont prises à l’égard du mineur, soit par la police, soit par le juge des libertés et de la détention, comme par exemple la prolongation du placement en zone d’attente. L’administrateur ad hoc ne paraît donc pas avoir apporté de réelles garanties aux mineurs non accompagnés612.

5.4.3 L’institution de l’administrateur ad hoc par la loi du 4 mars 2002 implique évidemment que, pour le législateur français, et contrairement à ce qu’avaient décidé certaines cours d’appel, un mineur peut être placé en zone d’attente, comme un adulte. Il n’est pas tenu compte de la spécificité de la situation du mineur, de sa vulnérabilité et du péril que peut constituer pour lui la privation de liberté.

Pendant la discussion de la loi du 4 mars 2002 devant le Parlement, le HCR et la Défenseure des enfants, Claire Brisset, ont exprimé leur opposition au projet d’institution de l’administrateur ad hoc en invoquant le risque de refoulement des mineurs non accompagnés dans leur pays d’origine et le danger qui en résulte ; ils proposaient que les mineurs étrangers non accompagnés soient pris en charge par le dispositif de protection des mineurs, conformément à l’article 3 de la convention

611 Les dispositions de cette loi ont été intégrées dans le CESEDA aux articles L. 221-5, L. 222-3, L. 223-1 et L. 751-1.
internationale des droits de l’enfant qui stipule : « Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale ».

Dans un rapport daté du 4 juin 2004, le Comité des droits de l’enfant des Nations Unies613 s’est déclaré « préoccupé » par le fait que « des mineurs non accompagnés, arrivant à l’aéroport, continuent d’être privés de liberté et d’être placés en détention avec des adultes » et qu’ils « puissent être renvoyés dans leur pays d'origine sans intervention judiciaire et sans que leur situation familiale ait été évaluée »614.

5.4.4 Aucune procédure particulière n’a été instituée pour les autres catégories de personnes vulnérables : femmes, personnes âgées, handicapés physiques ou mentaux, etc. Ces diverses catégories d’étrangers sont protégées contre un éloignement forcé vers un pays où ils seraient exposés à des risques particuliers en raison de leur sexe, de leur âge ou de leur état de santé, mais les conditions matérielles de leur éloignement ne fait l’objet d’aucune mesure spécifique.

613 Le Comité des droits de l'enfant, créé par l’article 43 de la Convention internationale relative aux droits de l'enfant, est l'organe chargé « d'examiner les progrès accomplis par les États parties dans l'exécution des obligations contractées par eux en vertu de cette convention ».

Annexe I : Demande d’asile en France et dans le monde.

1- Demandes de statut de réfugié en France

<table>
<thead>
<tr>
<th>Année</th>
<th>OEFPRA</th>
<th>OEFPRA - CRR</th>
<th>CRR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Taux d’entretien</td>
<td>% d’accords</td>
<td>% d’accords</td>
</tr>
<tr>
<td>1993</td>
<td>27 064</td>
<td>54,9 %</td>
<td>25 480</td>
</tr>
<tr>
<td>1994</td>
<td>25 864</td>
<td>55,2 %</td>
<td>28 710</td>
</tr>
<tr>
<td>1995</td>
<td>20 815</td>
<td>40,3 %</td>
<td>20 096</td>
</tr>
<tr>
<td>1996</td>
<td>17 465</td>
<td>45,4 %</td>
<td>22 403</td>
</tr>
<tr>
<td>1997</td>
<td>21 416</td>
<td>45,0 %</td>
<td>24 167</td>
</tr>
<tr>
<td>1998</td>
<td>22 375</td>
<td>40,0 %</td>
<td>22 405</td>
</tr>
<tr>
<td>1999</td>
<td>30 907</td>
<td>24,0 %</td>
<td>24 151</td>
</tr>
<tr>
<td>2000</td>
<td>30 475</td>
<td>31,0 %</td>
<td>20 278</td>
</tr>
<tr>
<td>2001</td>
<td>47 291</td>
<td>40,1 %</td>
<td>40 779</td>
</tr>
<tr>
<td>2002</td>
<td>51 087</td>
<td>46,3 %</td>
<td>50 268</td>
</tr>
<tr>
<td>2003</td>
<td>52 264</td>
<td>40 %</td>
<td>66 344</td>
</tr>
</tbody>
</table>

2- Principales nationalités de demandeurs d’asile en France en 2003

<table>
<thead>
<tr>
<th>Nationalité</th>
<th>Demandes</th>
<th>OEFPRA</th>
<th>OEFPRA + CRR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turquie</td>
<td>6 076</td>
<td>9 268</td>
<td>489</td>
</tr>
<tr>
<td>Chine</td>
<td>5 294</td>
<td>3 450</td>
<td>31</td>
</tr>
<tr>
<td>RDC</td>
<td>4 407</td>
<td>8 160</td>
<td>845</td>
</tr>
<tr>
<td>Mauritanie</td>
<td>2 324</td>
<td>4 579</td>
<td>506</td>
</tr>
<tr>
<td>Algérie</td>
<td>2 431</td>
<td>2 830</td>
<td>115</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>1 967</td>
<td>2 193</td>
<td>303</td>
</tr>
<tr>
<td>Russie</td>
<td>2 147</td>
<td>2 276</td>
<td>828</td>
</tr>
<tr>
<td>Congo</td>
<td>1 762</td>
<td>3 373</td>
<td>382</td>
</tr>
</tbody>
</table>

3- Les réfugiés dans le monde

<table>
<thead>
<tr>
<th>Pays d’asile</th>
<th>Réfugiés</th>
<th>Demandeurs d’asile</th>
<th>Réfugiés rapatriés</th>
<th>Déplacés</th>
<th>Apartheid et divers</th>
<th>Population relevant du HCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ase</td>
<td>9 671 000</td>
<td>995 100</td>
<td>1 094 700</td>
<td>4 180 900</td>
<td>1 145 800</td>
<td>17 093 400</td>
</tr>
<tr>
<td>Afrique</td>
<td>3 137 000</td>
<td>166 100</td>
<td>345 100</td>
<td>571 600</td>
<td>65 500</td>
<td>2 269 600</td>
</tr>
<tr>
<td>Europe</td>
<td>2 307 100</td>
<td>392 100</td>
<td>35 600</td>
<td>584 900</td>
<td>674 300</td>
<td>4 258 100</td>
</tr>
<tr>
<td>Amérique du Nord</td>
<td>583 600</td>
<td>376 400</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>962 000</td>
</tr>
<tr>
<td>A. Latine, Caraïbes</td>
<td>20 000</td>
<td>7 200</td>
<td>300</td>
<td>1 244 100</td>
<td>26 500</td>
<td>1 316 400</td>
</tr>
<tr>
<td>Océanie</td>
<td>40 000</td>
<td>4 000</td>
<td>---</td>
<td>---</td>
<td>400</td>
<td>74 100</td>
</tr>
</tbody>
</table>

Source : Guide de l’Asile en France 2004, AISF.

Annexe II : Reconnaissance du statut de réfugié en France.
### RECONNAISSANCES DU STATUT DE RÉFUGIÉ 2003
**SELON LE MOTIF**

<table>
<thead>
<tr>
<th></th>
<th>nombre</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>O.F.P.R.A.</strong></td>
<td>6 526</td>
<td>67%</td>
</tr>
<tr>
<td>dont Accords demandeurs &quot;primo-entrants&quot;</td>
<td>5 796</td>
<td>59,2%</td>
</tr>
<tr>
<td>dont Art. 1A2 Convention de Genève</td>
<td>5 729</td>
<td>58,5%</td>
</tr>
<tr>
<td>Convention de New York (Apatrides)</td>
<td>53</td>
<td>0,5%</td>
</tr>
<tr>
<td>Mandat HCR</td>
<td>10</td>
<td>0,1%</td>
</tr>
<tr>
<td>Action en faveur de la liberté</td>
<td>4</td>
<td>0,04%</td>
</tr>
<tr>
<td><strong>Accords &quot;Unité de famille&quot;</strong></td>
<td>674</td>
<td>6,9%</td>
</tr>
<tr>
<td>dont enfant</td>
<td>228</td>
<td>2,3%</td>
</tr>
<tr>
<td>conjoint</td>
<td>418</td>
<td>4,3%</td>
</tr>
<tr>
<td>tutelle</td>
<td>28</td>
<td>0,3%</td>
</tr>
<tr>
<td><strong>Transferts vers la France</strong></td>
<td>36</td>
<td>0,4%</td>
</tr>
<tr>
<td>motif manquant</td>
<td>20</td>
<td>0,2%</td>
</tr>
</tbody>
</table>

| **C.R.R. - Accords suite annulation** | 3 264 | 33%|

| **TOTAL RECONNAISSANCES** | 9 790 | 100%|

---

**Reconnaissances globales - 2003**

- **Accords "primo-entrants"** 45,1%
- **Unités de famille** 23,1%
- **Autres** 0,7%
- **Annulations** 31,1%

*Source : Rapport d’activité 2003, OFPRA.*

---

**Annexe III : Décisions réexamens par nationalité (OFPRA).**
### DEMANDES D'ASILE, RÉEXAMENS ET DÉCISIONS PRISES PAR NATIONALITÉ

<table>
<thead>
<tr>
<th>CONTINENT</th>
<th>total demandes hors mineurs A</th>
<th>dont lées demandes</th>
<th>dont réex</th>
<th>demandes mineurs A</th>
<th>total général</th>
<th>décisions OFPRA (hors mineurs A)</th>
<th>admission globale (hors mineurs A)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>total</td>
<td>CR</td>
<td>RJ</td>
<td>% accord</td>
<td>CR suite AN</td>
<td>total CR</td>
<td>% CRT</td>
</tr>
<tr>
<td>Europe</td>
<td>18 861</td>
<td>22 882</td>
<td>2 475</td>
<td>10,8%</td>
<td>1 481</td>
<td>3 954</td>
<td>17,3%</td>
</tr>
<tr>
<td>Asie</td>
<td>11 998</td>
<td>8 956</td>
<td>561</td>
<td>6,3%</td>
<td>542</td>
<td>1 103</td>
<td>12,3%</td>
</tr>
<tr>
<td>Afrique</td>
<td>21 513</td>
<td>32 536</td>
<td>3 212</td>
<td>9,9%</td>
<td>1 102</td>
<td>4 314</td>
<td>13,3%</td>
</tr>
<tr>
<td>Amériques</td>
<td>1 920</td>
<td>1 889</td>
<td>227</td>
<td>12,2%</td>
<td>139</td>
<td>366</td>
<td>19,7%</td>
</tr>
<tr>
<td>section Apatrides</td>
<td>137</td>
<td>111</td>
<td>53</td>
<td>47,7%</td>
<td>53</td>
<td>47,7%</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>54 429</td>
<td>66 344</td>
<td>6 526</td>
<td>9,8%</td>
<td>3 264</td>
<td>9 790</td>
<td>14,8%</td>
</tr>
</tbody>
</table>

mineurs A = mineurs accompagnants | CR = accord ; RJ = rejet ; AN = annulation C.P.R. | 'tmt' accord OFPRA % = CR / total décisions OFPRA (CR + RJ) % | % CRT = 'tmt' global admission % = CR+AN / total décisions OFPRA (CR + RJ) %
### Country Report France

<table>
<thead>
<tr>
<th>Requests presented</th>
<th>Total number of requests presented by France to other Dublin States</th>
<th>Total number of requests addressed to France by other Dublin States</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of requests in total number of applications</td>
<td>1.3%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Requests accepted</td>
<td>359</td>
<td>1149</td>
</tr>
<tr>
<td>% of requests accepted in requests presented</td>
<td>52.4%</td>
<td>61.7%</td>
</tr>
<tr>
<td>Requests refused</td>
<td>163</td>
<td>617</td>
</tr>
<tr>
<td>% of requests refused in requests presented</td>
<td>23.8%</td>
<td>33.2%</td>
</tr>
<tr>
<td>Requests pending</td>
<td>180</td>
<td>17</td>
</tr>
<tr>
<td>% of requests pending in requests presented</td>
<td>26.3%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Number of asylum seekers returned</td>
<td>111</td>
<td>468</td>
</tr>
<tr>
<td>% of asylum seekers returned</td>
<td>14.5%</td>
<td>40.7%</td>
</tr>
</tbody>
</table>

*Source: Ministère de l’Intérieur (ECRE, Rapports nationaux - France, 2003)*
- CHAPTER VI -

COUNTRY REPORT GERMANY

by
Prof. Dr. Kay Hailbronner,
LL.M (Montreal),
University of Konstanz
1. Statistics

The Aliens Central Registry, in which all foreigners are registered relating their residence title and some personal data including a duty to leave Germany, has registered by 31 December 2004 a number of 371,074 foreigners obliged to leave Germany. 168,145 were subject to expulsion or deportation and 202,929 received a toleration which means that they did not dispose of a residence title but could not be deported temporarily for factual or legal reasons such as illness, resistance to be deported, danger of inhuman treatment or insufficient medical treatment in the country of origin. Compared to the year 2000 the number is considerably lower. By the end of 2000, the Aliens Central Registry had registered 234,682 persons subject to expulsion or deportation while 261,506 were obliged to leave, but were in possession of a toleration.

Not included in the total number of aliens disposing of any valid residence title are “illegal” aliens who are neither registered in the Aliens Registry nor in any other personal registry. It is unknown how many “illegal” aliens are in Germany without being registered. Estimation varies widely, corresponding to the individual perceptions and interests of political groups or organisations active in matters of illegal aliens.

As to the number of deportations the statistics indicate a slight decrease of the number of overall deportations. While in 2002 29,036 persons had been deported either by land or by sea or by air, in 2004 23,334 deportations have been made. The largest number of deportations has taken place by air to countries of origin (26,286), of which 24,550 were to the country of origin. The number corresponds roughly to the numbers in 2004. 21,970 deportations were made by air, of which 19,769 were made to the country of origin. The overall number of deportations between 2002 – 2004...
Country Report Germany

was 78,857. By far the largest number of deportations has taken place to Serbia and Montenegro with 13,878 in 2002-2004, followed by Turkey (12,501), the Philippines (5,663), Rumania (3,811) and Bulgaria (4,340).

33,381 voluntary returns were registered during that time (the largest group returning voluntarily to Serbia and Montenegro (14, 510 in 2002–2004).

Considering the number of persons, not disposing of any valid residence title and therefore obliged to leave, the number of voluntary and involuntary returns appears rather modest. The reasons why forced return faces substantial difficulties has repeatedly been discussed in Germany on the level of the federal government and the Länder as well. The Länder authorities point to typical difficulties of expulsion which may be summed up by some examples of obstacles. A first obstacle lies in the lack of cooperation of aliens reluctant to return to their home country. Relevant reports point to the following patterns of behaviour:

- destruction or hiding of documents,
- covering up illegally,
- church asylum, i.e. hiding with ecclesiastic entities in order to be spared from expulsion,
- issuing of incorrect statements with respect to citizenship such as to hide their true nationality,
- refusing to cooperate with public authorities with regard to identification or obtaining of documents,
- resisting against identification by, or obtaining of documents from diplomatic or consular missions of (alleged) home countries,
- claiming reasons jeopardizing legality of removal right before the implementation of return orders,
- committing self-injury or threatening of suicide, and
- continuous misbehaviour on the way to the aircraft such as to provoke a rejection of transport by the pilot.

408
The second category of factual obstacles to expulsion relate to difficulties in cooperating with certain countries. Such difficulties comprise that:

- applications for travel documents filed with consular or diplomatic missions are slowly processed,
- consular or diplomatic missions require presentation of documents in spite of establishment of citizenship,
- in certain countries establishing identities may take several years,
- consular or diplomatic missions refuse the production of their (alleged) nationals or impose significant fees,
- certain countries make establishment of citizenship dependent on a positive statement of the individual concerned or testimony of several persons living within their shores,
- certain countries refuse issuance of travel documents unless the individual concerned is prepared to return voluntarily,
- certain countries refuse to recognize temporary papers of identification they have issued at an earlier stage of the proceedings, and
- border officials and other security personnel of certain countries refuse cooperation with official of Germany’s Federal Border Police entrusted with the task of implementing removal orders.
2. Legal Situation

2.1 General Principles

With the entry into force of the Immigration Act of 30 July 2004 the law relevant to return and repatriation has not changed substantially. In the area of granting a humanitarian residence permit for persons who do not dispose of a valid residence title, there have been some changes by new provisions which make it possible to grant a residence permit now in cases in which under the Aliens Act of 1990 persons could not be granted a residence title. Similarly to the previous legislation under Sec. 22, foreigners may be granted a residence permit on humanitarian grounds, if the Federal Office for Migration and Refugees has incontestably established that the conditions for a barrier to deportation are met. This provision means substantial change in the legal status of persons who previously received only a toleration. Under the new Immigration Act they will receive a residence permit even if the reasons for leaving Germany are based upon factual conditions like the absence of valid documents for travel or the refusal of a country of origin to take back its own nationals. Sec. 25 makes an exception, however, if a foreigner

- has repeatedly or grossly breached duties to cooperate or
- if serious grounds warrant the assumption that the foreigner has committed a crime against peace, a war-crime or a crime against humanity or an offence of considerable severity,
- is guilty of acts contrary to the objectives and principles of the United Nations,
- represents a risk to the general public or a risk to the security of the Federal Republic of Germany.

According to Sec. 25 para. 4 of the Residence Act 2004 a foreigner may also be granted a residence permit for a temporary stay if his/her continued presence in the
federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests. A residence permit may be extended if departure from the federal territory would constitute exceptional hardship for the foreigner due to special circumstances pertaining to the individual case concerned.

Finally, in derogation from the general principles on issuing a residence permit, even foreigners subject to expulsion or deportation may be granted a residence permit, if his/her departure is impossible in fact or in law, and the obstacle to deportation is not likely to be removed in the foreseeable future. The residence permit should be issued if deportation has been suspended for 18 months. A residence permit, however, may only be granted if the foreigner is prevented from leaving the federal territory through no fault of his/her own. Fault on the part of the foreigner applies in particular if he/she furnished false information, deceives the authorities with regard to his/her identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure.

A new provision provides for the implementation of the EU Directive 2001/55 on temporary protection. A foreigner who is granted temporary protection on the basis of a resolution of the Council of the European Union and who declares his/her willingness to be admitted into the federal territory shall be granted a residence permit for the duration of his/her temporary protection.

Finally, a number of cases who had previously been dealt with in the realm of return and repatriation will now be transferred to the area of lawful residence. Under Sec. 23a the Länder are authorised, by way of derogation from the legal conditions for the issuance and extension of residence titles, to issue an “extralegal” residence permit to a foreigner who is unappealably obliged to leave the federal territory. The granting of the residence permit requires a petition from a hardship commission to be established by the Land government. The new procedure does not provide for an individual right. The hardship commission shall take action solely on their own initiative. No third
Country Report Germany

parties can require a hardship commission to take up a specific individual case or making a specific decision.

The Immigration Act does not provide in detail for the conditions on granting a residence in cases of hardship. Sec. 23a of the Residence Act provides only as a condition for granting a hardship residence that the foreigner is unappealably obliged to leave the federal territory and that a hardship commission which has been established by the Land government has made a recommendation to grant a residence permit. It is within the responsibility of the Länder governments to follow this recommendation and to grant a residence permit. Sec. 23a provides that the decision may be made “with due consideration as to whether the foreigner’s subsistence is assured or a declaration of commitment by third persons to pay for the foreigner’s subsistence is submitted”. A case of hardship will in general not be considered if the foreigner has committed an offence of considerable severity. The authority to grant a residence permit represents the public interest only and does not constitute any rights on the part of the foreigner.

It is exclusively within the discretion of the Länder government to establish a hardship commission in accordance with this provision by virtue of a statutory instrument. The Länder are also authorised to specify the procedure, provide for grounds for exclusion and qualified requirements pertaining to the declaration of commitment, including conditions to be met by the party submitting such a declaration. The hardship commission shall take actions solely on their own initiative. No third parties can require a hardship commission to take up a specific individual case or to make a specific decision. A hardship commission may only decide to file a hardship petition after establishing that urgent humanitarian or personal grounds justify the foreigner’s continued presence in the federal territory.

If a foreigner, who is dependent on social welfare and who has been issued a residence permit under this provision, relocates to the area of responsibility of another
institution, the social welfare institution in whose area of responsibility a foreigner’s authority has issued the residence permit, shall be required to reimburse the costs accruing to the local social welfare institution which now bears responsibility for the foreigner concerned for a maximum period of three years from the date of issue of the residence permit.

It seems that in the meantime (until May 2005) a majority of Länder have established hardship commissions, consisting mainly of representatives of churches and of ministries as well as of non-governmental organisations, such as refugee organisations. In some Länder the parliamentary petition committees have been established as hardship commissions, which raises constitutional concerns. In general, the establishment of hardship commissions has been welcomed by human rights organisations. However, there has also been some criticism based upon the constitutional principle of democratic responsibility and the rule of law prohibiting that final decisions on return that have been reviewed by administrative courts can now be changed on the basis of recommendations of an external hardship commission, which has no democratic legitimation and which acts without any sufficiently precise statutory requirements of what constitutes an urgent humanitarian or personal ground justifying the departure from the ordinary legal rules on issuing a residence permit.

It seems that the basic reason to establish this “extra-legal” procedure has been a growing dissatisfaction with the somewhat rigid rules of the Aliens Act 1990 concerning the possibility to grant a humanitarian residence permit. The Aliens Act of 1990 as well as the Residence Act of 2004 provide for the possibility to grant a humanitarian residence permit by a general political decision to certain categories of aliens who are unappealably obliged to leave the federal territory. Such regulations have been enacted from 1990 until 2003 in a number of cases, particularly in relation with the admission of a large number of civil war refugees from Bosnia-Herzegovina and from Albania as well as from other countries. However, sometimes persons whose asylum claim has been rejected but who could not be deported due to technical obstacles, like the inability to remove such persons or due to the lack of
documents did not meet the criteria of such general regulations particularly because they were not able to show regular employment or because at the time of applying they were dependent on social welfare. In some cases persons, who had been temporarily admitted on the basis of a toleration during the war in Yugoslavia, had spent ten years or more in Germany. In spite of having raised children in Germany, they were after ten years or more deported to Bosnia-Herzegovina or to other countries, since they did not fall under any of the general hardship regulations allowing for a humanitarian residence permit. The establishment of a hardship commission is destined to make exceptions from the general applicability of the law.

The provisions on termination of stay in chapter 5 of the new Residence Act have not changed the existing law under the Aliens Act 1990 much. A foreigner is required to leave the federal territory if he/she does not possess or no longer possesses a necessary residence title and a right of residence does not exist under any other title like the EEC/Turkey Association Agreement.

A foreigner against whom an unappealable expulsion order exists, shall be obliged to report to the police office which is responsible for his/her place of residence at least once a week, unless the foreign authorities stipulate otherwise. If a foreigner is obliged to leave the federal territory unappealably for reasons other than the grounds for expulsion in the previous case, an obligation to report to the police authorities may by imposed, if necessary in order to avert a danger to public safety and law and order.
2.2 Administrative Procedures of Removal and Deportation

The Residence Act 2004 distinguishes in chapter 5 between provisions terminating the stay of a foreigner and the provisions on enforcement of the obligation to leave the federal territory. While the first part has not changed very much the rules of the Aliens Act 1990 concerning the grounds establishing the obligation to leave the federal territory, there are a number of new legal instruments of enforcing the obligation to leave and to facilitate removal and deportation.

The principle is stated in Sec. 50 whereby a foreigner shall be obliged to leave the federal territory if he/she does not possess or no longer possesses a residence title and a right of residence does not exist under a treaty like the EEC/Turkey Association Agreement. The foreigner is required to leave the territory forthwith, or if a period has been allowed for departure, by the end of this period. There is a maximum period of six months after which the obligation to leave the federal territory becomes unappealable. It may be extended in special cases of hardship. The obligation to leave the federal territory is not fulfilled by entering another Member State of the European Union unless entry and residence in such state is permitted.\textsuperscript{615}

The law provides for a number of restrictions for persons required to leave. Change of address must be notified to the foreigners authority. The passport should be taken into custody until the time of departure. For the purpose of terminating his/her residence a foreigner may be included in police investigative files relating to wanted persons in order to determine his/her whereabouts and to apprehend him/her if his/her whereabouts are not known. A foreigner who has been deported may be reported for the purposes of refusal of entry and for the purpose of his/her apprehension.

\textsuperscript{615} See Sec. 50 para. 4.
Sec. 50 et seq. of the Residence Act provide for the different grounds establishing the obligation to leave. The common grounds – similar to the aliens legislation in other EU Member States – are

- expiry or revocation of a residence permit or a residence title,
- expulsion,
- withdrawal of a residence title,
- permanent absence from the federal territory,
- announcement of a deportation order on the basis of a prognosis in order to avoid a special danger to the security of the Federal Republic of Germany or a terrorist threat.\(^{616}\)

In the case of rejected asylum seekers the obligation to leave in general arises with the unappealable rejection of an asylum claim or in case of accelerated procedures if an application for asylum has been rejected as manifestly unfounded with the administrative decision unless an administrative court has granted suspensive effect to the appeal within a period of seven days.

The Independent Federal Commission in charge of examining the migration policy of Germany in its report\(^{617}\) has noted that there is a significant number of foreigners who are obliged to leave the country and who, although they have been granted a temporary suspension of deportation, actually created the obstacles preventing their removal themselves. Whenever efforts to remove foreigners obliged to leave the country fail, the reasons can be attributed in many cases to the foreigners themselves

---

\(^{616}\) For the latter ability see the new provision in Sec. 58a, which gives the supreme Länder authority the power to issue such a deportation order without prior expulsion. Exceptionally also the Federal Ministry of the Interior may issue a deportation order in deviation from the principle that it is within the responsibility of the Länder to apply the Residence Act.

or to certain countries of origin and transit.  

The report goes on to state that although there are no statistics available on the number of persons who cannot be removed or can only be removed with considerable delay, there is need for a comprehensive policy of return and removal on all state levels. The Commission noted that there are diverging goals and interests of the various ministries (particularly home affairs and foreign policy) which are making it extremely difficult to enhance the practice of returns. They need to be harmonised and coordinated more. It has therefore been recommended that considerations be made to extend a concentration of return and removal tasks at federal level and Land level.

The option of concentrating particular removal tasks on one federal authority should be considered (for instance central service point or other centre of local authorities involved in the task of removal; central contact for non-governmental organisations). At the level of the Länder, specialised central foreigners authorities should be considered for larger Länder to support the local foreigner authorities of some Länder. In addition, the possibility of creating central removing centres with responsibility across the Länder should be examined. At the federal level the Commission recommends to consider whether in addition to centralising passport procurement for certain countries of origin, which has already taken place to a certain extent, further tasks of removal outside this sphere of enforcement should be looked after centrally by a federal authority.

Some of these suggestions have been taken up in new provisions on enforcement of the obligation to leave the federal territory, although the suggestion to defer further responsibility to federal authorities has not found much support. As one of the most prominent innovations one may mention the possibility to make a number of restrictions for persons required to leave, the establishment of departure facilities and the provision of custody awaiting deportation.

---

618 See report at p. 147.
Country Report Germany

The general rule is laid down in Sec. 58 of the Residence Act. A foreigner shall be deported if the obligation to leave the federal territory is unappealable and voluntary fulfilment of the obligation to leave is not assured or supervision of departure appears necessary on grounds of public security and law and order. The obligation to leave the federal territory shall be unappealable if the foreigner

- has entered the federal territory unlawfully,
- has not applied for initial granting of a residence title,
- becomes obliged to leave the federal territory by virtue of a ruling on his/her return by another Member State of the European Union pursuant to the Council Directive 2001/40 of 28 May 2001 regarding the mutual recognition of rulings on the return of third state nationals provided, however, that the ruling concerned is recognised by the competent authority and provided further that no period has been allowed for departure or a granted period has expired.

Special rules apply in case of foreigners who have entered the federal territory unlawfully. They may be removed within six months of crossing the border without any further requirements. The authorities, however, before removing an illegally staying foreigner must examine whether a deportation ban applies, for instance due to the application of non-refoulement principles.

As a rule, before an alien can be deported, a deportation warning is required by way of a notice of intention to deport. This notice must be served in writing, specifying a period allowed for departure. The notice of intention to deport should also specify the state to which the foreigner is to be deported and inform the foreigner that he/she could also be deported to another state which he/she is permitted to enter or which is obliged to admit him/her. Under German law only the deportation warning is the act which can be appealed. When the notice of intention has become unappealable, the foreigners authority shall, for the purpose of further decisions on deportation or the suspension of deportation, ignore any circumstances which represent an obstacle to deportation to the state specified in the notice of intention to deport. Any other cir-
cumstances cited by the foreigner which represent an obstacle to deportation or to deportation to this specified state may be ignored.

Since the law, however, cannot exclude completely the claim of legal obstacles to deportation in such cases, the Residence Act provides that a foreigner under these circumstances may put forward his objection through a court of law by means of legal action or a temporary relief procedure pursuant to the Administrative Procedure Code. It follows that the examination of such deportation barriers is examined by the administrative court.

German law does not provide for an additional deportation order. If the notice of intention to deport becomes unappealable, the administrative authorities are in principle authorised to execute a deportation without any additional formal order. A separate deportation order is only exceptionally made under Sec. 58a in the case of a foreigner in order to avert a danger to the security of the Federal Republic of Germany by the supreme Land authority or the Federal Ministry of the Interior.

2.3 Legal Barriers to Return

Sec. 60 of the Residence Act points out the obstacles prohibiting deportation. The law distinguishes between obligatory obstacles to deportation, “half-obligatory” obstacles and discretionary obstacles to deportation. Among the obligatory obstacles there are

- political persecution in the sense of the Geneva Convention, basically in accordance with the Qualification Directive,
- danger of torture,
- danger of death penalty,
- a formal request for extradition or a request for arrest,
Among the quasi-obligatory deportation barriers the law mentions a substantial concrete danger to his/her life and liberty (“a foreigner should not be deported”). Dangers in the state to the population or the segment of the population to which the foreigner belongs, however, are only recognised if for reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority orders a general suspension of deportation of foreigners from specific states or of categories of foreigners. Among the discretionary obstacles to deportation rank the provisions on a humanitarian residence permit laid down in Sec. 25. By way of derogation from the regular provisions a foreigner, who is subject to a final deportation order, therefore, may be granted a residence permit if his/her departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future. The residence permit should be issued if deportation has been suspended for 18 months. A residence permit may only be granted if the foreigner is prevented from leaving the federal territory through no fault of his/her own.

The competence for examining obligatory legal obstacles to deportation is divided between the Federal Office for Refugees and Migration and the Länder authorities. In principle, the obligatory obstacles of political persecution and non-refoulement under Art. 3 ECHR are within the exclusive competence of the Federal Office, if an asylum application is filed with the Office. If an applicant, however, does not file an asylum application, but relies for instance exclusively on Art. 3 ECHR, it is within the competence of the Länder to decide about a humanitarian residence permit or, as the case may be, about the existence of a deportation ban in the context of the review of the legality of a deportation warning.

\[619\] See Sec. 60a of the Residence Act.
However, according to Sec. 59 para. 3 the existence of deportation bans as such shall not preclude the issuance of the notice of intention to deport. This provision which may not be very easy to understand is based on the assumption that there may be other states to which a foreigner required to leave may be deported. Therefore, a notice of intention to deport can even be issued if there is a deportation ban with relation to a particular state. The state to which a foreigner cannot be deported is to be specified in the notice of intention to deport. This decision is subject to judicial review. An administrative court has to establish whether there is a deportation ban.

The exclusive competence for legal obstacles under the European Convention on Human Rights arising from the non-refoulement principle of Art. 3 ECHR is granted to the Federal Office only if the reasons for the legal obstacle are based on the country of destination. This means that in case of serious illness, the Länder authorities are competent if deportation would result in inhuman treatment if the basis of the deportation barrier lies in the inability to be returned (for instance for technical reasons or temporary illness) rather than in the situation of the country of origin. It follows according to the Federal Administrative Court that the exclusive competence of the Bundesamt refers only to legal or factual barriers relating to a particular destination country. This means that a rejected asylum seeker subsequent to an unsuccessful asylum application may apply to the alien authorities for toleration or a humanitarian residence permit based upon reasons which are not related to the circumstances in the country to which an asylum seeker is to be returned.

It has become somewhat difficult in the judicial practice to decide whether in an individual case the Federal Office is competent to decide exclusively upon an application for toleration or whether the alien authorities are competent. The basic reason for this distinction has been the argument that according to the law the administrative authorities, closer to the individual case, should decide whether there are barriers which might prevent deportation in an individual case, while it is up to the Federal

Office for the Recognition of Refugees to decide upon the general conditions in the home country preventing deportation. In practice, however, the distinction raises difficult questions. In cases of illness the issue whether a person may receive adequate medical care in the country of origin is decided by the Federal Office while the question if a person may be transported back to his/her home country due to illness will be decided by the alien authorities. Further, the issue of whether there is a danger of serious aggravation of the illness of an applicant may be due to the situation in the home country (in which case the Federal Office is competent) or to the constitution of the applicant or the process of a deportation (in which case the alien authorities are competent).

Different procedural rules and different appeal rights apply to each procedure. Generally speaking, the Administrative Procedure Act tries to accelerate the asylum proceedings by excluding an internal administrative review procedure and by limiting the number of judicial instances while the judicial procedure in case of applications for a humanitarian residence permit or any other form of subsidiary protection within the competence of the alien authorities is subject to the general rules of the Administrative Court Procedure Act which allow for a full judicial review. In the case of a rejection of an asylum application as manifestly unfounded there is only one judicial review.

As a rule, formal decisions of the Bundesamt on the existence or non-existence of deportation barriers for which the Bundesamt is exclusively competent are binding for alien authorities in subsequent proceedings. The binding nature of negative decisions of the Bundesamt has been criticised with the argument that effective protection of human rights requires that the alien authorities should be able to decide at any


stage of the procedure whether non-refoulement prohibitions are applicable. In the jurisprudence, however, it has been recognised that alien authorities are also bound by a decision of the Bundesamt that no reasons precluding deportation exist. The binding nature of negative as well as positive decisions can also be based upon the legislative history attributing particular expertise to the Bundesamt to evaluate the political conditions in far-distant countries as one of the major reasons to transfer exclusive competence for asylum and asylum-related claims from the alien authorities to the Bundesamt.

It follows from the binding nature of the decisions of the Bundesamt on the existence of reasons precluding deportation that in the case of subsequent applications under Sec. 53 an applicant may file an application only for reconsideration based upon the general provisions of the Administrative Procedure Act. As a rule, such claims will be covered by a follow-up asylum application with the Bundesamt. The Bundesamt has to reconsider the case of an asylum seeker if there are new facts or legal reasons or new evidence capable of justifying a more favourable decision for the asylum seeker. Supported by the literature there has, however, been in the jurisprudence a trend to oblige the Bundesamt to examine an application for reasons justifying a suspension of deportation based upon the European Convention for Human Rights even in the absence of new evidence with the argument that prohibition of non-refoulement is of an absolute character. Similarly, the Federal Administrative Court in a decision of March 21, 2000 has stated that even in the absence of a legal obligation under the Administrative Procedure Act to reconsider a negative asylum

---

624 See Stumpe, op. cit., Sec. 31 APA, at No. 42.
625 See Sec. 51 VwVfG.
627 See Stumpe, op. cit., Sec. 31 APA, at No. 43.
628 NVwZ 2000, 940.
decision the discretion whether to reconsider the decision, in the case of a concrete
danger to life or liberty, may turn into an obligation. 629

As to the procedure before the alien authorities, there are no particular rules other
than the general rules on administrative procedure. The alien authorities will usually
take into account previous asylum proceedings or proceedings before other authorities
relating to a residence permit or suspension of deportation. There are no particular
rules on the binding nature of previous decisions of administrative authorities
except for the decision of the Bundesamt. Nevertheless, according to general principles on preclusion on subsequent applications a refusal to grant a humanitarian resi-
dence title or suspension of deportation may be repealed only, if there are new facts,
new legal provisions or new legal evidence.

In the administrative practice it is not uncommon that alien authorities are facing a
multitude of administrative as well as judicial proceedings following a final determi-
nation of a (first) asylum claim. Rejected asylum seekers may file a second, third or
fourth follow-up asylum procedure simultaneously or successively with applications
for humanitarian residence permit and/or toleration based upon non country of origin
related barriers for deportation such as disruption of family relations deserving con-
stitutional protection under Art. 6 of the Basic Law and Art. 8 ECHR, illness, imposs-
sibility to travel, lack of travel documents etc. Due to the difficulties in drawing a
sharp distinction between the exclusive competence of the Bundesamt to decide on
asylum-related protection claims and the competence of the alien authorities to de-
cide on non-asylum related claims for a residence permit or subsidiary protection,
simultaneous proceedings at the administrative and/or judicial level are fairly com-
mon. This may be one of the reasons why the acceleration of the asylum procedure in
itself does not necessarily result in a higher efficiency of administrative proceedings
to terminate the residence of rejected asylum seekers. Although applications for a

629 See also Administrative Appeal Court of Lower Saxony of 28.1.1999; see also
Goebel/Zimmermann, Asyl- und Flüchtlingsrecht, at No. 539.
humanitarian residence permit or toleration as such do not have any suspensive effect, administrative courts will usually grant interim judicial protection until alien authorities or the administrative court have decided upon an application on suspension of deportation.

### 3. Judicial Appeal Procedures

A rejection of an asylum application or an application for international protection under subsidiary protection grounds is usually connected with a notice of intention to deport. The decision of the Federal Office can be appealed before the administrative courts. No administrative appeal procedure, however, applies. The Administrative Procedure Act distinguishes between simply unfounded applications and manifestly unfounded applications. If the judicial appeal is unsuccessful the regular time limit for leaving the country is one month. Action with suspensive effect may be brought within a period of two weeks after the decision has been served.

In case of a successive application for a humanitarian residence permit or a toleration or suspension of deportation a judicial appeal against the negative decisions of the alien authorities of the Länder (including administrative appeal) may be filed with the competent administrative court.

The appeal does not have suspensive effect. The administrative court, however, may grant an interim order providing for a suspension of deportation until the administrative court has decided whether the administrative authorities are entitled to refuse the application for a residence permit. Such interim orders are frequently granted, based upon a balance of interests between the private interest to remain in the country until an applicant’s request has been finally determined upon, and the public interest to
terminate an alien’s residence. Administrative courts will regard as decisive criteria a preliminary assessment of the chance of an applicant to succeed with his/her claim.

4. Facilitation of Enforcement of Removal Decisions

The Residence Act 2004 has introduced a number of new provisions intended to facilitate the removal of persons unappealably obliged to leave the federal territory. According to Sec. 61 the stay of a foreigner unappealably obliged to leave shall be restricted to the territory of the Land concerned. Further conditions and requirements may be imposed. In addition, the Länder may establish departure facilities for foreigners who are unappealably obliged to leave the federal territory. The purpose of departure facilities is to enhance the willingness to leave the federal territory voluntarily and to provide support for return. In addition, accessibility for authorities and courts and implementation of a departure procedure shall be ensured. Departure facilities are intended as open institutions of returnees who provide no or insufficient data concerning the identity and/or nationality and/or refuse cooperation the procurement of travel documents. The idea is to enable an intensive psychological and social care directed towards the adjustment to the living conditions in the country of destination. The Administrative Guidelines provide that the particular concerns of women, children as well as juveniles and traumatised persons have to be taken into account.630

The larger Länder seem to have made use of these possibilities. In Baden-Württemberg, for instance, competences for processing and implementation of expulsions are assigned to four higher administrative districts. Each of these districts established asylum units which are exclusively competent to care for obtaining passports for nationals of certain countries. Any relevant measure such as to ensure identification including the country of origin and nationality and measure aimed at seiz-
ing documents which are necessary to possibly terminate residence shall be taken at the earliest possible stage of asylum proceedings.

If accommodation in a departure facility does not appear as a promising alternative, a foreigner can be placed in custody. Under Sec. 62 of the Residence Act a foreigner shall be placed in custody by judicial order to enable the preparation of deportation if a decision on deportation cannot be reached immediately and deportation would be complicated substantially or frustrated without such detainment. The duration of custody to prepare deportation should not exceed six weeks. In case of expulsion, no new judicial order shall be required for the continuation of custody up to the expiry of the order term of custody.

The Residence Act provides for a number of conditions for the judicial order for the purpose of safeguarding deportation (detention pending deportation) if

- the foreigner is unappealably obliged to leave the federal territory on account of his/her having entered the territory unlawfully,
- a deportation order has been issued according to Sec. 58a (terrorist threat) but is not immediately enforceable,
- the period allowed for departure has expired and the foreigner has changed his place of residence without notifying the competent authority,
- he/she has failed to appear at the location stipulated by the foreigners authority on a date fixed for deportation for reasons for which he/she is responsible,
- he/she has evaded deportation by any other means or
- a well-founded suspicion exists that he/she intends to evade deportation.

---

630 See Sec. 61.2.2 of the Provisional Administrative Guidelines of the Federal Ministry of the Interior of 22 December 2004.
Country Report Germany

In general detention pending deportation lasts two weeks if the period allowed for deportation has expired and it has been established that deportation can be enforced. By way of exception the order for detention pending deportation may be waived if the foreigner credibly asserts that he/she does not intend to evade deportation. Detention pending deportation shall not be permissible if it is established that it will not be possible to carry out deportation within the next three months for reasons for which the foreigner is not responsible.

Finally, detention pending deportation may be ordered for up to six months; in cases in which the foreigner frustrates his/her deportation it may be extended by a maximum of 12 months. A period of custody to prepare deportation shall count towards the overall duration of detention pending deportation.

There is a relatively large number of judicial orders on deportation, as the number of court cases indicates. The civil courts which are competent to control the legality of detention orders have usually applied relatively strict standards as to the proportionality of detention. Human rights organisations criticise generally that the possibility of detention is used too frequently and that persons detained are not sufficiently separated from persons detained for reasons of a criminal procedure.

5. The General Policy Debate on Return and Removal

As in most other EU Member States Germany is trying to pursue a stricter policy of removal and return. Stronger efforts are undertaken in order to promote voluntary return. Therefore, a number of programmes have been undertaken to organise government-assisted return programmes. Most recent statistics available on voluntary return indicate that from 2002 – 2004 on the whole 33 381 persons have voluntarily returned, among them 1 302 persons from Bosnia-Herzegovina, 1 401 from Bulgaria
and 1 117 from Iraq and 1 153 from Iran, to mention the largest countries. In addition, by a special programme 14 510 persons from Serbia-Montenegro have returned and 2 217 persons from Turkey.

It is recognised that return must meet various requirements whose necessary degree of interplay local foreigners authorities cannot achieve. Therefore, return should include counselling adapted to the foreigners individual needs. The Independent Migration Commission 2000 has noted that the offer of support for economic and vocational reintegration should be incentive enough to leave Germany on the one hand, but must not, for instance, act as an incentive for renewed immigration to Germany.

The Independent Migration Commission also advises to use the specific knowledge of private and non-governmental organisations involved in the area. Repatriation aids are considered as promising if they are integrated into repatriation projects that specific target groups which cannot be organised or financed by individual repatriation authorities. The Commission notes that it is important to have a defined wealth of experience and a constantly up-dated overview and documentation of all the repatriation aids and cooperation possibilities which are available, if necessary also beyond national boundaries. This can be achieved by conducting regular analysis of weak spots. According to the Commission, no such conceptual, controlled and early promotion of return takes place in Germany. If it does, it only takes place in isolated cases. It is noted that the federal government and the Länder have adopted different return policies. They participate in different ways, for instance, in the re-integration and emigration programme for asylum seekers in Germany and government-assisted repatriation programme, that is implemented by the IOM in Germany. This is, where the Commission is convinced that more intense coordination and concentration are indispensable. Public awareness of voluntary return must be greatly increased and promoting it must be recognised even more as a task for the entire state. The Commission has recommended centralised advice and care facilities as an option to enhance the practice of promoting repatriation of foreigners who are obliged but not willing to leave the country are housed in open facilities, if they agree to be accom-
Country Report Germany

modated there. It is assumed that counselling adjusted specifically to their individual situation might induce them to leave the country voluntarily.

There is a number of projects and attempts to better organise repatriation by an integrated concept. The Land of Rhineland-Palatinate has undertaken a pilot project called “accommodating foreigners in the Land who are obliged to leave the country”. The idea is to find sufficient starting points to provide promising advice at the Land’s housing facilities. The findings gained in this project were to be used nation-wide. It is not altogether clear, however, to what extent the establishment of departure facilities contributed to a substantial facilitation of voluntary returns.

Another deficit is noted by the Commission with respect to insufficient knowledge. It is recommended that the consular representations abroad should be obliged to record the decisions concerning visa applications. This recommendation has now been implemented by the establishment of a visa data system which provides the personal data of the applicant and the duration of the visa granted.

Finally, a number of proposals have been made concerning the overcoming of factual removal barriers. One possibility may be to set up central authorities specialised in the return/removal of foreigners of certain countries of origin. They may render mutual assistance to the local foreigners authorities when returning foreigners to these countries of origin. The Federal Commission has noted that the policies to overcome such barriers are diverse within Germany. Therefore, they should be harmonised and coordinated more.⁶³¹

⁶³¹ See Report by the Independent Commission on Migration to Germany, p. 146 et seq.
- CHAPTER VII -
COUNTRY REPORT HUNGARY

by

Boldizsár Nagy

Budapest
Introduction, perimeters

This report contains seven subchapters. The first gives the basic data and refers to the annex where further tables are to be found and reviews the development of the law. The second discusses the recent regularization, which took place in 2004, after the accession to the European Union, the third glances at the legal norms regulating return, repatriation and expulsion. Then a detailed discussion of the interaction of the legal norms and administrative practices follows, capturing the practice. The fifth unit is an excursion into the reception of the EU norms, the sixth deals with the special procedures, while the seventh, last chapter takes up the policy issues and long term plans.

The usual caveats apply: Although the author wished to remain unbiased and control all the information provided to him, errors may have remained in the text, notwithstanding the usual plague of reports: that by the time it is used, the law underlying it may have been changed.

The content of the report is supported by a number of personal interviews which the author conducted to get access to unpublished data and insights. This is the place to express gratitude (in the time order of their contribution) to Ms. Gyuláné Domokos of the Office for Immigration and Nationality of the Ministry of the Interior, head of the Return and Repatriation Unit, Colonel László Balázs, head of the Aliens Police and Minor Offenses Department of the National Border Guards, Judge Anita Nagy
Country Report Hungary

of the Metropolitan Court in Budapest, Barbara Pohárnok and Attila Tari of the Hungarian Helsinki Committee, Monika Lázár from IOM Budapest and Csaba Biró (attorney at law) as well as to those who preferred to remain anonymous for their invaluable help.

I. Statistics and the law

A) Statistics

To evaluate the numbers on return and repatriation one has to establish a framework, by identifying the major migration processes and the primary stock and flow data.

Table 1.1. Flow data on regular migration

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Border crossings</td>
<td>93 809 000</td>
<td>96 829 291</td>
<td>104 656 971</td>
</tr>
<tr>
<td>Short term visa applications</td>
<td>4733</td>
<td>5203</td>
<td>7492</td>
</tr>
<tr>
<td>Visa for stay (3 -12 months) applications</td>
<td>17382</td>
<td>42534</td>
<td>48133</td>
</tr>
<tr>
<td>Applications for residence permit</td>
<td>37151</td>
<td>39564</td>
<td>44532</td>
</tr>
<tr>
<td>Application for permanent immigrant status</td>
<td>4653</td>
<td>7878</td>
<td>9360</td>
</tr>
</tbody>
</table>

Source: Ministry of the Interior: Diverse tables provided to the author (2002: rounded to 1000)
Table 1.2. Stock data on regular migration

Number of holders on 1 January of the given year

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shorter residence permit/visa</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>42 719</td>
<td>40 568</td>
</tr>
<tr>
<td>Long term residence permit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Permanent immigrant status</td>
<td>110 000</td>
<td>116 400</td>
<td>115 888</td>
<td>106 414</td>
<td>113 810</td>
</tr>
</tbody>
</table>


As it can be seen the number of foreigners residing in Hungary (immigrants, according to the UN definition, i.e. staying for more than a year) is fluctuating between 100 000 and 150 000, which is 1-1.5 % of the total population. 632

Table 1.3. Basic data on alien policing

<table>
<thead>
<tr>
<th></th>
<th>Expelled persons</th>
<th>Ban on entry and stay</th>
<th>Deportation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>7722</td>
<td>363</td>
<td>8991</td>
</tr>
<tr>
<td>2002</td>
<td>6095</td>
<td>714</td>
<td>1759</td>
</tr>
<tr>
<td>2003</td>
<td>4829</td>
<td>2901</td>
<td>1605</td>
</tr>
<tr>
<td>2004</td>
<td>4211</td>
<td>3004</td>
<td>965</td>
</tr>
</tbody>
</table>

632 The number of the population peaked in 1981 at 10 million 713 thousands. On 1 January 2005 it was calculated to be 10 Million and 97 thousands which amounts a more than 600 thousand loss, a fraction of which is caused by net emigration.
B) The relevant legislation

In June 2005 the relevant legislation has two major pillars. One is the law relating to the stay of foreigners, the other regulating asylum. The regulation is layered, the relevant Act of Parliament („Gesetz“) is accompanied by a government decree („Regierungsverordnung“), which may be implemented by a decree of the minister. All of them may have been amended - sometimes – substantively, without formally changing their designation. Naturally the Hungarian Constitution forms the basis of both pillars. It contains an article on asylum, and another on the rights of foreigners. On the next page follows a table giving an overview of the evolving codification.

Table 1.4. Table summarizing relevant Hungarian legislation

633 Figures in circulation vary widely. Tamás Wetzel in his PhD thesis (Az idegenrendészeti eljárás, unpublished) has 13987 expulsion for 2001. (For 2002-2004 there is no difference)

634 Article 65 grants asylum to those falling under the Geneva Convention, provided no safe third country or safe country of origin rule can be applied. Article 58 guarantees the right of legally sojourning foreigners to move and settle freely within the country or to leave it, and prescribes that legally sojourning foreigners may only be expelled on the basis of a resolution adopted according to the law.
<table>
<thead>
<tr>
<th></th>
<th>Law relating to foreigners</th>
<th>Law relating to asylum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Act</strong></td>
<td>Government decree</td>
<td>Ministerial decree</td>
</tr>
<tr>
<td>Including amendments by</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Previous</td>
<td>LXXXVI of 1993 64/1994 (IV.30)</td>
<td>9/1994 (IV. 30)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
II. Regularisation and changes in the treatment of illegal migrants including rules on detention and expulsion

A) Regularisation

Hungary has no tradition in regularising illegal/irregular foreigners. (Henceforth I will use illegal as a factual description of those who do not, or no longer have a formal legal entitlement according to the Hungarian law to sojourn/reside on Hungarian territory or who have engaged activities which were not within their entitlement, e.g. took up employment without the appropriate permits. The term will not include asylum seekers, unless otherwise indicated.)

This is not to say that there were none. Quite the contrary, a great number of persons were believed to circumvent the rules on foreigners, especially in the form of overstaying and/or illegally taking up employment. A specific form of „unusual” stay was that of mainly ethnic Hungarians from Romania: using the right to stay for 30 days without a visa they would in fact work in Hungary departing and immediately returning after 30 days, starting a new period\textsuperscript{635}. That has ended, however, in 2004 when the bilateral agreement with Romania was changed to conform with the Schengen rules. Accordingly now the same „guestworkers” can stay 90 continuous days, but then have to leave the country for at least 90 days, as - according to the visa regulation – the visa-free stay can not exceed 90 days within any 180 days period starting with the first entry.\textsuperscript{636}


\textsuperscript{636} See the „Agreement on the Abolition of the Mutual Visa Obligation Concluded by the Government of the Hungarian Republic and the Government of Romania”, 9 April 2003. (It entered into force on 23 October 2003.)
As to the number of those illegally staying and/or working in Hungary, one can only refer to indirect data, like that of the alien policing statistics\(^{637}\) or to reports, according to which controls in Budapest and Pest county (comprising almost one third of Hungary’s population) in 2002 discovered 669 cases of violations of alien’s policing rules.\(^{638}\)

The first formal, „legislative” regularisation\(^{639}\) took place in 2004 May-July, when 90 days were given to illegal foreigners to submit a request for a one year residence permit. The legal basis was Article 145 of Act XXIX of 2004 and its implementing rule, incorporated in Article 127/B of the Government decree 170/2001 (IX.26). The Act amended a great number of acts at the eve of the EU accession\(^{640}\) and one of its „transitory and final closes” described the general regularisation. According to the ministerial justification at the time of presenting the bill to Parliament the motive was to give a chance for legal stay to those who could not acquire documents from the country of origin and to prevent secondary migration into other member States of the EU. The explanatory report also referred to the requirement of family unification.

These were the terms of the act:

---

637 See above Table 1.3 and below, Table 4.3.
639 Informal regularisation by way of ignoring the applicable rule and issuing residence permit to persons without meeting the formal preconditions presumably has occurred before, frequently out of fairness or equity, as in the case of refugees from Yugoslavia, who no longer fell under the protection schemes available for them but did not wish to return to Voivodina, wherefrom they had fled as ethnic Hungarians. The Minister for Interior arranged for their exceptional treatment - not last as a consequence of pressure from a number of human rights NGO-s see: http://www.helsinki.hu/ Open letter to the director of OIN, 28 July 2004 (visited: 11 July 2005) The largest state endorsed „exception” related to the early refugees from Romania in 1988-1989. Tens of thousands were granted residence permit without ever having met the formal requirements.
640 It was published on 28 April 2004, two days before the accession took effect.
The applicant ought to have arrived in Hungary before 1 May 2003 – i.e. must have been in the country for a year –, had to prove her/his identity and had to belong to one of the four groups entitled to r eguralisation:

a) live in family household with Hungarian national or legally resident foreign spouse or with Hungarian national child of whom (s)he has parental custody;

b) as the owner or managing director of a company pursue income generating activity;

c) be “capable to run her/his life in Hungarian language and her/his further stay is justified by her/his cultural attachment to Hungary”;

d) her/his expulsion could not be implemented for reasons of Article 43 of the AESF, which incorporates the prohibition of returning someone to a country threatening with exposure to persecution for Geneva Convention grounds or torture, inhuman or degrading treatment or death penalty.

Excluded were from the regularisation those who did not fall under the above categories and those, who would fit into them but were in aliens police detention, were serving prison sentence, were under a criminal charge or investigation or had been sentenced beforehand for an intentional crime.

In case of the first three categories (essentially: family links, business, ethnic Hungarians) granting „amnesty” was compulsory if the conditions were met, in case of the other illegal foreigners, it was up to the discretion of the authorities. Those who got the residence permit were entitled to a labour permit irrespective of the labour market situation.

Applications had to be submitted within 90 days from 1 May 2004 and the authority had to decide within another 90 days from the submission. No appeal or review was available.

641 Proving identity could be done by a document issued by a public notary if original documents from the country of origin could not be acquired. However, in that case the applicant had to offer a plausible explanation for this circumstance.

642 Except for those with family links, i.e. subparagraph a)
Altogether 1406 applications have been submitted until the final deadline (30 July 2004). Out of these 334 relied on family reasons, 792 claimed business engagement, 270 cultural attachment and 10 relied on non-refoulement. Several of the requests were of mixed motives. Decisions have not come fast and certainly not within the time limit prescribed. By November 2004, 1128 have been approved, and 233 rejected with all the others pending or terminated.

B) Changes in the treatment of illegal migrants

a) Detention

Rules on detention of illegal migrants have been subject to a lot of criticism. Between 1993 and 1999 November detention of illegal migrants could – in principle – last forever, and indeed there were cases in which a foreigner who has committed no crime, just violated rules on entry and stay was detained for more than two years. The amendment of the 1993 Act in 1999 introduced an absolute limit of 18 months, after which - if expulsion could not be implemented for whatsoever reason – the foreigner had to be released to a community shelter. However, if the person violated to rules of the shelter, or committed another minor offence against the aliens law (like making another effort to cross the border illegally) (s)he could once again be put into detention, again lasting for a maximum of 18 months. The new codification of 2001 has curtailed the detention in two ways and established new forms of it.

The curtailment meant that the maximum period was reduced to 12 months and another clause was introduced according to which detention must terminate if „it becomes obvious that the expulsion can not be implemented“ (Art. 46/8 )643. At the same time the Act added two new forms of detention to the already existing „alien

643 For the sake of simplicity I disregard the hungarian convention on referring to Articles (or sections) and paragraphs of legal acts. The first figure in my code refers to the Article number, the second to the next level and so on exh being separated by a / symbol.
policing detention”. One is called „detention for refusal” can last for a maximum of 30 days, is implemented by the Border Guards and in essence serves the readmission agreements. Those who may be returned or are taken back, with a chance to be returned to their home country (or to a third country) may be detained for a maximum of 30 days. The other new form of detention is called „detention in preparation of expulsion” and is also applicable for a maximum of 30 days when the identity of the foreigner or the legality of her/his stay is „not clarified”. In both „new” detention forms the 30 days is an absolute limit. When it expires the foreigner could be is re-leased (if not returned/removed yet) and sent to a „designated place of stay”, which in practice means community shelters run by the Office of Immigration and Nationality. If conditions of the „aliens policing detention” are met, the foreigner is placed into that. In practice almost exclusively the second option further detention) is applied (unless removal was successful).

All three sorts of detention may only be ordered by the aliens policing authority for five days, after which court review must take place monthly in the first six months and every 90 days thereafter.645

644 Art 46 paragraph 1:

„In order to ensure the implementation of the expulsion order, the regional alien policing authority may place the foreigner in alien policing detention who

a) has been hiding from the authority or has prevented the implementation of the expulsion order in any other way;

b) has refused to depart or there are other good reasons to presume that he would delay or thwart the implementation of the expulsion order;

c) is subject to expulsion and prior to departure has committed a petty offence or criminal act;

d) has severely or repeatedly violated the prescribed rules of behaviour in the place designated for his mandatory stay, has failed to meet the obligation to appear prescribed for him in spite of being called upon to do so and has thereby impeded the alien policing procedure;

e) has been released after a prison sentence levied owing to having committed a deliberate criminal act.”

645 The law as it stands is contradictory, because -probably as a codification mistake – Art 51/A uses different time limits from Art 46/6
b) Privileges of EEA citizens

Changes in the treatment of foreigners who (no longer) have the right to stay also affected citizens of the European Economic Area, who after accession, were granted more beneficial treatment than other foreigners. Voluntary departure must be offered to them before an expulsion order can be adopted. They can not be subjected to „self standing” entry and stay ban (not linked to expulsion), neither can they be refused entry at the border. Their expulsion is limited to most serious cases (release from prison sentence for an intentional crime, terrorism, subversive activity, human smuggling, illness threatening public health).

III. The situation of the rejected applicant and of the person no longer in need of international protection and the legal instruments related to return and repatriation,

A) The situation of the rejected applicant

a) Rejection without any need for protection

i. Procedure – changes in May 2004

The first question is, when an applicant for refugee status qualifies as (finally) rejected. The answer is that according to the prevailing interpretation of Art43/2 of the AESF\(^646\) which speaks of a final and enforceable decision of the refugee authority, the asylum seeker qualifies as applicant until the decision becomes not only final but also enforceable That only occurs if there is no application for judicial review, or that review has been completed by the competent court.

\(^{646}\) When the foreigner is subject to an asylum procedure, the returning, refusal of entry or expulsion can be implemented only pursuant to the final and enforceable resolution of the refugee authority rejecting the application.
As in the case of most applicants there is no other legal ground on the basis of which the person would have a right to stay, cessation of the „applicant” position usually leads to an „illegal foreigner” designation. In fact, in most of the cases that qualification comes first - as the person is caught by the authorities either during an effort to enter or to leave the Hungarian territory illegally, or while staying in the country without proper entitlement. Therefore the refugee status determination procedure in many cases is an „intermezzo” embedded in the aliens police procedure.

Table 3.1. Way of arrival of the asylum seekers

<table>
<thead>
<tr>
<th>Year</th>
<th>Legal</th>
<th>Illegal</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>684</td>
<td>5728</td>
</tr>
<tr>
<td>2003</td>
<td>558</td>
<td>1843</td>
</tr>
<tr>
<td>2004</td>
<td>454</td>
<td>1146</td>
</tr>
</tbody>
</table>

Source: Office of Immigration and Nationality of the Ministry of Interior homepage, visited 20 June 2005

The precise relationship of the two administrative procedures has been the subject of much debate and a sequence of changes in the last decade, especially if one includes the procedure leading to the determination that the person - although not a refugee or temporarily protected person – nevertheless must not be sent back as a consequence of the non-refoulement command, and therefore should gain the status „authorized to stay”.

For the sake of brevity this report limits itself to the prevailing legal and factual situation.
Conveniently one can differentiate between two scenarios of applications for Geneva Convention status. In the first (less frequent) scenario the asylum seeker announces her/his claim to refugee status right at the moment of entry, or while on Hungarian territory. The person voluntarily gets into contact with the Office of Immigration and Nationality of the Ministry of the interior (henceforth: OIN) which is competent for conducting the refugee status determination procedure. In that case the person - if (s)he has no accommodation and means of subsistence – is directed to a refugee reception center where (s)he can stay until the end of the procedure. Freedom of movement is retained, the asylum seeker is not considered to be an illegal foreigner, immediately gets a „certificate entitling for temporary stay” and as soon as technically possible a humanitarian stay permit.

In the second scenario the asylum seeker involuntarily contacts the authorities after being held up or arrested. Whether in the course of illegal entry, during illegal stay or while trying to exit Hungary illegally, (s)he confronts the authorities. The aliens police branch of the OIN or the border guards’ aliens police department will normally initiate an aliens police procedure for violating the rules. During that procedure the foreigner will declare herself/himself an asylum seeker and request the protection by Hungary.

In most of the cases the aliens police authority will order expulsion (exception: if it finds the non-refoulement rule incorporated in Article 43 of AESF applicable⁶⁴⁷). However, the implementation of the expulsion will be suspended as Art 43/2 of the same Act declares that

⁶⁴⁷ „Returning, refusal of entry and expulsion shall not be ordered and shall not be implemented with respect to a country which, with regard to the person concerned, does not qualify as safe country of origin or a safe third country, in particular, where the foreigner would be exposed to persecution owing to reasons of race, religion, national or social affiliation or political views, or to the territory of a state or the border of an area where there is good reason to suppose that the returned, refused or expelled foreigner would be exposed to torture, inhuman or degrading treatment or the death penalty”
‟When the foreigner is subject to an asylum procedure, her/his return, refusal of entry or expulsion can be implemented only pursuant to the final and enforceable resolution of the refugee authority rejecting the application.‟

In practice in both scenarios asylum seekers will not be removed until the final decision.

The refugee status determination procedure has been quite long until 1 May 2004: two administrative levels could be followed by two (non-litigious) court levels. To complicate the issue, until the practical start of the four level court system (July 2003) every asylum seeker had the right to appeal from the Metropolitan Court in Budapest to the Supreme Court. The reason for this was that the first level court to proceed in the case had to be at the appeal court level (at the Metropolitan Court). The Metropolitan Court of Budapest had exclusive competence for all refugee status determination reviews. Between July 2003 and May 2004 the High Court of Budapest replaced the Supreme Court as the second and therefore final instance.

After 1 May 2004 the procedure has become substantively curtailed and changed. Only one (local) administrative level remained and appeal to the court was limited to one court review. The procedure has become litigious and there is a compulsory hearing of the applicant by the only court having competence in refugee matters: the Metropolitan Court of Budapest. Its decision is final.

648 The English terms in the generally used translation of the Hungarian Act may not appear clear to the native reader. In fact „return‟ practically means rejection at the border for lack of means/documents required to entry. „Refusal of entry‟ is the application of readmission agreements, either from Hungary to another country or through Hungary (in transit) or as part of a chain of readmissions.

649 Since then, the four levels are – from the bottom – : local (many) – county (21 of them) – High (5 of them) – Supreme (1)

650 Nevertheless no hearing is required when the applicant disappeared or has submitted a repeated application Art 39/3
The significance of the revamping of the procedure is that before 1 May 2004 the procedure could last for years, and in most of the cases by the time the final rejection of the application was handed down by the Supreme Court (later, between 2003 and 2004: the High Court), the applicant had left the country. Therefore the issue of removal was practically moot.

Under the present rules - and with Eurodac and the Dublin II mechanism in operation - the issue of the removal has been revived.

ii. Follow up in case there is no need for protection

If scenario one (voluntary contact – no illegality of stay during the procedure) materializes, the Metropolitan Court will confirm the finding of the refugee department of the OIN according to which the person is neither a Geneva Convention refugee, nor someone who is protected by the non-refoulement rule as enshrined in Article 43/1 AESF.

Following the decision the refugee department will initiate that the aliens police department proceed.

If the person has another title to stay (like family link or income and residence appropriate for a „normal” residence visa) than the person may apply for a residence visa on the usual aliens’ law grounds. That is rare and typically is based on marriage as no other visa (entitling to stay in Hungary) is issued within Hungary.

Generally the aliens police department will decide that the rejected asylum seeker must leave. The decision may be a resolution that the person is obliged to leave the

651 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316/1 and Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50/1
country or an expulsion order. In the first case the person should leave within thirty
days. (Art 17/4 of the AESF). If an expulsion order is taken then the order will de-
determine whether it is immediately executable and it will in any case set a date
until departure must take place. Immediate executability is not related with the time
allotted for departure but with the fact that a request for review will not have suspen-
sive effect. Nevertheless, if such a request is launched against the immediately ex-
cutable expulsion order, based on the prohibition of refoulement to torture and in-
human or degrading treatment, expulsion is stayed until the applicability of the non-
refoulement rule as enshrined in Art 43/1 of the AESF is „clarified”. (Art 40/2 of the
AESF and Art 50/2 of Government Decree 170/2001 implementing the AESF)

If the second scenario (expulsion already before the start of the refugee status detem-
rination procedure) unfolds - and the implementation of the expulsion order had been
suspended -, then, after the final refusal to recognize the person as in need of interna-
tional protection, the refugee department of the OIN informs the aliens police de-
partment of the same organization that there is no longer any obstacle to the removal
of the person (provided the person is still within sight).

In both scenarios before the actual removal once again the aliens police authority has
to satisfy itself that the removal will not violate the protection offered in Art 43/1 of
the AESF. This is the consequence of Art 43/1 of the Decree implementing the Act

652 The immediate implementation of the resolution on expulsion may be ordered when the foreigner is unable to maintain
himself/herself or does not have adequate conditions of accommodation (AESF Art. 42/2.)

653 As a pure coincidence Art 43 of the AESF and of its implementing decree both deal with non-refoulement, the latter
referring back to the former and setting the details of its implementation.
b) Rejection with the recognition of a duty not to refouler – authorized to stay status 654

There is another possible outcome of either the aliens police or the refugee status determination procedure. Namely either authority may find that

„there is good reason to suppose that the returned, refused or expelled foreigner would be exposed to torture, inhuman or degrading treatment or the death penalty.”

If that is the case a „status”, namely the „authorized to stay” position has to be recognized either by the aliens police or by the refugee status determining authority. As it is clear from the wording of Art 43/1 of the AESF, this is close to the subsidiary protection status envisaged in the so-called qualifications directive of the EU655 but – as it is also clear – is certainly not (yet) a transposition of that.

In our context the „authorized to stay” status is only relevant as the result of the refugee status determination procedure. In that case the authority has a dual finding: it rejects the application for Convention status, but – on its own initiative and fulfilling an obligation imposed on it by law – determines that the rejected applicant nevertheless can not be returned to her/his country of origin or to a third country because of the threat of torture, inhuman or degrading treatment or capital punishment.

654 Until 1 January 2002 the status was regulated in the Asylum Act. Since then it is part of the AESF, see Art 2/1 and 43/1 of the Act and Articles 81-96 of the implementing decree 170/2001.

One can not apply for this „status” as a separate kind of protection. It is for the authorities to pass a finding that removal of the person would violate this - broader – non-refoulement rule.

A person authorized to stay gets a humanitarian stay permit, is entitled to housing (in community shelters) and enjoys the freedom of movement in the country. (S)he is entitled to work, but only with a work permit. However that is automatically issued, without the investigation of the labour market situation if the request for the permit is endorsed by the OIN. The stay permit itself is automatically reviewed after one year. If circumstances no longer justify its application the person becomes subject to the general law on foreigners.

B) Legal instruments related to return and repatriation

Return and repatriation is easiest when there is a readmission agreement in force. Over the last decade Hungary has developed a web of readmission agreements. The following table summarizes the main results as they were valid on 1 June 2005.

<table>
<thead>
<tr>
<th>Neighbours</th>
<th>Austria</th>
<th>Croatia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungarian Act promulgating the treaty</td>
<td>20 April 1995</td>
<td>10 May 2003</td>
</tr>
<tr>
<td>Published treaties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Second generation treaty?</td>
<td>(yes)</td>
<td>yes</td>
</tr>
<tr>
<td>Accompanied by (unpublished) implementing agreement / protocol</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Country</td>
<td>Report Code</td>
<td>Date</td>
</tr>
<tr>
<td>-----------------</td>
<td>-------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Romania</td>
<td>LX of 2002</td>
<td>30 November 2002</td>
</tr>
<tr>
<td>Serbia-Montenegro</td>
<td>XXII of 2003</td>
<td>29 March 2003</td>
</tr>
<tr>
<td>Slovakia</td>
<td>VII of 2004</td>
<td>22 October 2003</td>
</tr>
<tr>
<td>Slovenia</td>
<td>LXXXI of 1999</td>
<td>29 July 1999</td>
</tr>
<tr>
<td>Ukraine</td>
<td>XXIV of 1995</td>
<td>5 June 1994 [sic]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Report Code</th>
<th>Date</th>
<th>Signed</th>
<th>Portugal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benelux</td>
<td>CXXI of 2003</td>
<td>1 December 2003</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>VII of 1996</td>
<td>5 August 1995 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Estonia</td>
<td>XLIV of 2004</td>
<td>7 December 2002 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Germany</td>
<td>LXXVIII of 1999</td>
<td>1 January 1999</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Greece</td>
<td>XX of 2005</td>
<td>1 May 2005</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Italy</td>
<td>LXXIX of 1999</td>
<td>9 April 1999</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Latvia</td>
<td>XXVIII of 2002</td>
<td>4 May 2002</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Poland</td>
<td>IX of 1996</td>
<td>5 August 1995 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Portugal</td>
<td>XXXIII of 2005</td>
<td>22 February 2002 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Report Code</th>
<th>Date</th>
<th>Signed</th>
<th>Portugal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>XCVIII of 2001</td>
<td>27 December 2001</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>LXXVII of 1999</td>
<td>16 July 1999</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Macedonia</td>
<td>CXIII of 2004</td>
<td>13 August 2004</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Moldova</td>
<td>XXIV of 2000</td>
<td>2 January 1998 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Switzerland</td>
<td>IV of 1996</td>
<td>8 July 1995 [sic]</td>
<td>no</td>
<td>yes</td>
</tr>
</tbody>
</table>
Naturally, readmission agreements concluded by the European Union and the clauses in other treaties with the effect of readmission - as in the Partnership Agreement, signed in Cotonou with the ACP states\textsuperscript{656} – also bind Hungary, as their effect has been extended to the new member states\textsuperscript{657}. According to Article 20 of the Community readmission agreement with Albania\textsuperscript{658} the provisions of that agreement

\begin{quote}
„shall take precedence over the provisions of any bilateral agreement or arrangement on the readmission of persons residing without authorisation which have been or may, under Article 19, be concluded between individual Member States and Albania.”
\end{quote}

Similar rules are contained in the agreements for which there is no Hungarian parallel bilateral agreement.\textsuperscript{659}

The actual application of these agreements does not show a great impact and indicates a decreasing trend of their utilisation. According to the homepage of the border guards in 2004 only 1521 persons were returned to another country on the basis of all

\textsuperscript{656} OJ L 317/3 of 15.12.2000, Art. 13

\textsuperscript{657} See Art 6 paragraph (4) of the Act of Accession (OJ L 236/33, of 23.9.2003)

\textsuperscript{658} OJ L 124/22 of 17.5.2005

the agreements, whereas even less, 801 were readmitted to Hungary on their basis. Figures do not seem to be consistent if one compares different sources, but if a consistent comparative basis is chosen - namely the timeline of the Hungarian Statistical Yearbook - then it becomes clear that there is a downward trend since the turn of the millennium.

Table 3.3. Persons returned to another country on the basis of an international treaty:

<table>
<thead>
<tr>
<th>Year</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1452</td>
<td>2316</td>
<td>2621</td>
<td>2622</td>
<td>1600</td>
<td>1721</td>
</tr>
</tbody>
</table>

Source: Statistical Yearbook of Hungary, 2003, Table 30.6 at p. 544

In practical terms the International Organization for Migration’s Budapest office is of help when the actual departure of persons who do not fall under the readmission agreements but volunteer to return (depart) takes place. In their assisted voluntary return programs they assisted the return of the following number of persons, among whom in 2003 groups with more than 10 participants were the following: Chinese (74), Egyptians (13), Mongolians (18) Turkish (30) and Kosovars (28) and in 2004 Chinese (12) Mongolians (33) citizens of Serbia-Montenegro (21) and Turkish (32)

Table 3.4. Assisted voluntary returns from Hungary

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>217</td>
<td>326</td>
<td>337</td>
<td>391</td>
<td>46</td>
<td>281</td>
<td>952</td>
<td>458</td>
<td>236</td>
<td>204</td>
<td>220</td>
<td>154</td>
</tr>
</tbody>
</table>

Source: Communication of IOM Budapest to this author

Country Report Hungary

The basis of the cooperation is the Agreement between the Government of the Republic of Hungary and IOM for co-operation in the field of migration concluded on 18 December 1995, which in its Art 1 (b) envisages that IOM would establish programs in the field of promoting the voluntary return of “rejected asylum seekers and other foreigners who have entered illegally”. IOM has concluded memoranda of understanding on the implementation of the program and set up joint bodies with the Hungarian authorities.

A motivation to depart voluntarily may be derived from Art 32/3 AESF which states that the

“alien policing authority may waive the expulsion of the foreigner or the ordering of the prohibition on entry and stay when the foreigner undertakes to leave the territory of the country voluntarily.”

As the consequence of the expulsion is a 1 to 10 years ban on return and even a ban on entry and stay (without formal expulsion, e.g. when the person is not within the country) may be ordered for a maximum of five years, departing voluntarily is frequently a reasonable option, and certainly it will become even more so, when the measure taken by the Hungarian authorities may lead to an alert in the Schengen Information System and therefore prevent access to the then 27(?) member states of the European Union.

IV. Practice - the interaction of norms and reality

661 Published as „Treaty from the Minister of the Interior,“ 1996/13 Magyar Közlöny, 1996/31, 19 April 1996

a) Disappearance

There is one most important feature of the interaction between law and practice: most of the non-recognized asylum seekers do not become subject to any return – removal measure, because they disappear from sight of the authorities.
Table 4.1. Procedures started, Convention or other status recognized and procedure terminated in Hungary 2000-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>New arrivals</th>
<th>Refugee Determination Procedure Started</th>
<th>Convention Status recognized</th>
<th>Authorized to stay</th>
<th>Rejected</th>
<th>Procedure terminated</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>7801</td>
<td>7801</td>
<td>197</td>
<td>680</td>
<td>2978</td>
<td>4916</td>
</tr>
<tr>
<td>2001</td>
<td>9554</td>
<td>9554</td>
<td>174</td>
<td>297</td>
<td>2995</td>
<td>4565</td>
</tr>
<tr>
<td>2002</td>
<td>6412</td>
<td>6412</td>
<td>104</td>
<td>1304</td>
<td>2578</td>
<td>5073</td>
</tr>
<tr>
<td>2003</td>
<td>2401</td>
<td>2401</td>
<td>178</td>
<td>772</td>
<td>1545</td>
<td>1436</td>
</tr>
<tr>
<td>2004</td>
<td>1600</td>
<td>1600</td>
<td>149</td>
<td>177</td>
<td>931</td>
<td>522</td>
</tr>
<tr>
<td>Total</td>
<td>27768</td>
<td>27768</td>
<td>802</td>
<td>3230</td>
<td>11027</td>
<td>16512</td>
</tr>
</tbody>
</table>

Source: OIN processed by Boldizsar Nagy

As the table clearly tells, of all the applicants who applied for Convention status in Hungary in the five years 2000-2004 a bit less than two thirds (59,4%) never made it to any substantive decision. In their case the procedure was terminated, which in practice means that they had not waited until a final decision. In fact many of those, who were rejected also absconded without submitting an appeal or request for review.
The average duration of stay in the reception centers used to be 60 days in the late nineties – which was certainly less than the time required to reach a decision on the merits.\textsuperscript{663} That has changed by now, and it is reported that in early 2005 that duration increased to 220 days,\textsuperscript{664} but simultaneously the figures plummeted with altogether less than a thousand persons left in the “rejected asylum seeker” category.

b) No need to create a single procedure – there is one

As there is only one procedure for intentionally seeking the protection of the government of Hungary, there was no need to establish a single procedure to accelerate arrival at a final decision. As already mentioned above there is no separate track leading to an authorized to stay status: whether the person is entitled to it - even if not qualifying as a refugee – will be decided in the course of the normal refugee status determination procedure and the refugee authority will determine if there is an obstacle to return - and therefore the person should be considered as authorized to stay – or can be subjected the normal aliens police procedures leading to voluntary departure or expulsion.

c) Forms of protection

Debates surrounded the situation when the applicant was declared to be a person authorized to stay but denied recognition as a refugee and applied for judicial review. The question was, whether the review may affect this “protection” status or must be limited to the review of the legality of the denial of the refugee status and leave the “person authorized to stay” quality - with the accompanying benefits – intact.

\textsuperscript{663} http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=428b09714 visited 11 July 2005

\textsuperscript{664} ibid
Country Report Hungary

A judgment of the Metropolitan Court of Budapest, delivered on 29 April 2005 in the case of an Ethiopian former student,\(^{665}\) proves that the question is real and the Court may reform the refugee authority’s decision and recognize the affected person as Convention refugee even if (s)he had already enjoyed protection as a person authorized to stay.

The answer taking shape is the following: whereas the review is limited to the petition - and so the Court must not revoke the authorized to stay qualification – the refugee determination authority - when learning about the appeal - in reality denies the benefits from the applicant and “downgrades” her/his legal position to a mere applicant status even, if the authority itself had recognized that the person is (would be) entitled to the benefits (like the right to take up employment) accruing to persons authorized to stay.

According to the practice as a reaction to this, asylum seekers who have been recognized as authorized to stay do not submit an appeal, but start a new (repeated) procedure which leads to a fast refusal. However, that does not affect the authorized to stay position acquired previously. Then, appealing this rejection the court procedure can be set into motion without deprivation from the benefits and still entailing a chance to be recognized as a Convention refugee.

**d) Safe third country - readmission**

Techniques leading to the avoidance of a fully fledged procedure include the use of the safe third country rule through the readmission agreements mentioned above. Interviews and unpublished reports reveal a mixed image, difficult to clarify. According to a report by the Hungarian Helsinki Committee, published on 26 Septem-

\(^{665}\) 6.K.32643/2004/12 - unpublished
the suspicion that persons had been returned to Ukraine without having a chance to contact the refugee authorities can not be excluded.

That would contradict to the Hungarian law. Art 2/e of the AA gives the following definition the safe third country:

“a country where prior to arrival in the territory of the Republic of Hungary a foreigner stayed, travelled through or travelled from where the applicability of the Geneva Convention had been recognised at his/her request, or he/she had the chance, but did not take advantage of submitting an application for recognition; provided that the legal rules and actual practice of this country guarantee the examination of the merit of the asylum claims and provided that had the foreigner made such a claim, s/he would not have been exposed to persecution, torture, inhuman and/or degrading treatment nor would have been returned to a country where s/he would face persecution or human rights abuses”…

Art 4/1 declares that recognition as a refugee must be denied if the person came from a safe third country and does not refute the presumption of its safety. Two consequences derive from this:

- A formal procedure ought to be started even in cases when the safe third country rule could be applied.
- The asylum seeker must be given an opportunity to challenge the finding that the given country was safe. (There are no formal lists of safe third countries.)

In fact this procedure is not one of the manifestly unfounded/accelerated procedure cases, so by the time the rejection based on Art 4/1 becomes final and executable -

666 http://www.helsinki.hu/indexm.html visited 11 July 2005

667 As determined Articles 43-45 of the AA.
meaning it appears in a Metropolitan Court judgment – deadlines for return on the basis of readmission agreements may have easily passed.

The other reading of the same situation at the Hungarian-Ukrainian border comes from the state authorities, which - in unpublished internal memos - complain about the cumbersome co-operation between the authorities at the opposite sides of the border. Whereas taking back own citizens does not seem to cause a problem, according to the Hungarian remarks, returning third country nationals who had crossed the border illegally was almost impossible in the beginning of this decade. An enhanced willingness to cooperate only came forward when substantive contribution was offered by the Hungarian side to its counterpart, in terms of training, as well as taking the shape of communication and other equipment.

Encounters with the border guards serving at the "external" border (especially on sections bordering Ukraine, Romania, Serbia-Montenegro) recall lessons learnt during the Socialist times: the impact of a legal obligation depends in a disproportionate measure on the good personal relationship of those serving at any given section. If the human relationship of the commanders is good, the readmission agreement or whichever obligation (notification, etc.) will by obeyed. However, if that immaterial but vital element is missing, the simplest operations encounter insurmountable obstacles. To give an abstract example: the Hungarian border guards would arrest a small group clearly crossing the border illegally from the neighbour’s direction. They would offer returning them back without formalities as the case was clear. The other side may even concede the fact that the group came from its territory but then ignore the suggestion to agree on a date and place for their return.

No statistics is available which would indicate the number of those who had applied for refugee status and had been rejected - either on safe third country, safe country of origin or other basis - among those who had been returned on the basis of one of
the readmission agreements or as voluntary departurers or as ad hoc returnees following expulsion with - or without - forced removal (deportation).

Indirectly the following two tables may be of help

4.2. Expulsion, detention, forced removal by year and major nationalities

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Number of expelled person</th>
<th>Detention for aliens policing purposes</th>
<th>Forced removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romanian</td>
<td>3301 2881 2573</td>
<td>Romanian 153 147 155 Romanian 754 834 391</td>
<td></td>
</tr>
<tr>
<td>Ukrainian</td>
<td>824 833 634</td>
<td>Moldovan 60 54 68 Ukrainian 63 163 224</td>
<td></td>
</tr>
<tr>
<td>Moldovan</td>
<td>340 166 143</td>
<td>Turkish 26 36 45 Moldovan n.a. 120 77</td>
<td></td>
</tr>
<tr>
<td>Ecuadorian</td>
<td>0 30 132</td>
<td>Chinese 175 63 38 Serb-Montenegrin 630 109 46</td>
<td></td>
</tr>
<tr>
<td>Serb-Montenegrin</td>
<td>516 233 100</td>
<td>Serb-Montenegrin 133 58 26 Turkish n.a. 53 43</td>
<td></td>
</tr>
<tr>
<td>Chinese</td>
<td>240 99</td>
<td>Indian 93 12 15 Ecuadorian n.a. n.a. 22</td>
<td></td>
</tr>
<tr>
<td>Turkish</td>
<td>132 82 74</td>
<td>Russian 10 13 4 Mongolian n.a. n.a. 21</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>722 503 436</td>
<td>Other 434 196 220 Other n.a. 326 141</td>
<td></td>
</tr>
<tr>
<td>Total:</td>
<td>6095 4829 4211</td>
<td>Total: 1084 579 571 Total: 1759 1605 965</td>
<td></td>
</tr>
</tbody>
</table>

Source: Various mimeos of the OIN and its website (each section ordered according to the 2004 rank)

The breakdown of the forced removals for 2002 are missing for technical reasons)
Country Report Hungary

If these table are compared with the list of the nationalities of whom more than ten rejections have been reached in the same year one can conclude that most of the rejected asylum seekers manage to avoid forced removal and few of them participate in voluntary returns.

4.3. Rejections in the asylum procedure (first level, normal and accelerated together)

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Rejected668</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2002</td>
</tr>
<tr>
<td>Vietnamese</td>
<td>156</td>
</tr>
<tr>
<td>Georgian</td>
<td>22</td>
</tr>
<tr>
<td>Turkish</td>
<td>68</td>
</tr>
<tr>
<td>Serb-Montenegrin</td>
<td>6</td>
</tr>
<tr>
<td>Nigerian</td>
<td>78</td>
</tr>
<tr>
<td>Chinese</td>
<td>61</td>
</tr>
<tr>
<td>Afghan</td>
<td>42</td>
</tr>
<tr>
<td>Algerian</td>
<td>18</td>
</tr>
<tr>
<td>Iraqi</td>
<td>66</td>
</tr>
<tr>
<td>Iranian</td>
<td>49</td>
</tr>
<tr>
<td>Ukrainian</td>
<td>10</td>
</tr>
</tbody>
</table>

668 The table includes the dominant groups of the previous tables and the nationalities among which more than 10 rejections occurred at the administrative level(s). The statistics does not screen out repeated procedures. Figures refer to persons (not cases)
### 4.4. removal by air

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese</td>
<td>4</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Vietnamese</td>
<td>2</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Bulgarian</td>
<td>6</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>
As most of the rejected asylum seekers came from countries to which return on land is inconceivable there remains the conclusion that the overwhelming majority of the rejected asylum seekers does not return to her/his country of origin as the consequence of the action of the Hungarian authorities and only a very limited number of them are embraced by the Voluntary Assisted Return Programme operated by IOM and OIN (with participation of the Border Guards and the Police) and financed by OIN

V. The impact of the EU acquis

a) The Schengen acquis

In general, the country has adopted the laws and regulations necessary to apply the relevant EU acquis by the date of accession (1 May 2004). As the Schengen Protocol made it clear, no derogations could be sought and none were\textsuperscript{669}. The notable exception is the whole mechanism of the abolition of controls at the internal borders and the adoption of the corresponding measures related to crossing the external borders

\textsuperscript{669} Protocol integrating the Schengen acquis into the framework of the European Union, OJ 1997 C 340/93 of 10. 11. 1997), “For the purposes of the negotiations for the admission of new member states into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.”

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Country & 1 & 5 & 3 \\
\hline
Albanian & 1 & 5 & 3 \\
\hline
Turkish & 9 & 7 & 1 \\
\hline
Macedonian & 5 & 1 & 1 \\
\hline
Moldavian & 5 & 5 & 0 \\
\hline
Syrian & 5 & 2 & 0 \\
\hline
\end{tabular}
\caption{Country Report Hungary}
\end{table}
and the introduction of the Schengen Visa System and the operation of the second SIS. Article 3 of the Act on Accession\textsuperscript{108} sets the final terms of the division of the acquis and an EU presidency document issued at the end of the accession negotiations.\textsuperscript{109} provides the details. A recent resolution of the Hungarian Government\textsuperscript{670} declares that Hungary will be ready to start the Schengen evaluation by the first half of 2006 and envisages that Hungary will submit its request to start that evaluation together with the three other countries of the Visegrad co-operation (the Czech Republic, Poland, and Slovakia). The strategic goal, according to the government resolution is to fully apply the Schengen acquis from October 2007.

b) The changing role of the Border guards

The perspective of the abolition of internal border controls\textsuperscript{671} exercises pressure on the Border Guards to review their functions and mission. In that spirit the division of competences between OIN and the Border Guards is changing: the Border Guards are acquiring an increased share in policing the foreigners and playing part in their return. Not only has their territorial competence been extended to the whole country, 

\textsuperscript{108} Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236/33 of 23.9..2003).

\textsuperscript{109} Doc 15440/02, SCH-EVAL 42 (10 December 2002).

\textsuperscript{670} 2328/2004 (XII.21)

\textsuperscript{671} The length of the Hungarian land borders (and there is no sea border!) is 2242,5 km. Out of that 1138,9 km (those with Slovakia, Austria and Slovenia) will become unguarded when internal border controls will cease in 2007. The entry into the system of Romania will lead to a further reduction with 447,8 km and of Croatia with 344,6 km, leaving the borders to Serbia-Montenegro (174,4) km and Ukraine (134,8 km) as external borders. As a reminder it may be appropriate to mention that at present Hungary controls a 1103,6 km long section of the EU’s external border which is more than one sixth of all land borders of the EU!
Country Report Hungary

not only do they participate in joint actions controlling foreigners and sites / entities which may be engaged in illegal acts linked to illegal migration, not only do they conduct the first – preliminary – hearing of those asylum seekers whom they stop while entering or leaving the territory illegally, but they also aspire at becoming the center for the return of foreigners no longer having the right to stay.

According to insider information the function of the present center within the OIN exclusively organizing the return travels, and the acquiring of the travel documents might be transferred to the Border Guards.

The fate of the joint instruction of the three ministers (Interior, Employment and Work, Finances) adopted in 2004 is instructive on this and also is a clear and important sign of the EU acquis’ impact.

c) The complex control inland

The joint instruction aims at establishing joint teams to increase the efficiency and to harmonize the actions of the authorities targeting illegal migration and other illegal acts linked to it. It sets up a complex control team involving the Border Guards, the Police, the OIN, the Customs and Finance Guard and the National Authority for Labour and for Security at Work. It was preceded by a similar instruction in 2002. Whereas the actual tasks are largely the same (information exchange, training, and complex controls in any part of the country by joint teams) there are three important changes:

672 20/2004. (BK15.) BM-FMM-PM együttes utasítás az illegális migráció és az ahhoz kapcsolódó más jogellenes cselekmények elleni hatósági fellépés hatékonyságának növelésére, illetve összehangolására (see Tble 1.4., second under „other relevant rules”)

673 2/2002. (BK10.) BM-PM-SzCsM együttes utasítás az illegális migráció és az ahhoz kapcsolódó más jogellenes cselekmények komplex mélységi ellenőrzésének kialakítására és működtetésére
-The new instruction sets up a formal leadership whereas the old instruction envisaged a horizontal cooperation of authorities with equal weight. An „Integrated Command Center” had to be set up, to be governed by a „Council of Commanders” which in turn was to have an operational arm, the „Integrated Command Group.” The Council is led by one of the general directors of the Border Guards and in the operational body the border guards have 3 and the police 4 representatives whereas the immigration authority (the main organ to deal with illegal immigration and removal) only one, just as the two other institutions involved. This is a clear shift from the cooperation of the equals (only coordinated by the Border Guards) to a cooperation under a hierarchical structure which is headed by the Border Guards.

- The second difference relates to the task to develop a common strategy for and the main directions of the fight against illegal migration and accompanying illegal acts, which were not explicitly mentioned in the previous instructions. Those instructions of 2002 were implementation-oriented these are both goal-setting and operationalizing.

- The third difference is financial: the new instruction envisages harmonization of national and „international” funds and calls for joint technical developments.

As the consequence of the accession the Border Guards have been reorganized, the so far separate border surveillance and border control units united into border policing units (altogether 63) under the auspices of 10 directorates covering the whole

---

674 (These designations may not be the ones the authorities intend to use, but at the writing of the report I could not find a formal document revealing the intended official English expression.)
country. Further restructuring and reduction of the number of territorial units is envisaged for the period when the Schengen acquis will fully be applied.\textsuperscript{675}

d) Standards of forced removal

The next clear acquis-impact is a short joint decree of the Minister of the Interior and of the Minister of Justice.\textsuperscript{676} As on 18 December 2000 a person claiming to be from Cameroon died after resisting his forced removal by air\textsuperscript{677} and considering that Council decision 2004/573/EC\textsuperscript{678} in its annex contains detailed guidelines on security provisions for joint removals by air and in light of the intention of the Commission to establish minimum standards for return it was only logical that rules be adopted. In essence the joint decree guarantees access to food, drink, female escort in case of removal of a female or a minor. The decree prohibits certain uses of tapes and sedatives, gases and head covers, but is far less detailed on coercive measures (constraints) than the Council decision, mentioned above, essentially referring back to the national rules applicable to police and the border guards.

e) Air transit cooperation and recognition of expulsion orders

According to the available information there were no other serious incidents when forcibly removing persons. Cooperation with other countries in case of (air) transit seems to be smooth, but neither the ICONET nor the joint flights do have a significant impact yet. Lack of implementation rules hinder the smooth implementation of

\textsuperscript{675} The source of the information is a self-presentation available at the website of the Border Guards: http://www.bm.hu/hatarosseg/hatrendeszet/uniokulbelell_elemei/frame.htm - visited 11 July 2005

\textsuperscript{676} 40/2004 (VII.2.)BM-IM együttes rendelet a kitoloncolás végrehajtásának szabályairól (see Table 1.4. first under „other relevant rules”)

\textsuperscript{677} Details can be found on the Hungarian Helsinki Committee’s homepage at http://www.helsinki.hu/docs/ebune01-03-01.pdf

\textsuperscript{678} OJ L 261/28 of 6.8.2004
the Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals and in March 2005 the relevant department of the OIN was still unaware of the opportunities offered by the Cotonou agreement.

With respect the mutual recognition of decisions on the expulsion of third country nationals as envisaged by the Council Directive 2001/40/EC of 28 May 2001 implementation came somewhat belatedly. Only Government decree 191/2004 introduced an additional article (65/A) into the Decree implementing the AESF. (Government Decree 170/2001) It is a rough skeleton of the directive with not insignificant deviations. First to mention is the basis of the expulsion order to be recognized. Whereas Article 3 of the directive includes two alternatives (either serious grounds for believing that a third country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within a Member State) the transposing rule simplifies: it either requires a court sentence meted out for an intentional crime (which is threatened with a year of deprivation of liberty in Hungarian law) or that it can be suspected that (s)he has committed a serious crime. So intention to commit a crime in the future, or the territorial limitation vanished. Disturbingly the Hungarian rule - unlike Art 3 (1) a) of the Directive – does not offer a choice in case the person holds a valid residence permit, including that of the enforcing state. Whereas according to the Directive the expulsion order “permits” the withdrawal of the residence permit, the Hungarian rule is categorical: the authority must withdraw it if it was issued by a domestic authority.

_____________________
679 OJ L 60/55 of 27.2.2004
681 OJ L 149/34 of 2.6.2001
682 In force since 20 June 2004
683 Art 65/A/4
Country Report Hungary

the directive has not really been applied yet, so this concern is fairly theoretical at the moment.

f) Carrier sanctions

Carrier sanctions have found their way into the Hungarian law long ago.\textsuperscript{684} The amendment of the AESF and of its implementing Decree on the eve of the entry into force of the Accession Treaty\textsuperscript{685} on the one hand introduced conformity with Article 4 of Council Directive 2001/51/EC\textsuperscript{686} by raising the fine to 4000 euros per person, on the other hand discharged the carrier from the duty to return the person if (s)he requested international protection (in Hungary) which releases the operator from the fine too, because fine can only be levied in case of an obligation to return the person.

g) Best practices handbook

A further impact of the EU harmonization is the enhanced willingness to cooperate within the narrower region. The governments of Austria, the Czech Republic, Germany, Hungary, the Netherlands Poland, Romania, Sweden, Slovakia, Slovenia and the International Organization for Migration have started a project on producing a handbook on good practices in the field of return programmes. Two meetings have been held in 2005 (in March and June) and presently the parties are working on the elaboration of the handbook which is supposed to

\textsuperscript{684} A 4000 Euro/vehicle/aircraft fine was introduced in 1999 by Act LXXV, applicable from 1 November 1999.

\textsuperscript{685} XXIX of 2004

\textsuperscript{686} OJ L 187/45 of 10.7.2001
“promote the uniformity of practices and improving the efficiency and transparency of the actions undertaken by the Member States” 687.

VI. Dublin II, Eurodac, special procedures

There were serious worries - especially in government circles - that the impact of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national 688 would lead to a radically increased caseload. Assuming that a large portion of the returned persons would not qualify as a person in need of international protection it was logical to expect an augmented demand for return to be implemented from Hungary to third countries, with all its financial and logistical implications.

Fears have not materialized. Between 1 May 2004 and 1 January 2005 Hungary has approved 303 requests to take back or to take charge but had only 71 persons transferred to Hungary. In 2005 out of 358 requests addressed to Hungary by 1 June 2005, 267 met with a positive response (of these 127 on the basis of Eurodac hit and 87 on visa/residence permit issued by Hungary, the rest on the basis of the remaining grounds including illegal crossing of the external border), but actually only 54 persons were taken back/taken charge of. 689 The number of denials was 20, the rest of the cases pending. In the same five months period Hungary addressed 15 requests to other member States and received 10 refusals and 5 approvals.

688 OJ L 316/1
689 Data are based on different mimeos and presentations of the competent official of the OIN. Their internal contradiction prevents a more detailed analysis.
Country Report Hungary

No data are available informing about the number of successful applicants among those returned on the basis of Dublin II, therefore it is impossible to clarify to what extent - if at all – the operation of Dublin II and the Eurodac system has increased Hungary’s liabilities in returning persons to third countries.

In terms of other special procedures affecting minors and other groups with special needs practice is negligible small. Nevertheless, interviews conducted for this report and the analogy of the care given to these groups by the refugee authorities\textsuperscript{690} suggest that the appropriate attention is there.

VII. Policy issues and long term plans

What is beyond the obvious – namely that increased funds would enhance the chance of preventing illegals from entering the country (and thereby reduce the need for return) and would make actual return a more realistic option in the case of those, who do possess travel documents entitling them to return?

Illegal migration is not on the top of the political agenda in Hungary, and awkwardly there are two factors which may increase the understanding for the intentions of those third country nationals who seek entry into the Union at any price.

The first is the transition period applied in respect of the freedom of movement in twelve “old” Member States. All the relevant political forces in Hungary consider that system misdirected and stigmatizing the population of the eight new Member States.

\textsuperscript{690} For a while even a specific home was operated for unaccompanied minors.
The second is the visa obligation asymmetrically maintained against Hungarian nationals by the United States of America and Canada.

In both cases Hungarians experience exclusion, the pain of being the undesired. That evokes sympathy for those who try to confront similar exclusionary tendencies of the EU as a whole – occasionally by means of illegal migration.

However, this is not to claim that the state authorities are lenient towards illegal migration. Quite to the contrary (as mentioned in the context of Dublin II and the Eurodac above) they prefer to appear as ardent fighters of the phenomenon.\textsuperscript{691} This manifests itself among others in the still very strict detention policy, which may lead to strict confinement for a full year (and repeatable) in case of persons who have not committed any crime, just violated rules on entry and stay. Also the very low recognition rate reveals that asylum seekers may be exposed to the “harm of doubt” which presumes that they are not bona fide asylum seekers.

As to the future: Hungary is certainly looking forward to the accession of Romania (and Bulgaria) to the EU and endorses the extension to Croatia as well. This flows from the country’s interest in securing the freedom of movement for all, including the large ethnic Hungarian minorities in the neighbouring countries. EU citizenship will free them from the pressures to migrate or stay in an irregular fashion which will benefit both the sending and the receiving country.

\textsuperscript{691} It should be remembered that the Budapest process aimed at fighting illegal migration got its name from the Hungarian capital and in the course of the global consultations the topic of the regional meeting held in Budapest in 2001 dealt with return of persons not in need of international protection, safe third countries and readmission agreements.
Country Report Hungary

As indicated by the already mentioned Government Resolution of December 2004 concerning the Schengen Action Plan the primary goal in the next years is to become fully prepared for the application of the complete Schengen acquis and thereby enable the abolition of border controls at the internal borders. Appropriate domestic flanking measures have already been taken and the rational use of the funds derived from the Schengen Facility may enable this country to take its share from the fight against illegal migration and from the return operations. That share ought to be fair. Fair as to its size and fair to the persons affected.

---

692 2328/2004 (XII.21)

693 See Article 35 of the Act of Accession
- CHAPTER VIII -

COUNTRY REPORT IRELAND

by
JohnHandoll,

Dublin
1. General Legal and Administrative Framework

Administrative Developments

On 1 March 2005, the Minister for Justice, Equality and Law Reform announced the establishment of a new Naturalisation and Immigration Service (INIS) as an executive office within his Department.

Policy and Legal Constraints

In general terms, the past few years have seen a more robust approach to immigration and asylum policy. The traditional discretion-based approach to migration – reflecting the judicially-endorsed belief that the “state must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State” – has been fully applied by the Minister especially in relation to those who are not entitled to remain in the State, whether because their permission to remain (as asylum-seekers, students, visitors or workers) has expired or because they have always been in an irregular situation. There has been a limited regularisation of the position of unlawfully-resident third country national parents of Irish citizen children born before 1 January 2005, but this reflects a widespread concern that Irish citizen children may otherwise be required to leave the State with their non-national parents. In general, there is a policy that unlawfully-resident persons should leave the State: while this policy has been increasingly applied, there are doubtless a large number of “irregulars” unknown to the authorities or whose position is under examination.

In relation to asylum, Ireland has been concerned to ensure that its international obligations under the Geneva Convention regime are met: at the same time legislative changes have been made in order to enable the “weeding-out” of spurious asylum claims and of claims that ought to be considered elsewhere.
Country Report Ireland

The IMPA country report pointed to “impediments to expulsions, such as resistance of the deportee, lack of documents, lack of cooperation of airlines and court challenges to deportation”. Many of these impediments reflected deficiencies in the legal and administrative framework, which have been addressed in the interim (see 2., below). To the extent that court challenges to deportation can be properly regarded as an “impediment”, it has to be said that, notwithstanding legislative attempts to limit challenges, the Irish courts have, more than ever, shown themselves prepared – when called upon to do so – to vindicate individual rights over the interests of the Executive.

In making outline policy proposals for a new Immigration and Residence Bill (April 2005), the Department of Justice described the deportation process as “a fair process but in practice it is time-consuming and resource-intensive and is inadequate to deal in a timely and efficient fashion with the volume of potential deportation cases pending”. Some outline policy proposals are identified below (Section 2, “Proposed Legislation”).

Parents of Irish-Born Citizen Children

In the 1990 Fajjuonu case, the Irish Supreme Court recognised that, where non-nationals had resided in Ireland for an appreciable time and had become a family unit with Irish citizen children born in the State, the non-national parents might be entitled to reside in Ireland by virtue of the residence rights of their Irish children.

The matter was revisited by the Supreme Court in early 2003. In L & O v. Minister for Justice, which involved cases of rejected asylum seekers and asylum seekers covered by the Dublin Convention each with children born in Ireland, it was held by a majority of the judges that non-national parents do not have the right to remain in the State by virtue of the residence rights of their Irish citizen children. The Court made it clear that where the Minister decided to deport the non-national parents – where this was in the common good on the basis of the need to preserve respect for the in-
tegrity of the asylum and immigration system – they could be accompanied by the Irish citizen child.

In June 2004, a referendum approved a constitutional amendment removing the constitutional right to Irish citizenship of all those born in the island of Ireland. With the Irish Nationality and Citizenship Act 2004, children of non-Irish nationals (save for UK nationals) born after 1 January 2005 will be entitled to *jus soli* citizenship only if the non-national parents have satisfied minimum residence requirements. This more restrictive *jus soli* entitlement to Irish nationality reflects a more insular approach, but also reflects concern about the consequences of the constitutional entitlement which appeared in the 2004 *Chen* ruling of the Court of Justice.

**Readmission Agreements**

Ireland has entered into readmission agreements with Romania, Poland, Nigeria and Bulgaria. These agreements, which provide for the readmission of certain categories of person at the request of a Contracting Party, reflect, in the words of the Department of Justice, “the importance of a return and readmission policy as an integral and vital component in the fight against illegal immigration”.

The Agreement with Nigeria was signed on 29 August 2001. Though ratified by Ireland in March 2002, it had not been ratified by Nigeria as at February 2005, though, according to the Irish Minister for Justice, the Nigerian authorities were operating the spirit of the agreement. Over 175 Nigerian nationals have been deported to Nigeria since September 2001. There have been reports that the standard of reception of deportees in Nigeria frequently falls below acceptable standards – with deportees detained on arrival, required to pay bribes to secure release and placed in poor housing with insufficient regard paid to the needs of minors: it is, however, difficult to judge whether these reports are substantiated.
2. Involuntary Return (Deportation/Removal)

The Legislative Framework for Deportation/Removal

It should be noted that there are two different processes for removing non-nationals from the State – removal following refusal to land and deportation.

Removal from State of persons refused leave to land. The Immigration Act 2003 contains provisions which enable removal from the State (as distinct from deportation by means of an order) of persons refused leave to land: this applies to persons aged 18 years and above (or reasonably suspected to be of this age) suspected to have been unlawfully in the State for less than three months. This covers persons who have been refused admission to the State (for reasons such as lack of employment permit, lack of proper documentation, or insufficient funds) and to those who have evaded immigration control. Such persons may be arrested and detained and then swiftly removed from the State, subject to the possibility of legal challenge to the validity of the proposed removal. There is no prohibition of future re-entry. The person concerned is required to facilitate and cooperate with the immigration officer/member of the Garda Síochána engaged in the removal and must not endanger the safety of himself/herself and others in the process. Where the identity of the carrier bringing the person into the State is known, that carrier may be required to remove that person from the State at no expense to the State.

Deportation. The Immigration Act 1999 continues to provide the basis for deportation orders made by the Minister for Justice, Equality and Law Reform. The Minister is empowered to make an order requiring a specified non-national to leave the State within a specified period and to remain outside. Subject to the possibility of revoking the order, the deportation order requires the deportee to stay outside the State permanently. According the Department of Justice, Equality and Law Reform (April 2005): “[a]s a result, the deportation process is characterised by the formality that would be expected of a process of such gravity”.

480
Orders may be made in respect of a number of different categories of non-national, covering a person:

- who has served/is serving period of imprisonment imposed by a State court;
- whose deportation has been recommended by a State court before which he/she was indicted with or charged with any crime or offence;
- required to leave the State under the EC (Aliens) Regulations 1977;
- to whom Reg. 19 of the EC (Right of Residence for Non-Economically Active Persons) Regulation 1977 applies;
- whose application for asylum has been transferred to a convention country for examination under Section 22 of the Refugee Act 1996;
- whose application for asylum has been refused by the Minister;
- to whom leave in the State has been refused;
- who, in the Minister’s opinion, has contravened a restriction or condition imposed in respect of landing in/entering into/leave to stay in the State; or
- whose deportation would, in the opinion of the Minister, be conducive to the common good.

The Minister is generally required to notify the person concerned of his/her proposal to make a deportation order and the reasons for it and give the person concerned to make representations in writing. The Minister must take account of any representations and notify the person concerned of the decisions and reasons for it. These provisions do not apply to a person who has consented in writing to deportation, persons required to leave under the EC Regulations and persons whose application for asylum has been transferred to a convention country.

The Act sets out a number of matters to which the Minister must have regard in determining whether to make a deportation order:
A person subject to a deportation order may be required to do a number of things effectively to facilitate the deportation, including presenting himself/herself to the Garda Síochána, producing requisite documentation, cooperating in obtaining documentation, residing in a particular district or place, reporting to the Garda Síochána or immigration officer at specified intervals and notifying changes of address.

Under the Immigration Act 1999, as amended by the Illegal Immigrants (Trafficking) Act 2000, a person the subject of a deportation order may be detained in accordance with the provisions of the 1999 Act for the purpose of ensuring his or her deportation from the State. Specifically, where an immigration officer or member of the Garda Síochána reasonably suspects that a person subject to a deportation order aged 18 years and above (or reasonably suspected to be of this age) has failed to comply with any provision or a notified requirement, or intends to leave the State and enter another state without lawful authority, or has destroyed identity documents (or possesses forged identity documents) or intends to avoid removal from the State, he or she may arrest the person without a warrant and detain him or her in a prescribed place (for an aggregate period of no more than eight weeks). The person thus arrested and detained may be placed on a means of transport about to leave the State and shall be deemed to be in lawful custody until the means of transport leaves the State. Persons in charge of means of transport shall, if required, receive the deportee and any dependents on board, and afford his or her and any dependants proper accommodation and maintenance.
Where a person detained institutes court proceedings challenging the validity of the deportation order, the court may determine whether the person should continue to be detained or is to be released, with such conditions as may be thought appropriate, including those as to residence, reporting and the surrender of passports or travel documents.

A deportee is not to obstruct the person authorised to deport him or her, is to cooperate as necessary to enable the authorised person to obtain travel documentation and tickets, is to sign/affix fingerprints to such documentation and is not to endanger the safety of himself or herself or others in the course of deportation.

The right of challenge before the courts against a deportation order, or notifications relating to proposed deportation was limited by the Illegal Immigrants (Trafficking) Act 2000, which provides that an appeal lies only to the High Court by way of judicial review: in contrast to the ordinary time limits for judicial review, the application must be made within 14 days of the making of the act being challenged unless the High Court considers that there is a good and sufficient reason for extending this period. The possibility of a further appeal to the Supreme Court has also been severely limited.

Asylum procedures. The Immigration Act 2003 contained provisions considerably tightening up the asylum process, ostensibly to discourage those with no valid claim for protection. In relation to Dublin II, a greater degree of flexibility is provided for, with the Minister able to designate immigration officers at points of entry to make first instance decisions, with speedier decision-making procedures and with the possibility of short-term detention. The fact that appeals against the first instance determination will not have suspensive effect should also result in a speedier process. Asylum applicants who fail to cooperate with the Refugee Applications Commissioner and furnish relevant information may find their applications deemed with-
Country Report Ireland

drawn or lacking in credibility. Withdrawal will result in termination of the application and a recommendation, which cannot be appealed to the Refugee Appeals Tribunal, that the applicant should not be declared to be a refugee. In certain “undeserving” cases, there are shorter periods of time for appealing to the Tribunal. There are provisions for expediting asylum procedures, by enabling the Minister to direct the Commissioner or Tribunal that priority be given to certain classes of persons determined by reference to factors such as (the list is not exhaustive): the grounds for applications; the applicants’ country of origin or habitual residence; the likelihood that the applications are well-founded; whether applicants have made false or misleading representations; and whether applicants are nationals or have a right of residence in a safe country of origin.

The right of challenge before the courts was limited by the Illegal Immigrants (Trafficking) Act 2000, which provides that an appeal lies only to the High Court by way of judicial review: in contrast to the ordinary time limits for judicial review, the application must be made within 14 days of the making of the act being challenged, whether a recommendation of the Commissioner, a decision of the Tribunal or a decision by the Minister to refuse an application for refugee status, unless the High Court considers that there is a good and sufficient reason for extending this period. The possibility of a further appeal to the Supreme Court has also been severely limited.

**Proposed Legislation**

In November 2004, the Department of Justice, Equality and Law Reform signalled that a draft Scheme of a Bill to, *inter alia*, streamline the deportation process had been developed and was with the Office of the Attorney General for advice.

Although this draft Scheme has not been published, the Department of Justice published in April 2005 a discussion document containing outline policy proposals for
an Immigration and Residence Bill. A number of proposals have been made in the context of removal/deportation. These include:

1. A single procedure for protection (or “one stop shop”) has been mooted as one possible way for streamlining the deportation process. This would allow refugee and subsidiary protection needs to be considered earlier on in the process. At present, asylum applications are considered under a specific procedure whilst other claims for protection are addressed by the Minister in the relatively late context of the deportation process.

2. The removals process, as distinct from the deportation process, could be extended to cover persons with no legal basis for being in the State and to persons who have failed to obtain protection following the single procedure. This would not, however, apply to categories of persons such as (a) dependent family members of an EU national; (b) parents of Irish-born citizen children; and (c) failed asylum applicants who have a continuing pre-existing permission to remain in the State on some other basis.

3. Any review of removal decisions should have no suspensive effect.

4. In the context of deportation, the Minister should have the ability to provide for different periods of exclusion.

5. Persons seeking to return after a certain period of deportation should be required to repay the cost of the deportation before being readmitted.

**Administrative Developments**

From 25 January 2005, there have been new measures to speed up the asylum and deportation process in respect of nationals of States which are subject to prioritisation orders for the purposes of asylum processing: this concerns nationals of Nigeria, Romania, Bulgaria, Croatia and South Africa. In addition to an expedited asylum-determination process and speedier processing of deportation orders for applicants found not to be in need of refugee protection (and having no other protection or hu-
Country Report Ireland

Manitarian needs), the new arrangements will include the establishment of dedicated accommodation centres. Individuals concerned will have statutory obligations to reside in such centres and to report to immigration officers in the course of the asylum and deportation processes. Failure to comply with these obligations in the deportation process is an arrestable offence. It is expected that these arrangements will facilitate the speedier processing and effecting of deportation orders, since failed asylum seekers will be more readily available to the immigration authorities and Garda National Immigration Bureau while return travel arrangements are being made. It is made clear that the choice to avail of the voluntary return procedure prior to the making of a deportation order will continue to be available. The Minister has stated that the possibility for faster returns “are fairer on the individual and are critical to the protection of the integrity of the asylum system”. [Department of Justice Press Release, 24 January 2005]

These new measures appear to have been applied in a deportation exercise carried out in March 2005. It appears that 35 Nigerian nationals were arrested and deported using a specially-chartered aircraft. Several of those deported were “aged-out” minors, who had arrived in Ireland as unaccompanied minors and had been placed in the care of the Health Service Executive until the age of 18, after which they could be deported: one of these was about to sit his School Leaving Certificate and the Minister for Justice has subsequently decided to allow him to return for a limited period. A number of adults – who seem to have been failed asylum-seekers – left children behind in Ireland and this separation of parent and child – effected by the deportee – has caused considerable concerns (as have reports of “heavy-handed” tactics by the police and other officials).
Transportation

As a small island State, Ireland does not have direct air routes to many of the countries to which deportees are sent. Where scheduled flights have been used, this has often involved changing airports and each deportee is often accompanied by two gardaí (policeman) (see the IMPA country report). The alternative means – chartered flights – is more flexible, requires a smaller escort (one garda to two refugees) and may be open to sharing arrangements between sending countries (to date there has been cooperation with the UK and the Netherlands). The cost-savings in going the charter route may be considerable – in a February 2004 operation involving the deportation of 65 failed asylum-seekers to Romania and Moldova, at a total average cost per deportee of euro 1,400, it was reckoned that use of scheduled flights would have cost considerably more.

The Department has previously chartered services to Romania, Bulgaria, Moldova, Algeria, Nigeria and Ghana. It has indicated that it may for the future also seek services to CIS countries and to States in the Northern Africa and West Africa regions. Since January 2002 to end-December 2004, there have been 12 repatriation charter flights. There has been at least one chartered flight to Nigeria in 2005. Flights, which have generally been made from Dublin Airport, have been accompanied by an appropriate number of Garda (police) escorts, based on a prior risk assessment of the operation.

In January 2005, the Department of Justice, Equality and Law Reform invited tenders for the appointment of qualified and certified EEA/North American carriers for use by An Garda Síochána in the return by air to other countries of persons without permission to remain in the State. The aim of the process is to establish a panel of up to three air charter service providers, with contracts for particular flights to be concluded with panel members as required. It is envisaged that the Department may, from time to time, carry out joint charter removal operations with other States in-
volving stopovers at other airports to collect returnees for onward travel to final destinations.

Concerns have been expressed about “heavy-handed” behaviour by Gardaí involved in the process. There were recent, unsubstantiated, reports about forced sedation of deportees to Nigeria. The IMPD country report correctly states the legal constraints on the use of force (principles of reasonableness, proportionality and minimum force necessary in the circumstances): clearly it is difficult to judge, in highly emotive situations, whether these constraints are always observed.

**Parents of Irish-Born Citizen Children: a Measure of Regularisation**

As a result of the 2003 Supreme Court judgment in the L&O Case, the Minister decided no longer to accept applications for residency for persons on the basis of their parentage of an Irish-born (and hence Irish citizen) child. However, by mid-2004, it became clear that, of the estimated 11,000 persons subject to the possibility of deportation following the ruling, only around 1,000 had been given notice of deportation and a small number actually deported.

In January 2005, the Department of Justice, Equality and Law Reform introduced revised arrangements regarding the granting of permission to remain in the State of non-nationals who are the parent of an Irish-born child. These arrangements apply only to non-national parents of a child born in the State before 1 January 2005. Under the revised arrangements, which in practice involve quite onerous information and documentary requirements, successful applicants will be given permission to remain legally in the State for an initial period of two years, which may be renewed for a further three years subject to conditions.
Though not expressly characterised as such, these revised arrangements can be seen in terms of regularisation of illegal immigrants.

3. Voluntary Return

It continues to be the case that more people opt for voluntary return rather than deportation. In many cases, voluntary returnees are persons who have opted to leave the State after being made aware that the Minister proposes to make a deportation order against them.

Statistics

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of deportations</td>
<td>521</td>
<td>590</td>
<td>599</td>
</tr>
<tr>
<td>Voluntary returns</td>
<td>506</td>
<td>762</td>
<td>528*</td>
</tr>
</tbody>
</table>

Voluntary Assistance Return Projects

In November 2003, the Minister for Justice, Equality and Law reform announced three new programmes on assisted voluntary return programmes for asylum seekers and irregular migrants. These programmes, to be undertaken on behalf of the Department by the International Organisation for Migration (IOM) built upon the success of the pilot voluntary return programme operated by the IOM in Ireland since November 2001. The three programmes are:

1. A general Voluntary Assisted Return Programme (VARP) open to all asylum seekers, persons refused asylum status and irregu-
lar migrants from non-EEA countries who wish to return home voluntarily but do not have the means, including the necessary documentation, to do so. For the year 2005, there is a budget of euro 927,016, funded by the Department of Justice, Equality and Law Reform. In January 2005, the IOM reported that 398 persons, representing 60 different nationalities, arrived home under the Programme (223 migrants were assisted in 2005).

2. An Assisted Voluntary Return and Reintegration Programme to assist the parents of Irish-born children wishing to reintegrate their family in the parents’ country of origin. In January 2005, the IOM stated that 96 families (in total, 157 individuals) had availed of the possibility of reintegration assistance.

3. A pilot Return and Reintegration Programme for Unaccompanied Minors, extended in 2005, co-funded by the Department and the ERF.

In November 2004, the IOM announced a new Voluntary Return and Reintegration Programme for Nationals of Sub-Saharan African Countries. This programme, which is co-funded by the Department of Justice, Equality and Law Reform and the European Refugee Fund, aims to contribute towards the sustainable return of Sub-Saharan African nationals by providing them with assistance for their reintegration in the region where they intend to build their lives. The Department of Justice, Equality and Law Reform and the European Refugee Fund have between them committed euro 200,000, between November 2004 to October 2005. Between November 2004 to end February 2005, 11 migrants have been assisted in returning to their country of origin.

Legislative proposals

It is proposed that a specific legal basis for voluntary return schemes should be contained in forthcoming the Immigration and Residence Bill.

21 April 2005
Annex

Statistical Data (source: Department of Justice, Equality and Law Reform)

The number of persons deported from the State in each of the three years, 2002, 2003 and 2004 is provided in the table hereunder:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>521</td>
</tr>
<tr>
<td>2003</td>
<td>590</td>
</tr>
<tr>
<td>2004</td>
<td>599</td>
</tr>
</tbody>
</table>


The number of persons deported from the State by nationality in each of the three years 2002, 2003 and 2004, is provided in the tables.

<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>9</td>
</tr>
<tr>
<td>Algeria</td>
<td>7</td>
</tr>
<tr>
<td>Belarus</td>
<td>6</td>
</tr>
<tr>
<td>Brazil</td>
<td>4</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>17</td>
</tr>
<tr>
<td>Cameroon</td>
<td>1</td>
</tr>
<tr>
<td>China</td>
<td>19</td>
</tr>
<tr>
<td>Congo</td>
<td>1</td>
</tr>
<tr>
<td>Croatia</td>
<td>10</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>66</td>
</tr>
<tr>
<td>Dr Congo</td>
<td>1</td>
</tr>
</tbody>
</table>
### Country Report Ireland

<table>
<thead>
<tr>
<th>Country</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>5</td>
</tr>
<tr>
<td>Ghana</td>
<td>1</td>
</tr>
<tr>
<td>Hungary</td>
<td>1</td>
</tr>
<tr>
<td>Iran</td>
<td>2</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>6</td>
</tr>
<tr>
<td>Kosovo</td>
<td>19</td>
</tr>
<tr>
<td>Latvia</td>
<td>15</td>
</tr>
<tr>
<td>Lithuania</td>
<td>13</td>
</tr>
<tr>
<td>Macedonia</td>
<td>11</td>
</tr>
<tr>
<td>Malaysia</td>
<td>5</td>
</tr>
<tr>
<td>Moldova</td>
<td>24</td>
</tr>
<tr>
<td>Nepal</td>
<td>1</td>
</tr>
<tr>
<td>Nigeria</td>
<td>46</td>
</tr>
<tr>
<td>Pakistan</td>
<td>3</td>
</tr>
<tr>
<td>Poland</td>
<td>63</td>
</tr>
<tr>
<td>Romania</td>
<td>128</td>
</tr>
<tr>
<td>Russia</td>
<td>10</td>
</tr>
<tr>
<td>Serbia</td>
<td>1</td>
</tr>
<tr>
<td>Somalia</td>
<td>2</td>
</tr>
<tr>
<td>South Africa</td>
<td>8</td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
</tr>
<tr>
<td>Stateless</td>
<td>2</td>
</tr>
<tr>
<td>Sudan</td>
<td>1</td>
</tr>
<tr>
<td>Ukraine</td>
<td>9</td>
</tr>
<tr>
<td>USA</td>
<td>2</td>
</tr>
</tbody>
</table>
Persons deported from the State by nationality 2002.

<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>4</td>
</tr>
<tr>
<td>Algeria</td>
<td>3</td>
</tr>
<tr>
<td>Angola</td>
<td>1</td>
</tr>
<tr>
<td>Belarus</td>
<td>2</td>
</tr>
<tr>
<td>Brazil</td>
<td>2</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>11</td>
</tr>
<tr>
<td>China</td>
<td>49</td>
</tr>
<tr>
<td>Croatia</td>
<td>17</td>
</tr>
<tr>
<td>Czech Req.</td>
<td>68</td>
</tr>
<tr>
<td>Egypt</td>
<td>8</td>
</tr>
<tr>
<td>Estonia</td>
<td>11</td>
</tr>
<tr>
<td>Guatemala</td>
<td>1</td>
</tr>
<tr>
<td>India</td>
<td>4</td>
</tr>
<tr>
<td>Iraq</td>
<td>4</td>
</tr>
<tr>
<td>Israel</td>
<td>3</td>
</tr>
<tr>
<td>Kosovo</td>
<td>16</td>
</tr>
<tr>
<td>Latvia</td>
<td>19</td>
</tr>
<tr>
<td>Lithuania</td>
<td>29</td>
</tr>
<tr>
<td>Malaysia</td>
<td>6</td>
</tr>
<tr>
<td>Moldova</td>
<td>17</td>
</tr>
<tr>
<td>Niger</td>
<td>1</td>
</tr>
</tbody>
</table>
Country Report Ireland

<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nigeria</td>
<td>22</td>
</tr>
<tr>
<td>Pakistan</td>
<td>6</td>
</tr>
<tr>
<td>Peru</td>
<td>1</td>
</tr>
<tr>
<td>Philippines</td>
<td>2</td>
</tr>
<tr>
<td>Poland</td>
<td>41</td>
</tr>
<tr>
<td>Portugal</td>
<td>1</td>
</tr>
<tr>
<td>Romania</td>
<td>169</td>
</tr>
<tr>
<td>Russia</td>
<td>6</td>
</tr>
<tr>
<td>Serbia</td>
<td>1</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>1</td>
</tr>
<tr>
<td>South Africa</td>
<td>38</td>
</tr>
<tr>
<td>Sudan</td>
<td>1</td>
</tr>
<tr>
<td>Turkey</td>
<td>1</td>
</tr>
<tr>
<td>Ukraine</td>
<td>19</td>
</tr>
<tr>
<td>USA</td>
<td>3</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>1</td>
</tr>
<tr>
<td>Zaire</td>
<td>1</td>
</tr>
</tbody>
</table>

Persons deported from the State by nationality 2003.

<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>3</td>
</tr>
<tr>
<td>Algeria</td>
<td>14</td>
</tr>
<tr>
<td>Angola</td>
<td>4</td>
</tr>
<tr>
<td>Armenia</td>
<td>1</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>1</td>
</tr>
<tr>
<td>Country</td>
<td>Count</td>
</tr>
<tr>
<td>--------------</td>
<td>-------</td>
</tr>
<tr>
<td>Bosnia</td>
<td>1</td>
</tr>
<tr>
<td>Brazil</td>
<td>8</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>4</td>
</tr>
<tr>
<td>Cameroon</td>
<td>1</td>
</tr>
<tr>
<td>China</td>
<td>18</td>
</tr>
<tr>
<td>Croatia</td>
<td>13</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>13</td>
</tr>
<tr>
<td>Egypt</td>
<td>2</td>
</tr>
<tr>
<td>Estonia</td>
<td>1</td>
</tr>
<tr>
<td>Gambia</td>
<td>1</td>
</tr>
<tr>
<td>Georgia</td>
<td>1</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>1</td>
</tr>
<tr>
<td>Hungary</td>
<td>5</td>
</tr>
<tr>
<td>India</td>
<td>1</td>
</tr>
<tr>
<td>Israel</td>
<td>4</td>
</tr>
<tr>
<td>Jordan</td>
<td>1</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>1</td>
</tr>
<tr>
<td>Kosovo</td>
<td>17</td>
</tr>
<tr>
<td>Latvia</td>
<td>4</td>
</tr>
<tr>
<td>Lebanon</td>
<td>1</td>
</tr>
<tr>
<td>Lithuania</td>
<td>3</td>
</tr>
<tr>
<td>Malaysia</td>
<td>2</td>
</tr>
<tr>
<td>Moldova</td>
<td>57</td>
</tr>
<tr>
<td>New Zealand</td>
<td>1</td>
</tr>
<tr>
<td>Nigeria</td>
<td>77</td>
</tr>
</tbody>
</table>
Country Report Ireland

Pakistan 3
Palestine 1
Philippines 1
Poland 3
Romania 250
Russia 7
Serbia 5
Slovakia 5
Somalia 2
South Africa 29
Syria 2
Tunisia 1
Turkey 2
Ukraine 26
Vietnam 1

Persons deported from the State by nationality 2004.

There are approximately 430 persons at present awaiting deportation from the State, where travel and escort arrangements are in the course of being made. A further 5,850 persons are currently evading deportation orders but it is not known how many of these are still in the State. The number of persons granted temporary leave to remain in the State in the years 2002, 2003 and 2004 is provided in the table.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>158</td>
</tr>
<tr>
<td>2003</td>
<td>86</td>
</tr>
</tbody>
</table>
Persons granted temporary leave to remain in the State 2002-2004.
- CHAPTER IX -

COUNTRY REPORT ITALY

by
Prof. Bruno Nascimbene,
Università degli Studi di Milano
1. Foreword

1.1 This study describes the Italian procedure for the recognition of refugee status within the general framework of the Law on immigration, taking into account the recent normative developments, and outlines the national “return policies” related to refugees, also in the context of the mechanisms for the removal of irregular migrants and of the implementation of some meaningful European Union rules.

As a general remark we have to point out that Italy, traditionally a source of emigration, is a young country of immigration and this justifies both the lack of regulation for a long period of time since the birth of the united State, and the amount of laws and implementation decrees adopted from the 1980s onwards.

Law n. 189/2002 (known as “Bossi-Fini”), in force since September 2002, rules the entry and stay of foreign citizens, that is extra-EU nationals only, and provides for two articles modifying the procedure for the recognition of refugee status. It represents an amendment to the text of the first organic discipline about immigration adopted in Italy, namely Law 40/1998 (called “Turco-Napolitano”), then included into the Single Act n.286/98, which is the most meaningful instrument to coordinate the norms in the subject matter.

Regular entry in Italy is organised by the “quota policy” while a complex mechanism (based on rejection, expulsion and detention in centres) regulates the expulsion of irregular migrants.

---

694 Law 30 July 2002, n.189 “Amendment of the law on immigration and asylum”.
Country Report Italy

With the recent law the selective and repressive elements prevail over the inclusive ones; on the one side, the entry into the country depends on the effective necessity of the economic system and the working of the quota system may depend on the co-operation of the States of origin in fighting illegal immigration; on the other hand, the duration of administrative detention is extended and dismissal foreshadows expulsion, since the permit of stay is subordinated to a contract of employment.

1.2 In order to better understand the weight of return policies, it is worth summarising briefly the conditions of foreign citizens’ entry and stay in Italy.

As a general rule, the entry depends on the signature of a contract of stay (“contratto di soggiorno”). A foreign citizen can enter the territory of the State for the only purpose of signing the contract of stay for subordinate work: after signing the contract, the foreign citizen is endowed with the permit of stay. In case of dismissal or resignation, the foreign citizen is included into the list of the unemployed, until the expiry of his/her permit of stay and the renewal of his/her permit of stay could only occur if there is a new contract, otherwise the migrant is compelled to leave the country.

---

696 As for the repressive character of the “Bossi-Fini” law, see e.g. Supreme Court of Cassation, III Penal Sect. (Cassazione, Terza Sezione Penale) n. 3162/2003, stating that public order and security functions have become “a central topic in the new law […] with an unilateral interpretation of Community Law” and “reversing the solidarity vision into an exclusively repressive one” [our translation].

697 Art.3 c.4 S.A. foresees that a yearly President of the Council of Ministers provision establishes, on the basis of fixed criteria, the maximum quota of foreign citizens allowed to enter the national territory for reasons of subordinate, seasonal and autonomous work. This mechanism works with many difficulties, because it assumes a perfect job demand and supply dynamics between subjects who do not know each other, and also because quotas are usually less than (requested) needs. Therefore, the majority of foreign citizens who appear to have entered the country with a work-visa actually already entered the country illegally (or with other types of visa) and after having found a job in the black market were forced to go out irregularly in order to come back in respect of legal provisions. A more realistic model seemed that relying (in law 40/98) on the “sponsor”, which was more flexible and more respectful of the economic dynamics.


699 The whole procedure is responsibility of the Prefettura, local representation of the Government – Ministry of the Interior; the work authorisation is issued by the Provincial work office. The permit of
As far as the right of asylum is concerned, the new legislation does not provide for the necessary organic asylum law (still missing in Italy, notwithstanding a Constitutional norm), but rather restricts the access to the procedure and, even if setting some positive changes, in the end limits dramatically the possibility for those escaping from persecution and violence to be recognised refugee status.

2. The Italian procedure for the recognition of refugee status

2.1 Legal basis

Legal basis for the ascertainment of Costitutional asylum and the recognition of the refugee status in Italy:

- Constitution 1948, art. 10(3)
- Aliens Act 28 February 1990, n.39;
- Presidential Decrees n.136/1990 and 237/1990;
- Presidential Decree 31 August 1999, n.394;
- Law 30 July 2002, n.189;
- Presidential Decree 18 October 2004, n.334;
- Presidential Decree 22 September 2004, n.303.

stay is the title of residence to be requested by foreign citizens within 8 days from the entry and is issued by the local Police Headquarters (Questura) – Ministry of the Interior.

In the words of L. Pepino – “La legge Bossi-Fini: le ragioni di un no”, in Il nuovo diritto dell’immigrazione – Profili sostanziali e procedurali, IPSOA, 2003, p.14 – the Bossi-Fini law “not only represents a negative qualitative leap, new in the context of the immigration discipline, but also a very tough attack – against values such as fairness, solidarity and democracy – which will affect the whole system”
2.2 According art.10(3) of the Italian Constitution, “any foreign citizen who is prevented in his/her country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution shall be entitled to asylum in the territory of the Republic, pursuant to the conditions provided by law”\(^{701}\). This subjective individual right to enter the country and to have its demand analysed affects the right of the State as to who admit into the national territory, but Italy has not so far adopted the ordinary legislation here foreseen, therefore at the moment as for **Constitutional asylum** no procedure and no rights (but for the admission one) have been stated.

The right of asylum should be granted by a Civil Court procedure and so far few Courts ruled accordingly, mainly subordinately to a process of appeal lodged against the rejection of the Geneva refugee status\(^{702}\). The foreign citizen enjoying Constitutional asylum could not be expelled into the country of origin or into a country where protection could be denied or from where he/she might be transferred to the first.

2.3 Italy adopted the implementation measures of the Geneva Convention relating to the status of refugees (the ratification of which had been authorized by L.722/54), and particulary of its art. 1, with Law 39/90 and with two Presidential Decrees defining the recognition procedure. L.39/90 does not represent the implementation of the Constitutional provision: “asylum” (in the Constitutional sense) is actually a broader concept than “refuge”, even if terms often overlap (e.g. “asylum seeker” as a person requesting for the refugee status).

After the entry into force of the Presidential Decree n.303/04 (implementing art.31-32 of the L.189/02 dealing with refugees) the procedure for the **recognition of refugee status** envisaged by L.39/90 and related acts has changed. Amendments are

---

\(^{701}\) In 1997, a very important judgement (Cass. S.U. 4674/97) recognised the full implementation of the subjective right to Constitutional asylum, despite the lack of ordinary law.

\(^{702}\) An increasing number of people were granted asylum under the Italian Constitution on the basis of Civil Courts decisions in 2003 and 2004: e.g. Tribunale (Civil Court) di Lucca 11.9.2003 (in www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2004/gennaio); Tribunale di Firenze
in force since 21 April 2005. Instead of a single Central Eligibility Commission there are now 7 Territorial Commissions for the determination of refugee status, instituted in the local Government Offices (Prefetture) and located in areas where arrivals are frequent and procedures should be speeded up.\(^{703}\)

### 2.3.1 The access to the procedure and the retention of asylum seekers

Foreign citizens have to present the asylum request to the Border police when entering the country, or afterwards to the local Police Headquarters. Even if stated that the asylum seeker cannot be confined for the only purpose to examine his/her asylum request, two retention cases, possible or mandatory, are foreseen by the law.\(^{704}\)

Retention is realised in “identification centres” and in “centres for temporary permanence and assistance.”\(^{705}\)

Retention is possible, for the sole purpose of defining the request, to check out identity or nationality, to verify the elements on which the demand is grounded or impedimental clauses.\(^{706}\) Possible retention is implemented in identification centres and people can leave the centre only on authorisation, otherwise the asylum demand is deemed renounced.

Retention is mandatory when the foreign citizen has been stopped because he/she violated (or attempted to violate) border controls or because he/she is irregular, or because already expelled/rejected: in the first two cases retention is carried out in identification centres, in the last one in “CPTs”.\(^{707}\), according to rules on administrative detention and expulsion.

---

\(^{703}\) There’s one National Commission with tasks on data monitoring and co-ordination of the Territorial ones, and with competence on exlusion and cessation clauses. The Territorial Commissions will be located in: Gorizia, Milan, Rome, Foggia, Crotone, Siracusa, Trapani. The Commissions are composed by a Prefect (Ministry of the Interior – Civil Liberties Department), a Police officer, a member indicated by the Local Authorities Conference, and by a UNHCR representative, all with right to vote. The Commission could be integrated by a representative of the Foreign Affairs Minister in special cases, and by a member of the National Commission in the case of “review” (see infra).

\(^{704}\) If strictly applied, the both include all cases, making the non-retention an exception.

\(^{705}\) See infra.

\(^{706}\) Recognition of the status in another State, due permanence in another country signatory of the Convention (sufficient to ask for the status there), conditions of art. 1F Convention, charged in Italy for a criminal offence or threat for national security, member of a criminal or terrorist organisation.

\(^{707}\) See infra.
Retained asylum seekers are not endowed with a permit of stay, but with a “certificate of presence”; only if the procedure does not end in due term the person can be released and issued a permit of stay.

In the case where the retention is possible the procedures for the determination of the competent State are activated, while when it is mandatory Italy considers itself competent. The rules are those stated in Regulation 343/2003/CE 18 February 2003 (“Dublin II”), included the web system for data comparison (Eurodac); if the request is deemed un-admissible the asylum seeker should be transferred, in any case respecting art. 19(1) S.A. which protects from the risk of being expelled to a country where the person could be persecuted for reasons of race, sex, religion, language, nationality, political opinions, personal or social conditions (or from where he/she risks being transferred to a country where he/she could suffer the same treatments): this is a prohibition to expell people who could face a risk despite the recognition of their refugee status.

Moreover, art.20 S.A. states that with Decree of the President of the Council of Ministers measures of temporary protection could be adopted for meaningful humanitarian reasons in case of conflicts, natural disasters or other serious events outside the EU, and the same says the Legislative decree n.85/2003 (implementing Directive 2001/55/CE), but the admission to a temporary protection measure does not prohibit the presentation of the request to obtain the refugee status; in any case beneficiaries cannot be deported.

2.3.2 The procedure for recognising refugee status

The procedure is ordinary (35 days) only for foreign citizens coming regularly and then asking for asylum. Considered the fact that in the vast majority of cases people escaping from violence, discrimination and war conditions do not come through regular channels, but rather use ways which are more dangerous and less respectful of human rights, we can easily think that this will be an exceptional case.
For those coming irregularly and subjected to retention the procedure is simplified (20 days).

The Commission may recognise the refugee status or reject the request; moreover, it can deny the status, but ask the local Police Office (Questura) to issue a humanitarian permit of stay (art. 5(6) S.A.), when there are grounded reasons justifying non-refoulement, for instance relating to international obligations and particularly to art. 3 of the European Convention on Fundamental Rights. In the case of the simplified procedure another request of “review” can be presented, if – in 5 days’ time – new elements emerged or the asylum seeker deems the Commission has not considered properly those already presented. The review is decided by the same Commission, only integrated by a member of the National Commission.

If the asylum demand has been rejected – and if the review has been rejected as well – an appeal can be lodged within 15 days, but it does not suspend the removal procedure, immediately enforced. Therefore, the appeal would necessarily be lodged from abroad, but if the Prefect authorises the permanence on the territory.

The access to procedure, the issue of detention in retention centres, the independence of the decision board, the effectiveness of the (non suspensive) judicial appeal are the most meaningful critical points of the new rules for recognising refugee status.

3. Statistics

It is quite difficult to single figures regarding asylum seekers whose request has been rejected out of the total figures relating to expelled illegal foreign citizens, both because they are not differentiated and because monitoring systems vary from one local police headquarters to the other. It is moreover hard to report statistically
Country Report Italy

about the disappearance of rejected asylum seekers, who find themselves without any support after denial (often also before) and have to try and reach other countries or, in the worse case, remain within a grey area of irregularity and wait for the next regularisation chance.

In September 2004 the Ministry of the Interior issued the yearly figures about expulsions: in 9 months, 42,317 irregular migrants had been removed from the national territory (22,961 rejected at the border and 19,356 expelled709).

The measure of the statistical uncertainty about asylum seekers is clearly shown by one of the most recent publications on asylum in Italy, ICS Report710, which writes about 25.000 asylum seekers, while Ministerial sources report only 10.000 present on the national territory. In 2004, 781 requests were accepted, while 8.150 were the rejections of refugee status (2.350 of which were denials with recommendation for the issue of a humanitarian permit of stay)711.

General figures

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>781</td>
</tr>
<tr>
<td>Rejected request</td>
<td>8,150</td>
</tr>
<tr>
<td>Suspended cases</td>
<td>29</td>
</tr>
<tr>
<td><strong>Abschnitt 1.01NON</strong></td>
<td></td>
</tr>
<tr>
<td><strong>CONSIDERED REQUESTS</strong></td>
<td>15</td>
</tr>
<tr>
<td>Renounce</td>
<td>13</td>
</tr>
<tr>
<td>Review</td>
<td>30</td>
</tr>
</tbody>
</table>

708 For grounded risks on personal life/liberty, serious personal reasons or health problems.
709 See *infra* for the distinction between rejection and expulsion. Source: Ministry of the Interior (www.mininterno.it). The report specified that in the same period 9,707 irregular migrants reached the Southern shores.
4. Regularisations and legal and administrative arrangements concerning return and repatriation

4.1 The legal provisions mainly aim at granting expulsion and rejection of irregulars, excluding any kind of organic instrument to regularize the irregular entry into the territory, but for periodical provisions, called “regularisations” (“sanatoria”): so far, six regularizations occurred since 1986, the latest one – provided by Law 189/02 and by the following Law 222/02 – involved almost 703.000 foreign citizens.

In several cases, the regularisation has been a good chance for asylum seekers as well, since they cannot work and have to wait for the decision for even 19 months.
4.2 But for the peculiar case of assisted voluntary rapatriation for asylum seekers, in Italy “return” and “rapatriation” mean removal procedures namely rejection and expulsion.

In order to understand the framework in which return policies could be managed and deportation is implemented, we list here the most important legal instruments concerning rapatriation of irregular migrants. We stress that the limits and the obstacles mentioned when dealing with the access to the asylum procedure are dramatically linked to the measures foreseen for rejection and expulsion: asylum seekers arriving on the Southern coasts or through the Eastern borders are at risk of being rejected or expelled without even having the chance to express the will to ask for protection.

One of the latest cases occurred in Lampedusa (Sicily): last 17 March some 180 people were deported from Italy to Lybia, with police escort. The European Parliament adopted a Resolution inviting Italy to prevent from implementing collective expulsions of asylum seekers and “irregular migrants” towards Lybia or other countries and to grant the individual treatment of asylum requests and the respect of the non-refoulment principle.

As for Directive 2001/40/CE on mutual recognition of return decisions, it has been implemented by Legislative Decree 10.01.2005, n.12, which foresees that removal decisions adopted by the competent national authorities are rejection or expulsion (as specified further on), as well as the correspondent measures adopted by authorities of another EU Member State. The Prefect (Local Government authority) is charged to adopt the implementation of a removal provision issued by another Member State, if necessary after having had the necessary documentation from that country.

---

712 See infra.
713 A complete comment upon expulsion measures, their effects and their constitutional profiles see Bonetti P.-Casadonte A., Ingresso, soggiorno e allontanamento, in Nascimbene B. and others, Diritto degli stranieri, Padova, 2004, pp.426-620.
714 See also UNHCR, Press-Communicate, Italy: UNHCR deeply concerned about Lampedusa deportation of Libyans, 18.03.2005.
715 P6_TA-PROV(2005)0138
Rejection is an immediate denial of access to the national territory (art. 10 S.A.) and is enforced mainly by Border police when a foreign citizen attempts to enter the territory without fulfilling the entry conditions. Rejection implies non-admission or removal of the foreign citizen from the territory, without being prejudicial to his/her request for entry afterwards, if conditions are fulfilled.

Differently from rejection, expulsion (art. 12-16 S.A.) affects a foreign citizen after having entered the country and it represents the measure to remove the foreign citizen and to prevent him/her from re-entering the territory for a certain period. Recently, two Constitutional Court judgements deal with this specific part of the “special” immigration law\(^{716}\). When provided with an expulsion order, the foreign citizen is compelled to leave the national territory (autonomously or through escorting), immediately or within a certain period of time, and is prevented from re-entering the national territory\(^{717}\).

The Single Act envisages three forms of expulsion.

1) *Administrative expulsion*:

a) ordered by the Minister of Interior for reasons of public order and national security and enforced by the Head of local Police – Ministry of the Interior;

b) ordered by the Prefect, *Prefetto* – Head of the Provincial Governmental Authority, in case of illegal entry or stay in the national territory or in case the migrant belongs to categories identified as dangerous. This is the normal kind of expulsion, ordered by a Prefectorial decree and usually immediately enforceable (by the *Questore*) even if the person appeals. Previously the law provided for an “order to leave the territory” within 15 days and foresaw escort to the border only in particular cases, while now expulsion is always enforced by the Head of local Police by means

\(^{716}\) Judgement n.222/2004 declares unconstitutional the immediate enforcement of the expulsion and the lack of sufficient defence measures for the foreign citizen within the validation procedure and states the necessity of a judicial validation of the expulsion order – before the escort to the border, and with the possibility for the foreign citizen to be listened to and to be defended. Judgement n.223/2004 deems unlawful the provision foreseeing arrest for a crime for which it was not possible to apply custody in prison.

\(^{717}\) According to the Convention of the Schengen Agreement (ratified by Law n.388/1993), the foreign citizens can be registered on the Schengen Information System by the security or judicial authority, in order to avoid that those expelled from the Italian territory may enter another country Part of the Agreement.
of police escort to the border. When the expulsion order is indeed immediately enforced, it is hard for the foreign citizen to defend him/herself. As a matter of fact, an appeal (not suspending the execution of the order) against an expulsion order can be lodged at the Justice of the Peace (“Giudice di Pace”) competent for the place where the order of the Prefect has been issued, or through the Italian diplomatic/consular mission in the migrant’s country of origin/of residence. The attribution of those competences to the Justice of Peace has been fixed by Decree 241/2004 turned into Law 271/2004, adopted in reply to two judgements by the Constitutional Court (n.222/2004 and n.223/2004)\(^\text{718}\). The Bossi-Fini law enhances another repressive provision, namely the prohibition of re-entry after the enforcement of the expulsion order, which has been elevated from 5 to 10 years.

2) *Expulsion as a security measure* (judicial provision): the penal judge can order the expulsion of any migrant who is convicted of some of the crimes envisaged by the Code of Criminal Procedure, if he deems the foreign citizen to be socially dangerous. If identity, nationality are clear and a carrier is available, the expulsion is executive.

3) *Expulsion as a sanction substituting detention* (judicial provision): if the term of imprisonment inflicted by the judge is up to 2 years and there is no possibility for a suspended sentence, and if the execution is immediately enforceable, the judge can decide to substitute the sentence with an expulsion lasting at least 5 years. The foreign citizen is escorted to the border.

The key features of the Italian removal system are the so-called “centres for temporary permanence and assistance” (CPTA) or “temporary permanence centres” (CPT), introduced in 1998. Since then, detention measures in CPTs have been adopted for those who have been given notice of an expulsion order or of a rejection with escorting to the border which was not immediately feasible. Detention centres in Italy are guarded by the Police force and can be considered as ordinary instruments to make administrative expulsion easier; some of their features (e.g. the restriction of

---

\(^{718}\)The Constitutional Court case-law (judg. n.105/2001 and n.222/2004) states that escort to the border and confinement into detention centres affect personal liberty. See Caputo A.-Pepino L., *Giudice*
personal liberty and the restoration of the confinement by force, if people leave without authorisation) allow us consider them as para-detention facilities. They are ruled by directives of the Ministry of the Interior, through the local Prefect, who can sign conventions and agreements with public or private bodies to manage the centre and to guarantee legal advice, interpreters’ services and cultural mediation, social assistance and psychological support, ...  

At the moment, in Italy there are 15 CPTA and 5 reception centres (hybrid centres, using – temporarily or not – management rules which are typical of detention ones). A Report by MSF (Médecin Sans Frontières), issued in 2004, carefully highlights the socio-sanitary conditions of migrants detained in the CPT, the structures and management, the standards of services offered, the respect for procedures, providing for a thorough evaluation upon the system of administrative detention and first reception in Italy. The Bossi-Fini Law states that in the case of expulsion as substitution of detention, detention (in CPT) remains up to the moment in which documents for travelling are available. The Report deals also with topics such as the excessive use of force by the police, the possibility of leisure activities, the facilities for private talks, the availability of socio-sanitary services, the opportunity for detained migrants to get informed and to have contacts with associations and lawyers, and the fairness/efficiency in respecting procedures, above all in relation to the right of defence and the refugee status recognition. Even if a Directive of the Ministry of Interior fixes the criteria to rule the centre properly and to guarantee rights, deficiencies are meaningful and the whole system shows how difficult is to handle this kind of solution to solve the problem of irregularity.

di pace e habeas corpus dopo le modifiche al testo unico sull’immigrazione, in Diritto Immigrazione e Cittadinanza n.3/2004, p.18.
719 Often, these centres are often not “visible” to the public opinion, except for some cases where riots exploded or where self-injuries were provoked by the detained.
720 Torino, Milano, Bologna, Modena, Roma, Restinco (Brindisi), San Foca (Lecce), Bari Palese, Lamezia Terme (Catanzaro), Crotone, Serraino Vulpitta (Trapani), San Benedetto (Agrigento), Lampedusa (Agrigento), Pian del Lago (Caltanissetta), Ragusa.
721 Gorizia, Borgo Mezzanone (Foggia), Otranto (Lecce), Salinagrande (Trapani), Siracusa.
Detention in CPT, while waiting for the obstacles to the execution of the expulsion being removed, heavily affects personal liberty\textsuperscript{724}, that is to say that it limits freedom for a purpose which is not related to crime repression: being irregular on the territory or having crossed the border irregularly is not a crime, but an administrative infraction.

5. The detention of asylum seekers.

The new immigration law stated the institution of structures called “identification centres” \textsuperscript{725} and reserved to asylum seekers.\textsuperscript{725} The confinement shall be possible or mandatory. An asylum seekers shall be held in an identification centre in order to verify identity/nationality if he/she is without documents or found with false documents, or with the purpose to examine the grounds of the asylum request, when they’re not evident, or while waiting for the decision of admission into the territory. While an asylum seeker has to be detained if he/she has been stopped for violating or essaying to violate border controls (or just after), or in irregular condition of stay (identification centre), or if he/she presents request for the recognition of refugee status being already issued by an expulsion order (“CPT”).

The regulation\textsuperscript{726} implementing the new law states that these kind of centres should be open, at least for a certain number of hours per day, and also for contacts with lawyers, associations, integration activities, … but many doubts about the grounds on which an asylum seekers could/should be detained are justified.

In 2003, the vast majority of asylum seekers arrived in Sicily by boat were kept in closed camps for approximately 20 days and released after being identified and registered as asylum seekers. Others were obliged to stay in the camps for the entire duration of the asylum procedure, when the Central Eligibility Commission

\textsuperscript{724} Art. 13 Constitution, art.2 Immigration law 286/98 not amended by 189/02.  
\textsuperscript{725} These centres are foreseen in Gradisca d’Isonzo, Milano, Roma, Foggia, Siracusa, Crotone e Trapani.  
\textsuperscript{726} Decree n°303 of the President of the Republic, 16 September 2004 (Regulation of Implementation of the “Bossi-Fini” law relating to the procedures for the recognition of refugee status), foresees 7 identification centres (art.5).
decided to carry out interviews locally instead of in its office in Rome. In this case, freedom of movement was limited to the camps and those who received the rejection of their claim were ordered to leave the country within 15 days.\footnote{ECRE Italy Country Report, 2003.}

Despite art. 31 of the Geneva Convention\footnote{Art. 31 exempts refugees coming directly from the country of persecution of being punished on account of their illegal entry or presence and which provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are “necessary”. See also UNHCR Guidelines on the Detention of Asylum Seekers and Refugees (1999), e.g. Guideline 1 (“As a general principle asylum-seekers should not be detained”), Guideline 3 (“Exceptional grounds for detention”); JRS-Europe Observation and Position Paper 2004; ECRE Position Paper on the Detention of Asylum Seekers, 1986; as for the relationship between inclusion and deterrence of asylum seekers see A Survey of Policy and Practice Related to Refugee Integration, Oxford, 2004. See also UNHCR ExCom Conclusion n.44 (1986), UNHCR Guidelines on Detention of A.S. (1999).}, the physical continuity between detention centres and identification centres, together with the working of the new Italian procedure for the recognition of refugee \textit{status}, represent features leading to produce confusion of structures and above all uncertainties in the protection of rights.

\textbf{6. The application of Dublin II and the main legal and administrative schemes for voluntary return}

6.1 Under the Eurodac system, instituted by Regulation 2725/2000/CE, and the Dublin II Regulation, in 2003 out of 331 “Dublin cases”, 75 requests were accepted by other European countries, 147 were refused and 109 were still under examination by the end of the year. Italy was considered responsible for 11.030 cases.\footnote{ECRE \textit{idem}.}

There is no specific research on the implementation of EU Directives and Regulations: it is mainly reserved to administrative internal measures (“\textit{circolari}”), which are very seldom published by the Public Administration, therefore – but for rare cases where data are available – you can assess the impact of Community legislation in Courts, on occasion of trials in related matters.
6.2 The International Organisation for Migrations (IOM) manages a thorough programme of assisted voluntary return in the framework of the Central Protection System for asylum seekers and refugees, which began in 2001 under the support of the Ministry of the Interior, UNHCR and the Italian Association of Municipalities. According to the figures collected by ECRE\textsuperscript{730}, about 100 cases (immigrants and asylum seekers) were voluntarily repatriated under the IOM assisted programme in 2003.

In April 2003, IOM and the Ministry of the Interior presented the first guide for informed migration, focused on the Mediterranean area (Italy, Greece, Malta, Spain, Portugal) and financed by the European Commission (Odysseus Programme).

6.3 As regards legal and administrative or other barriers concerning the return (deportation), it is to be emphasized that the enforcement of an expulsion order, for different reasons (such as the necessity to rescue the migrant, to check out his/her identity and/or nationality, to wait for the travel document and to verify the carriers’ availability) is quite difficult. As a consequence, immigrants subject to a refusal of entry or to an expulsion measure are detained in the nearest detention centre (“centro di permenenza temporanea e assistenza” – centre for temporary permanence and reception), by order of the Head of local Police\textsuperscript{731}. If it is not possible to keep the migrant in the CPT, or the detention terms have expired without enforcement of the expulsion order, the Head of local Police orders the person to leave the country by his/her own, within 5 days and if he/she does not comply with this injunction without justified grounds\textsuperscript{732}, he/she is punished with arrest from 6 months to 1 year in the case of missing renewal of the permit of stay, from 1 to 4 years in other illegal permanence cases (penal consequences and summary trial procedure – rito direttissimo).

\textsuperscript{730} ECRE Italy Country Report 2003.
\textsuperscript{731} The order is transmitted within 48 hours to the competent Justice of the Peace validating the measure. Guarantees for the foreign citizen: to be defended by a lawyer (and to be granted legal aid), to be heard, to be put in conditions to understand the act. If not validated, the provision loses its effects, otherwise the migrant is detained for a period of 30 days (the previous legislation limited it to 20 days), which can be extended by the judicial authority for another 30 days, if expulsion is still hampered.
\textsuperscript{732} See Constitutional Court judgement n.5/2004, considering a wide notion of the “justified ground”.

516
Following the arrest, the migrant is expelled and escorted to the border by the police force.

Due to these complex features, the Italian return system has proved to be inadequate to the dimensions of the migration phenomenon, and has heightened the figures of those who are irregularly present, instead of discouraging illegal entries.

In the case of asylum seekers whose asylum demand has been rejected, the situation is even more difficult. Worrying aspects are, above all, the lack of suspensive appeal (which eliminates its effectiveness), the uncertainty of the return in safety and, of course, the danger of deporting/removing someone exactly to the place from where he/she is escaping.

6.4. Legal limits to the expulsion of asylum seekers or people searching for international protection come from important international acts, such as the European Convention on Human Rights – particularly art. 3 preventing torture or inhuman/degrading treatments, widely interpreted by the Human Rights Court case-law – and the Directive 2004/83/CE about minimum standards to recognise refugee status or international protection. This latest norm, even if not yet received into the national law system, has been highly considered by the Italian Ministry of Interior when writing the guidelines for the new Territorial Commissions and will hopefully be a meaningful piece of legislation which those deciding on asylum demands would take into account: it is particularly important in fixing a common “refugee” definition and in giving grounds for the recognition of a complementary form of protection (avoiding refoulment) to those who do not fulfil the Geneva Convention criteria.  

733 The Ministry has just published on its website (www.mininterno.it) a Vademecum for the asylum request, translated into English, French, Spanish and Arab.
- CHAPTER X -

COUNTRY REPORT LUXEMBOURG

by
Francois Moyse,
Luxembourg
1. **Number and status of foreigners obliged to return to their home country**

In Luxembourg the asylum procedure is very strict. The recognition rate of refugee status in Luxembourg is 2 to 5 % a year and most asylum-seekers receive a negative answer. Thus many of the foreigners concerned with the return issue are turned-down asylum applicants.

- The legal status of foreigners obliged to return has not changed in the past few years. Mostly asylum seekers, whose claims have been rejected, are subject to deportation from the country. It also concerns economical immigrants from third-countries, who have not been able or not been willing to obtain a residence permit. Finally, some cases are due to the menace of (“illegal”) immigrants to the public order.

An expulsion order may be enforced by the police for lack of necessary travel documents, in case the foreigner is considered as a threat to security, tranquility, public order or public health, if the foreigner does not have the necessary means of living and for a foreigner listed as non-admissible (article 96 - Schengen agreement).

The applicable legislation is still the law on foreigners of 28 mars 1972 on the entry and sojourn of foreigners and the employment of foreign workforce and a grand-ducal regulation of the same date. The Government has announced that it is working a new piece of law, which should be more adapted to the current times.

As far as unsuccessful asylum seekers are concerned, the 1951 Geneva Convention and the amended law of April 1996 on the asylum procedure stop to apply, once their application has been turned down. The former Dublin Convention and its subsequent Regulation (“Dublin II”) may, though, be the framework of a transfer of an asylum seeker to another EU country during the asylum procedure.
- As far as the numbers of foreigners obliged to return to their home country is concerned, most are turned-down asylum seekers.

In 1999, there were 263 foreigners who were deported, out of which 9 expulsions;
In 2000, there were 175 foreigners who were deported, out of which 6 expulsions;
In 2001, there were 188 foreigners who were deported, out of which 4 expulsions.\footnote{Source: Commission Consultative des Droits de l’Homme}

In 2002, there were 234 repatriations: 44 accompanied\footnote{So called voluntary returns} returns and 190 assisted\footnote{i.e. forced returns} returns;
In 2003, there were 708 repatriations: 98 accompanied returns and 610 assisted returns;
In 2004, there were 381 repatriations: 56 accompanied returns and 325 assisted returns.\footnote{Source: Ministry of Justice}

It is not possible to find out the exact numbers of those who were deported after rejection of an asylum claim for subsidiary protection or termination of other protected status after illegal entry and residence and a final order to leave. Only very few asylum seekers have been granted the temporary protection, as foreseen by the law of procedure of 1996. Indeed, there is no subsidiary protection for the moment, only a toleration procedure.\footnote{see under §3}
2. Regularization of illegal immigrants

In the past years, there has been one regularization procedure as such. In March 2001, two debates took place in Parliament about the regularization of illegal foreigners and the asylum policy of the government. The latter announced that, by exception, it would grant work permits and residence permits outside the normal scope of the modified law on foreigners of 28 mars 1972 on the entry and sojourn of foreigners and the employment of foreign workforce.

The criteria were decided and announced by the government, and printed in a brochure. A special cell of the three ministries of Labour, Justice and Family was appointed for this regularization, which took place between 15 May until 13 July 2001. 7 categories of foreigners were eligible (in short):

A. an adult having lived and worked all the time since 1. January 2000, if affiliated to the Social Security and if earning at least the equivalent of the minimum wage;

B. the same situation is concerned, but the person is not affiliated to the Social Security;

C. a person who is seriously ill and cannot go back to the home country within a year;

D. a person who is over 65 years old and has resided in Luxembourg since 1. January 2000 or who is working in Luxembourg and who is the father/mother of a child who holds a residence permit;

E. an adult person who has resided in Luxembourg since 1. January 2000 and who is the child of a residence permit holder;

F. a person who is the direct descendant or ascendant of a Luxembourg.

Some persons were not eligible:

1. persons having gravely hurt the public order
Country Report Luxembourg

2. persons having used false documents

3. persons who have entered the territory as students, apprentices or “cabaret artists” (i.e. prostitutes).

4. persons working in Luxembourg for a limited time/job;

5. persons not fitting into the abovementioned categories.

People from Kosovo were entitled to regularisation if they had arrived before 1 January, 2000. People fulfilling one of these conditions were given 6 months to find a job.

At the end of the campaign, 2,850 people had been regularised, 2,007 of whom came from former Yugoslavia, and practically all of whom were asylum-seekers: the total amounted to 1,554 applicants, 64% of which got a work and a residence permit.

After this “one-shot” regularization, no other such procedure was used.

In 2004, the new government, a coalition of the Christian-social party and the Socialist Party, announced a more humane attitude toward asylum seekers, whose applications were rejected.

It announced that it would grant residence permits to families, especially originating from the former Yugoslavia, who have been in Luxembourg before August 2001 and whose children are in secondary school. However no regularization procedure, whether legal or administrative, has been set up, rather the new Ministry of Foreign Affairs and Immigration, which is in charge of the issue and replacing the Ministry of Justice, has sent out letters to the families, by selecting them unilaterally. These permits are, according to the government, issued on an “exceptional basis”.

524
Finally, one has to mention the new developments in law. Due to the growing number of asylum seekers, many of whom originating from Western Africa, a draft bill on the asylum procedure was lodged in Parliament by the former Government. NGOs severely criticized the draft, which was then redrafted by the new Government and which should be voted upon in the next few months. This draft bill is integrating several EU-directives and innovates by creating a subsidiary protection mechanism. Nevertheless, it also reduces the procedural rights of asylum seekers and scraps the right to appeal in the administrative courts, after a negative ministerial decision and a confirmation by the first-instance court.

3. Legal and administrative arrangements concerning return and repatriation

The legal framework concerning return and repatriation has not changed in the past few years. Since 2004, the Ministry of Foreign Affairs and Immigration has been newly in charge of immigration, including return. Other ministries are though involved, like the Ministry of Family for practical details and the Ministry of Interior for police measures.

Unsuccessful asylum seekers may always accept to return voluntarily and will then receive some financial assistance.

If the unsuccessful asylum applicants do not accept to return by themselves, they will be put on a list of forced returns. Most forced returnees will end up in a plane with the destination of their homeland, escorted by a civil servant, on a commercial or a special flight.

As far as administrative measures used for speeding up the process of return, there are none that could be mentioned.
One must draw the attention to the draft bill of 2 December 2004 on asylum procedure, which was mentioned above\textsuperscript{739}. The main reason for the draft bill is the speeding up of the procedure, as well as the transposition of European directives.

Thus the Government intends to instate an accelerated procedure in certain cases, especially for asylum seekers originating from safe third-countries, to cancel some possibilities of appeal, to introduce shorter administrative and judicial deadlines and to instate some mechanisms intended to force the applicants to participate more actively in the procedure.

However, it is too early to assess the draft bill, especially because it does not actually change the issue of return and repatriation.

The used administrative measures facilitating the return are mostly travel documents ("laissez-passer"). The documents are negotiated with the destination country.

In the past two years, 11 charter flights have sent hundreds of persons to the former Yugoslavian territory of Montenegro, via Vienna, where the border police asks to be informed about these transit passengers. The Government also has held discussions with Albania on this issue.

In December 2004, the law of 24 November 2004 on readmission agreements of irregular foreigners was published. These agreements have been signed between the Benelux countries and Romania, Bulgaria, Estonia, Lithuania, Latvia and Croatia.

\textsuperscript{739} §2, final
- Currently the availability of alternative procedures to obtain a humanitarian toleration is slim. The law of 3 April 1996, as modified by the law of 18 March 2000, allows for the Government to grant a toleration document to turned-down asylum seekers. Such a document will be handed over in case the repatriation is impossible due to factual circumstances. In practice, such a toleration document will be given mostly when a person is ill. The document is valid for several months only and it may or may not be prolonged.

The draft bill on asylum procedures of 2 December 2004 will introduce the concept of subsidiary protection in Luxembourg law, in case there are real and serious reasons to believe that, if the applicant was sent back to his country, there would be a real risk for his life.

A temporary protection should also be introduced, in case of a massive influx of foreigners.

- As far as restrictive measures are concerned, one must notice that the cases of asylum seekers who have been put in the detention center, which is currently “housed” in the prison, have risen quite significantly. The courts are sometimes ordering the immediate liberation of some asylum seekers and sometimes, in a confusing case-law, are validating such detention.

Also, no work permit is issued to turned-down asylum seekers. The policy of the Government is to be very restrictive with work permits for third-country nationals, who have very little chance to get such a permit.

Once the application of an asylum seeker has been definitively rejected, including by the administrative courts, the social assistance, as foreseen by a grand-ducal regulation of 4 July 2002, is canceled.
4. Impact of EU-directives, regulations and measures on return and repatriation policies

The author is of the opinion that the impact of EU legislation and measures has been quite restricted. Most directives have not been transposed yet. Also they use minimum standards, which are already applicable most of the time. An exception may be Dublin II and Eurodac.

It is very hard to get the opinion of the Government on this matter.

5. Dublin II and Eurodac

The systematic recording of fingerprints has led to some cases of transfer of asylum seekers who had already lodged an application in another EU-country. However the number is not overwhelming.

One cannot say that it had a real influence on facilitating the return of rejected applicants to their home countries, as these applicants are being sent to other EU-countries.

The psychological influence has not been tremendously important: these measures allow to keep better track of those who have been transferred to another country.
In general there is no noticeable direct effect of EU directives and measures on return. EU plans are generally commented in the media. The government fully cooperates with other EU-members to go on with a more integrated European asylum policy.

The general public reacts generally more to local problems, like criminality of certain African asylum-seekers or the lodging of asylum seekers in their own town or village.

Some NGOs are closely monitoring the EU measures and legislation. The watch the return policy of the Government very closely and often are very critical of the collective returns.

6. Main legal or administrative schemes for voluntary return-incentives

The financial criteria have not changed in the past few years: the sum allocated depends on the length of stay in Luxembourg. Generally an adult will receive 1.190 EUR and a child 595 EUR. However it also happens that no financial aid is granted at all. In 2003, the total amount paid to 607 persons who were returned to their home country was 552.597 EUR.

In 2003, the number of forced returns had risen significantly. In 2004 such returns have been less numerous. It seems that currently the number of such returns has sharply dropped.
Country Report Luxembourg

The Luxembourg Government has also promised some financial help to the countries concerned with these returns, mainly the former Yugoslav republics.

7. Legal and administrative or other barriers for enforcement of return

The length of administrative procedures involves that many rejected applicants have been living in the country for several years and have somehow assimilated, especially the children, who have been to school and have learned the Luxembourgish language. It is psychologically disturbing for these people, and often for their neighbours in Luxembourg cities and villages to see them forced to depart after years of precarious but real residence on the Luxembourg soil. Therefore the forced returns are often commented and criticized in the written press or by NGOs.

Other practical difficulties include mostly the absence of identity documents or false identity documents. This is more and more the case for new applicants, many of whom come from Africa. It is sometimes impossible to organize a forced return to countries where the real identity of the applicant cannot be checked.

Also, the organization of returns represents, according to the Government, a important investment in time of employees and civil servants of the state, including translators and accompanying personnel.

In conclusion, the speeding up of the asylum procedure has been announced by the Government, who wants to pass the new law in Parliament quickly. Many NGOs are skeptical about the real impact of this bill. The forced return of foreigners who have lived in Luxembourg for a long period is indeed psychologically difficult to apply and to justify.
The EU texts should not change the issue of return in a significant way in Luxembourg.
- CHAPTER XI -

COUNTRY REPORT MALTA

by

Dr. Eugene Buttigieg
University of Malta
STUDY ON REFUGEE STATUS IN EU MEMBER STATES AND RETURN POLICIES

COUNTRY REPORT: MALTA

Dr Eugene Buttigieg*

Introduction

Irregular immigrants in Malta may be divided into three categories: those who enter the country legally but remain beyond their authorised stay, those who arrive in Malta without the proper documentation and those who arrive in an irregular manner either voluntarily or after finding themselves in distress at sea and are saved by the Maltese coast guard authorities. Records show that between 2002 and 2004, the number of illegal immigrants falling in the latter category arriving in Malta by boat reached a total of 3,576, of whom an average 85% were from Africa. Most of these irregular immigrants apply for refugee status.

Legislation

* LL.D. (Malta), LL.M. (Exon), Ph.D. (Lond). Senior Lecturer, Department of European and Comparative Law, University of Malta.

740 Irregular Immigrants, Refugees and Integration Policy Document issued by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity at 6.


742 Policy Document (n 1) 6.
The law governing refugee status is contained in the Refugees Act\(^{743}\) (and implementing regulations) that was enacted in order to incorporate the obligations assumed by Malta under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.\(^{744}\) This Act establishes the Refugee Commissioner who is appointed by the Prime Minister from among public officers or other persons who are deemed by him to have knowledge and experience in matters relating to refugees.\(^{745}\) The role of the Refugee Commissioner and his staff (Assistant Refugee Commissioners) is to examine applications for refugee status.\(^{746}\) Moreover, the Refugee Commissioner is entrusted by the Act with the responsibility to ensure that the provisions of the Act, described hereunder, are applied in conformity with international practice and for this purpose he may seek the assistance of the United Nations High Commissioner for Refugees or his representative (referred to hereafter as ‘High Commissioner’) or of any national or international non-governmental body concerned with refugee matters.\(^{747}\)

**Procedure for obtaining refugee status**

Any person seeking asylum arriving in Malta, after being interviewed by the immigration officer, may apply in writing for refugee status to the Refugee Commis-

---

\(^{743}\) Act XX of 2000, Chapter 420 of the Laws of Malta.

\(^{744}\) Ibid Art 3. Malta acceded to the Convention on 17 June 1971 and to the Protocol on 15 September 1971. Malta is also a member of the International Organisation for Migration (IOM) and has signed and ratified the European Agreement on the Abolition of Visas for Refugees, the UN Convention against Transnational Organised Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air.

\(^{745}\) Ibid Art 4.

\(^{746}\) Ibid.

\(^{747}\) Ibid Art 14.
The immigration officer is obliged to explain to the interviewee about his right to apply for refugee status and about the right to consult the High Commissioner and to have legal assistance during all the phases of the asylum procedure.\textsuperscript{749}

On the other hand, persons already in Malta (whether lawfully or not) seeking refugee status in Malta may apply to the Refugee Commissioner for refugee status only within two months of their arrival in Malta, except where there are reasons for delay deemed by the Refugee Commissioner to be special and exceptional. Even in this case applicants would be required to attend an interview, if necessary, with the assistance of an interpreter.\textsuperscript{750}

All information concerning these applications is safeguarded by confidentiality. The High Commissioner has free access to any asylum seeker and may be present during any interview conducted by the Refugee Commissioner. The Refugee Commissioner is obliged to ensure that the applicant presents his case as fully as possible, supports it with testimonies and provides adequate explanations for the reasons submitted in the application.\textsuperscript{751}

The Refugee Commissioner would recognize as a refugee any person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

\textsuperscript{748} The law provides that the apposite application form should, where possible, be in a language that is comprehensible to the applicant

\textsuperscript{749} Refugees Act, Art 8.

\textsuperscript{750} Ibid.

\textsuperscript{751} Ibid.
avail himself of the protection of that country\textsuperscript{752} or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events is unable or, owing to such fear, is unwilling to return to it, but does not include a person (a) who is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance; or (b) with respect to whom there are serious reasons for considering that such person has committed a crime against peace, a war crime, or a crime against humanity or has committed a serious non-political crime outside Malta prior to his arrival in Malta or has been guilty of acts contrary to the purposes and principles of the United Nations.\textsuperscript{753}

After the applicant has presented his case, the Refugee Commissioner would issue his reasoned decision in writing and this would take the form of a recommendation to the Minister responsible for immigration (hereafter referred to as the ‘Minister’). If the Refugee Commissioner issues a positive recommendation, the Minister may either issue a declaration declaring the applicant eligible for refugee status or appeal against the recommendation before the Refugee Appeals Board. Where the recommendation is for the rejection of the application, the applicant likewise has a right of appeal before the Refugee Appeals Board. However, even where an applicant fails to satisfy the requirements for refugee status, the Refugee Commissioner may opt instead to recommend that the person be granted humanitarian protection in Malta. In such a case the Minister would be obliged to grant such protection until he is satisfied, after consulting the Refugee Commissioner, that such protection is no longer necessary.\textsuperscript{754} Humanitarian protection means

\begin{footnotesize}
\textsuperscript{752} Where a person has more than one nationality, the term ‘country of nationality’ would be deemed to refer to each country of which he is a national, and such a person would not be considered as not having the protection of his country, if, without any founded fear of persecution, he has not sought the protection of one of the countries of which such a person is a national.

\textsuperscript{753} Refugees Act Art 2.

\textsuperscript{754} Ibid Art 8.
\end{footnotesize}
that the person would be granted special leave to remain in Malta until such time
when the person concerned can return safely to his country of origin or otherwise
resettle safely in a third country.\textsuperscript{755} The law does not specify, as it does in the
case of refugees, what other rights are enjoyed by holders of this humanitarian
protection status.

The Refugee Appeals Board was set up by the Refugees Act to hear and deter-
mine appeals against recommendations of the Refugee Commissioner. All the
members are appointed by the Prime Minister for renewable periods but one of
the members must be a person who has practised law for a number of years. A
member of the Board may be removed from office by the Prime Minister only on
grounds of gross negligence, incompetence or acts, omissions or conduct unbec-
coming a member of the Board. Appellants are entitled to free legal aid and,
though sittings are held \textit{in camera} (if all parties agree), a representative of the
High Commissioner is entitled to attend the sittings of the Board.\textsuperscript{756}

The decision of the Board is final and may not be challenged before any court of
law, except on grounds of violation of the human rights provisions of the Constitu-
tion of Malta\textsuperscript{757} or of the provisions of the Convention for the Protection of
Human Rights and Fundamental Freedoms 1950.\textsuperscript{758}

The Act provides for an accelerated procedure for denying the grant of refugee
status in the case of applications that appear prima facie to be manifestly un-
founded because:

\textsuperscript{755} Ibid Art 2.
\textsuperscript{756} Ibid Arts 5-7.
\textsuperscript{757} Constitution of Malta Arts 33-46.
\textsuperscript{758} The European Convention Act, Act XIV of 1987, Chapter 319 of the Laws of Malta, through
which the Convention became part of Maltese law and enforceable as such.
(a) the application is not related to refugee grounds as defined in the 1951 Convention and 1967 Protocol; or

(b) the application is totally lacking in substance and the applicant provides no indications that he would be exposed to fear of persecution in his own country or his story contains no circumstantial or personal details; or

(c) the applicant gives clearly insufficient details or evidence to substantiate his claim and his story is inconsistent, contradictory or fundamentally improbable; or

(d) the applicant bases his application on a false identity or on forged or counterfeit documents which he maintains as genuine when questioned about them; or

(e) the applicant deliberately made false representations of a substantial nature; or

(f) the applicant, without reasonable cause and in bad faith, destroyed, damaged or disposed of any passport, other document or ticket relevant to his claim, either in order to establish a false identity for the purpose of his application or to make the consideration of his application by the authorities more difficult; or

(g) the applicant deliberately failed to reveal that he had previously lodged an application for asylum in another country; or

(h) the applicant, having had ample earlier opportunity to submit an asylum application, submitted the application in order to forestall an impending
removal order from Malta, and did not provide a valid explanation for not having applied earlier; or

(i) the applicant has flagrantly failed to comply with the substantive obligations imposed by Malta’s legal provisions relating to asylum procedures; or

(j) prior to the application the applicant had made an application for recognition as a refugee in a country party to the Convention, and the Refugee Commissioner is satisfied that his application was properly considered and rejected in that country and the applicant has failed to show a material change of these circumstances.\(^{759}\)

An application would also be rejected under the accelerated procedure if the applicant is in possession of a travel document issued by a safe third country\(^ {760}\) pur-

\(^{759}\) Refugees Act, Arts 2 and 18.

\(^{760}\) The law defines a ‘safe third country’ as a country of which the applicant is not a national or citizen and where –

(a) the life or freedom of the applicant would not be threatened within the meaning of Article 33 of the Convention; and

(b) the applicant had resided for a meaningful period of time prior to his entry into Malta; and

(c) the applicant would not be exposed to torture or inhuman or degrading treatment, and would be treated in accordance with basic human rights standards; and

(d) the applicant had either already been granted protection or has had an opportunity, at the border or within the territory of that country, to make contact with that country’s authorities in order to seek their protection, before applying for asylum in Malta, or where there is clear evidence of his admissibility to that country; and

(e) the applicant is afforded effective protection against *refoulement* within the meaning of the Convention.
Country Report Malta

suanct to the Convention on the grounds that he is safe from persecution in such country.761

Moreover, following an amendment of the Act in 2004, an application for refugee status would be deemed inadmissible if the applicant:762

(a) has already been granted refugee status by another EU Member State; or

(b) has been granted refugee status by a country that is not an EU Member State and he can still avail himself of that protection in that country, including benefiting from the principle of non-refoulement and such person can be readmitted to that country; or

(c) is a national or citizen of one of the safe countries of origin listed in the Schedule annexed to the Act or at least has a right of residence therein.763

761 Refuges Act, Art 18.
762 Ibid Art 18A.
763 The Minister may from time to time amend by secondary legislation the list of countries in the Schedule so as to ensure that it contains only countries that in his opinion are safe countries of origin. The law defines a ‘safe country of origin’ as a country of which an applicant is a national or citizen or, if he is not a national or citizen thereof, in which he has a right of residence and which, in general terms, is considered as presenting no serious risk of persecution on the basis that a person seeking asylum will be treated in accordance with the following principles in that country:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular group or political opinion; and

(b) the principle of non-refoulement in accordance with the Convention and Protocol is respected; and
Rights of refugees and asylum seekers

In respect of Malta’s return policy, the Refugees Act guarantees protection of life and freedom by providing in Article 9 that no person may be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However, there is an exception to this rule that makes this safeguard inapplicable where there are reasonable grounds for regarding a refugee to be a danger to the security of Malta or, having been convicted of a particularly serious crime, constitutes a danger to the community.

The Act also guarantees the proper treatment of asylum seekers by providing that no asylum seeker may be removed from Malta before his application is finally determined and that such applicant must be allowed to enter and remain in Malta pending a final decision of his application. In the meantime, he is entitled to state education and training and to receive state medical care and services.\(^{764}\)

However, he needs the consent of the Minister in order to seek employment or to carry on any business and it is claimed that in the past this permission has not

---

(c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Convention and Protocol.

\(^{764}\) Refugees Act, Art 10.
been forthcoming. Moreover, if he is not in custody, he may reside and remain only in the places indicated by the Minister and is obliged to report at specified intervals to the immigration authorities as indicated by the Minister. Breach of any of these conditions would amount to a criminal offence. An asylum seeker also requires the authorisation of the Minister in order to leave Malta as otherwise on departure his application would be deemed withdrawn.

The Refugees Act grants various rights to refugees. Refugees have a right to remain in Malta and to be granted personal documents, including a residence permit. The grant of refugee status entitles the refugee to be immediately released from custody if he is in custody in virtue only of a deportation or a removal order. Moreover, refugees are entitled to the Convention Travel Document that entitles them to leave and return to Malta without the need of any visa and are entitled to access to state education and training and state medical care and services in Malta.

Dependent members of the family of a refugee, if they are in Malta at the time of or after the acquisition of refugee status, enjoy the same rights and benefits as the refugee. ‘Dependent members of the family’ are defined as the spouse of the refugee provided the marriage is subsisting on the date of the refugee’s application and such children of the refugee who on the date of the refugee’s application are under the age of eighteen years and are not married. The UNHCR has criticized this provision because it is not clear whether and at what conditions visas

766 Refugees Act, Art 18A.
767 Art 28 of the Convention relating to the Status of Refugees 1951.
768 Refugees Act, Art 11.
769 Ibid Art 2.
will be granted for the purpose of family reunions. Moreover, it finds this definition of a refugee’s ‘family’ as overly restrictive because it excludes from refugee status adult children and other members of the family who are dependent on the applicant as well as unmarried partners living in a durable relationship with the applicant.  

A refugee has no right to Maltese nationality nor are there any provisions facilitating the grant of citizenship to refugees, even though Maltese law allows dual and multiple citizenship. However, recently a government minister announced that the government is considering a change in policy in this regard in favour of granting citizenship to refugees who have been living in Malta for at least 10 years so as to enable them to integrate better into Maltese society.

Under the Refugees Act, applicants or refugees wishing to settle to another country may request the Minister to facilitate such resettlement and the Minister is empowered to do so, if necessary, with the assistance of the High Commissioner.

Revocation of refugee status

The Act provides for a number of instances where the refugee might lose his refugee status. Refugee status is revoked if the refugee:

---

770 Background Note on the Protection of Asylum Seekers and Refugees in Malta, June 2003.


772 Minister for the Family and Social Solidarity, Dolores Cristina, as reported in The Times of 18 June 2005 on p 19.

773 Refugees Act, Art 13.
(a) has voluntarily re-availed himself of the protection of the country of his nationality, or having lost his nationality, has voluntarily re-acquired it; or

(b) has acquired a new nationality and enjoys the protection of the country of his new nationality; or

(c) has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(d) can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; or

(e) is a person who has no nationality and, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, is able to return to the country of his habitual residence.774

The person who is notified that he has ceased to possess refugee status has a right to appeal against this decision to the Refugee Appeals Board.

Refugee status may also be revoked by the Minister, subject to a right of appeal to the Refugee Appeals Board, if he is satisfied that the person granted refugee status had been erroneously recognized as a refugee because the application on the basis of which the person was granted refugee status contained materially incorrect or false information, or he was so recognized owing to fraud, forgery, false or mis-

774 Ibid Art 15.
leading representation of a material or substantial nature in relation to the application.\footnote{Ibid Art 16.}

Furthermore, the Minister may, subject to a right of appeal to the Refugee Appeals Board, on grounds of national security or public order, order the expulsion of a refugee from Malta. However, the refugee must be allowed a reasonable period of time within which to seek legal admission into another country.\footnote{Ibid Art 17.}

\section*{Prohibited immigrants}

The Immigration Act\footnote{Act IX of 1970, Chapter 217 of the Laws of Malta.} provides that a person, not being a citizen of Malta or of another EU Member State, who has not been granted a right of entry or of entry and residence or of movement or transit in Malta as an ‘exempt person’, may be refused entry into Malta and if he lands or is in Malta without leave from the Principal Immigration Officer he would be deemed a prohibited immigrant.\footnote{Ibid Art 5.} The Principal Immigration Officer issues a removal order against such persons and they are detained in custody until they are removed from Malta. However, such persons have a right to appeal against such an order before the Immigration Appeals Board which is made up of three members appointed by the President of Malta acting on the advice of the Minister for renewable periods and removable from office by the President acting on the advice of the Prime Minister only on grounds of gross negligence, conflict of interest, incompetence, or acts or omissions unbecoming a member of the Board.\footnote{Ibid Art 14.} During the course of proceedings

---

\footnote{Ibid Art 16.}

\footnote{Ibid Art 17.}

\footnote{Act IX of 1970, Chapter 217 of the Laws of Malta.}

\footnote{Ibid Art 5.}

\footnote{Ibid Art 14.}
before it, the Board may, even on a verbal request, grant provisional release to any person who is arrested or detained and is a party to the proceedings, subject to such terms and conditions as it may deem fit.\textsuperscript{780} There is an appeal on points of law only from the decisions of the Board to the Court of Appeal.

Pending consideration of the application for refugee status, applicants who had been caught entering or staying in Malta illegally are deemed to be prohibited immigrants and as such are kept in custody in detention centres reserved for prohibited immigrants. Prohibited immigrants who have not applied for refugee status or whose application is rejected would be removed from Malta according to the procedure described in this section.

However, immigrants who applied for refugee status under the Refugees Act and who are in custody in virtue only of a removal or deportation order may apply to the Immigration Appeals Board to be released from custody pending the determination of their application for refugee status. The Board may uphold this request and grant release from custody only if it is satisfied that the continued detention of such a person, taking all the circumstances of the case into account, is unreasonable as regards duration. The Board may not grant such release where (a) the identity of the applicant including his nationality has yet to be verified, in particular where the applicant has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities or (b) when elements on which any claim by the applicant under the Refugees Act is based have yet to be determined and the determination thereof cannot be achieved in the absence of detention or (c) where the release of the applicant could pose a threat to public security or public order.\textsuperscript{781}

\textsuperscript{780} Ibid Art 25A.

\textsuperscript{781} Ibid.

548
Removal of a person from Malta would be to that person’s country of origin or country of nationality or the country from which he embarked for Malta or to any other country to which he may be permitted entry, in particular in accordance with the provisions of any applicable readmission agreement concluded by Malta and in accordance with international obligations to which Malta may be a party. However, this is subject to the provision in the Refugees Act referred to above that no person may be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The Principal Immigration Officer may also request the Board to issue an executive warrant against the immigrant and an order for forfeiture of money in his possession if it is satisfied that expenses have been or will be incurred by the Government in connection with the maintenance, medical treatment or expulsion of a prohibited immigrant or his dependants.

Where the prohibited immigrant arrived on a vessel or aircraft and he was denied leave to land or was found on shore without having obtained leave to land, the Principal Immigration Officer or any police officer is empowered to place that person on board the vessel or aircraft by which he arrived in Malta or on board another vessel or aircraft belonging to the same owners for removal from Malta.

Apart from the Principal Immigration Officer’s power to issue a removal order against prohibited immigrants, the Immigration Act also confers a general power on the Minister to issue deportation orders against any person if he deems it conducive to the public good.

782 Ibid Arts 14 and 19. If the prohibited immigrant is a member of a crew, he may be returned to where he was engaged.

783 Refugees Act, Art 9.

784 Immigration Act, Art 20.
According to one commentator, hundreds of removals or deportations are carried out every year with statistics showing that 590 were carried out in 2003 and 767 in 2002 but with a few exceptions (a notorious one being in 2002 when a number of Eritrean nationals were repatriated) all these deportations are voluntary not forced returns.\(^{785}\)

**Temporary Protection for Displaced Persons**

In May 2005, Council Directive 2001/55/EC was transposed into Maltese law via the Temporary Protection for Displaced Persons (Minimum Standards) Regulations 2005\(^{786}\) adopted under the Refugees Act. These regulations provide for the granting of temporary protection by the Refugee Commissioner to displaced persons in the event of a mass influx of displaced persons from third countries that are unable to return to their country of origin.\(^{787}\) This temporary protection would not prejudice the recognition of refugee status under the Refugees Act and the 1951 Geneva Convention and 1967 Protocol.\(^{788}\) Indeed, such persons may still apply for asylum at any time but it is up to the Refugee Commissioner to decide whether or not they may enjoy temporary protection and the status of asylum seeker concurrently while the application is under consideration.\(^{789}\) The definitions given by the Regulations to ‘temporary protection’, ‘mass influx’ and ‘displaced persons’ are identical to the definitions given in the Directive.\(^{790}\) It is the


\(^{786}\) LN 131 of 2005.

\(^{787}\) Ibid Reg 3.

\(^{788}\) Ibid Reg 4.

\(^{789}\) Ibid Part IV.

\(^{790}\) Ibid Reg 2.
Refugee Commissioner who declares whether or not a state of mass influx of displaced persons exists but this declaration must be based on an EC Council Decision establishing the existence of a mass influx. The Refugee Commissioner’s declaration has the effect of introducing in Malta temporary protection for the displaced persons concerned. 791

The duration of the temporary protection granted would be of one year, which period may be extended automatically by six monthly periods for a further maximum period of one year and may be further extended at the discretion of the Refugee Commissioner by another maximum period of one year. 792 Temporary protection would end at the end of this period or earlier by decision of the Refugee Commissioner following an EC Council Decision. The Commissioner’s decision would have to be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of the persons granted temporary protection, with due respect for human rights and fundamental freedoms and other obligations regarding non-refoulement. 793 The Refugee Commissioner may extend this temporary protection to additional categories of displaced persons over and above those to whom the Commissioner’s declaration referred to above applied where they are displaced for the same reasons and from the same country or region of origin. 794

Temporary protection confers various rights on the holders: residence permits for the entire duration of the protection, facility for obtaining necessary visas, right to employment or to engage in self-employed activities subject to the conditions of employment applicable to Maltese citizens, access to suitable accommodation and

792 Ibid Reg 5.
793 Ibid Reg 7.
794 Ibid Reg 8.
other assistance in terms of social welfare and means of subsistence and access to medical care and to the state education under the same conditions as Maltese nationals. Moreover, if a person enjoying temporary protection in Malta remains on or seeks to enter the territory of another Member State without authorization during the period covered by the Refugee Commissioner’s declaration, Malta would be obliged to re-admit that person to Malta.

The Regulations also provide for the reunion in Malta of members of a family of a person enjoying temporary protection in Malta that got separated due to circumstances connected with the mass influx, with the term ‘family’ being given a wide interpretation so as to include an unmarried partner in a stable relationship, children born out of wedlock and close relatives living together as part of a family unit at the time of the events leading to the mass influx who were wholly or mainly dependent on the person enjoying temporary protection. Reunited family members are granted residence permits under temporary protection.

In line with the EC Council Directive, persons enjoying temporary protection or whose temporary protection ends may return voluntarily to their country of origin while persons who are not eligible for temporary protection as well as those whose temporary protection ends may be forced to return but in both cases this should be done with due respect for human dignity. Moreover, the Refugee Commissioner must consider any compelling humanitarian reasons that may make return impossible or unreasonable in specific cases. Furthermore, where a person who had enjoyed temporary protection cannot for health reasons be reasonably expected to travel and would suffer serious negative effects if his treatment is interrupted, the Principal Immigration Officer must take the necessary measures to

795 Ibid Part III.
796 Ibid Reg 12.
797 Ibid Reg 16.
allow such a person to continue to reside in Malta as long as this situation persists. The Principal Immigration Officer may also allow families whose children are minors and attend school to continue to reside in Malta until the children concerned complete their current academic year.\textsuperscript{798}

The Regulations empower the Refugee Commissioner to exclude a person from temporary protection in the circumstances listed in Article 28 of the EC Council Directive but persons excluded from the benefit of temporary protection or family reunification may appeal to the Refugee Appeals Board.\textsuperscript{799} The Directive’s provisions on solidarity and the transferral of residence of persons enjoying temporary protection from one Member State to another are faithfully transposed into Maltese law via Part VI of the Regulations.

**Policy and Practice**

Although matters have improved since the entry into force of the Refugees Act in October 2001 that set up for the first time a mechanism for dealing with applications for asylum and defined the rights and duties of asylum seekers and refugees,\textsuperscript{800} the government’s policy in relation to illegal immigrants and asylum seekers and its application of the abovementioned legal provisions continues to draw the criticism of various non-governmental organizations. In a document published in February 2005 entitled ‘Reception of Asylum Seekers in Malta: Policy Recommendations’ (hereafter referred to as the ‘JRS paper’), the local Jesuit Refugee Service (JRS) highlights various concerns and makes a number of recommendations for policy change.

\textsuperscript{798} Ibid Part V.

\textsuperscript{799} Ibid Regs 27-28.

\textsuperscript{800} Prior to this Act since there was no national mechanism to process claims by asylum seekers, applications for refugee status were received, processed and determined by UNHCR (Rome) and the relative decisions then implemented by Malta.
The main criticism has been that the time taken for determination of applications for refugee status is extremely long (well over a year in many cases especially where an appeal is lodged with the Refugee Appeals Board) due to lack of resources and proper administrative structures, resulting in an unreasonably long period of detention in allegedly very poor conditions. The government’s detention policy itself, of automatically and indiscriminately keeping all asylum seekers, irrespective of age, sex, physical condition or personal circumstances, under custody the moment they are apprehended by immigration authorities, has come under sharp criticism not only from JRS but also from the UNHCR. Until recently, asylum seekers were kept in detention indefinitely for as long as it took their application to be determined or until they were repatriated or removed from Malta if their application was unsuccessful. The policy was then changed in December 2003 and currently the policy is to release all irregular migrants, including asylum seekers, who have been in detention for about eighteen months.

Another improvement has been that families arriving in Malta with minor children are held in detention for a much shorter period, generally until routine medical examinations are carried out and accommodation found in the ‘open centres’. However, when it comes to unaccompanied minors their period of detention can turn out to be quite considerable because the procedure for the issue of a care order can be quite lengthy due to the time it takes to verify the identity and age of the minor concerned. These difficulties are further complicated by the lack of

---

801 Background Note on the Protection of Asylum Seekers and Refugees in Malta, June 2003.
802 Reception of Asylum Seekers in Malta: Policy Recommendations Jesuit Refugee Service Malta (February 2005) at 9. JRS claims that this is not a clear change in policy as there was no official policy statement and the eighteen months time limit has been applied arbitrarily, in some cases release coming at the end of a longer or a shorter period of time. However, this eighteen months time limit is now confirmed in the Policy Document published by the government and discussed infra.
803 Ibid.
availability of accommodation for unaccompanied minors.\footnote{Ibid.} However, attempts are being made to accelerate and facilitate the process according to the government policy document, discussed further below.\footnote{Irregular Immigrants, Refugees and Integration Policy Document issued by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity at 13.} As for women who have just given birth there seems to be an unwritten policy that they would be released from detention once they have given birth, irrespectively of whether their application has been determined or not or accepted or rejected.\footnote{Reception of Asylum Seekers in Malta: Policy Recommendations Jesuit Refugee Service Malta (February 2005) at 9-10.}

Although, as in the case of other categories of vulnerable migrants, there is no policy of favourable treatment to pregnant women as far as length of detention is concerned, the Office of the Refugee Commissioner has adopted a policy of prioritizing applications from pregnant asylum seekers. However, of course if a pregnant asylum seeker’s application is rejected this would mean that she would remain in detention until she gives birth. As for other classes of vulnerable migrants such as elderly or disabled persons there is no favourable policy operated by the Refugee Commissioner but in some cases he has prioritized their applications upon request for medical reasons.\footnote{Ibid at 10.}

The JRS paper notes that since 2002, most of the persons that applied for refugee protection were kept in custody pending the determination of their application because the vast majority of asylum seekers were persons who had been caught by the immigration authorities and either refused admission into Malta or denied permission to stay in Malta, most of them having arrived by boat insufficiently documented or undocumented.\footnote{Ibid at 5.}
The JRS paper puts the number of immigrants in the detention centres at the beginning of 2005 at 620, most of them being asylum seekers. There are no official statistics of detainees awaiting the outcome of their application for refugee status but the JRS paper reports that at the end of January 2005 there were approximately 300 detained asylum seekers awaiting their initial interview with the Office of the Refugee Commissioner while another substantial number was awaiting the outcome of an appeal to the Refugee Appeals Board.

It should be noted, however, that there is a small number of asylum seekers (there are no official statistics available) who are not in detention but living in the community. They would be immigrants who either (i) entered Malta legally and applied for refugee status or (ii) entered and stayed illegally in Malta but managed to apply for refugee status before they were apprehended by the immigration authorities so that they were never detained (though asylum seekers in this category may still be detained if they are unable to show that they have the financial means to support themselves) or (iii) were released from detention after a period of eighteen months and are still awaiting the outcome of their appeal to the Refugee Appeals Board.

JRS observes that there is a category of forced migrants seeking protection in Malta who cannot apply for refugee status or obtain protection under the Refugees Act as they do not qualify as asylum seekers in the strict legal sense of the word but these persons claim that they need protection from forced return. According to JRS within this class of people there are persons who are entitled to protection

---

809 Ibid. The source quoted is the answer given by the Minister responsible for immigration to a parliamentary question on 31 January 2005.

810 Ibid.

811 Ibid.
in terms of the European Convention of Human Rights or the UN Convention for the Prevention of Torture and Other Forms of Cruel Inhuman and Degrading Treatment.\textsuperscript{812}

JRS notes that although, as shown above, the law grants certain rights to asylum seekers, in practice a distinction is made between asylum seekers that were released from detention and those that were never detained. Asylum seekers that were released from detention are housed in government-run ‘open centres’ where residents are provided with basic shelter and food and initially with a small allowance to cover personal expenses. On the other hand, the asylum seekers who live in the community receive no state assistance whatsoever while awaiting the determination of their application for refugee status. While support is thus generally lacking, there seems to be a policy of not granting permission to asylum seekers to work. It is claimed that, on the whole, government has no policy for the reception of asylum seekers in the community.\textsuperscript{813}

As a response to such criticism the Government issued a policy document at the beginning of 2005.\textsuperscript{814} The document claims that, with a rising influx of irregular immigrants landing in Malta in recent years, due to Malta’s small size and high population density the situation has reached critical conditions.\textsuperscript{815} It is calculated that one illegal immigrant in Malta is pro rata equivalent to the arrival of 114...
immigrants in Italy and to 150 immigrants in UK.\textsuperscript{816} This, notwithstanding, the document reports that between January 2002 and November 2004 53\% of applicants were granted refugee or humanitarian protection status and thereby allowed to reside in Malta, claiming that this is the highest acceptance rate in Europe.\textsuperscript{817} Over 800 refugees and persons with humanitarian protection now live in open centres.\textsuperscript{818} Records show that in the first five months of this year, 2005, the Refugee Commissioner had already received 494 applications, 70\% of which he accepted and granted refugee status or humanitarian protection.\textsuperscript{819}

The policy document clearly confirms that although the detention policy will be retained, no one would be detained for longer than ‘administratively necessary’ for the processing of the relative asylum application or for the procedures leading to deportation and that in any case the detention period would not last longer than eighteen months. In the face of criticism regarding the treatment of vulnerable persons, the policy document announces that persons who are vulnerable by virtue of their age and/or physical condition, in particular unaccompanied minors, persons with disability, families, pregnant women, elderly persons and lactating mothers will be given special treatment and will be exempted from detention and

\textsuperscript{816} In a more recent document, a Briefing to the ambassadors of EU Member States residing in Malta on 5 July 2005, Press Release No 1038, slightly different figures are given. It states that relative to Malta’s population size, the arrival of one illegal immigrant in Malta is equivalent to the arrival of 140 illegal immigrants in Italy, 150 in the United Kingdom, 205 in Germany, 150 in France, 100 in Spain, 25 in Belgium and 40 in the Netherlands.

\textsuperscript{817} Policy Document (n 75) 5. In the period between January 2002 and December 2004, according to a report in \textit{The Times} of 18 June 2005, the Refugee Commissioner examined 1661 applications involving 2039 individuals. Currently there are some 135 pending applications regarding 141 individuals.

\textsuperscript{818} \textit{The Times}, 11 July 2005 at 16.

\textsuperscript{819} National Statistics Office (NSO) News release 133/2005 of 20 June 2005. Almost 90\% of the grants over the January 2002-May 2005 period were given as humanitarian protection and just over 10\% as refugee status.
housed in alternative centres though the document does not identify which authority will be responsible for determining whether a person falls in the category of ‘vulnerable persons’.  

Moreover, in this document government states that its detention policy will be tempered by a commitment to ensure that border and national security officials and those involved in the processing of asylum applications would be sensitive to the physical and emotional needs of the detainees, would make them aware of their rights and obligations under law and inform asylum seekers about organizations that provide assistance to asylum seekers and would ensure examination of applications in the shortest time possible and that decisions would be taken individually, objectively and impartially. It undertakes to strive to maintain basic sanitary conditions, a degree of privacy, access to free health services and communication facilities in the detention centres. The policy document also announces various social welfare initiatives concerning irregular immigrants irrespective of whether they have been granted any official status or not and whether living in closed detention centres, in open centres or in the community.

One criticism raised by JRS in its document related to the plight of irregular immigrants that are not granted refugee or humanitarian protection by the Refugee Commissioner and yet still face a potentially dangerous situation if repatriated. As stated above, the Refugee Commissioner may either recommend refugee status or humanitarian protection where the applicant does not qualify for refugee protection. JRS observes that since the scope of humanitarian protection is not defined in the law, the Refugee Commissioner is left with a lot of discretion. It

---

820 Policy document (n 75) 11, 13-14.
821 Ibid 10.
822 Ibid 12.
823 Ibid Part II.
Country Report Malta

notes that so far this form of protection has been extended only to people coming from countries facing violent conflict or where repatriation is a practical impossibility, over the past three years being granted generally to people from Somalia, Liberia, Ivory Coast, Congo and lately Eritrea. It, therefore, laments that this protection is not normally granted to persons from other countries who nevertheless would still face serious violations of their human rights if they were to be returned home or who otherwise need protection from forced return on humanitarian grounds, such as deserters, draft evaders, victims of trafficking, persons suffering from serious medical conditions or disabilities receiving treatment in Malta that is unavailable in their country of origin, persons in respect of whom there is no country that will accept them due to de jure or de facto statelessness or their country of nationality refuses or fails to issue the necessary travel documents to allow repatriation and vulnerable young adults unaccompanied by any member of their immediate family. JRS observes that to date a number of such persons have been allowed to remain in Malta at the discretion of the Minister but this means that they are deprived of any formal legal status and lack rights that are enjoyed by refugees and persons granted humanitarian protection while facing an uncertain future.  

The government policy document partly addresses this issue by stating that irregular immigrants who are not eligible for refugee status or humanitarian protection would be required to leave Malta but voluntary return will always be preferred to forced return and forced removal will only take place as long as there is no well-founded fear that any deportee would face serious danger to his life or liberty or be subjected to persecution on reaching his destination.


825 Policy Document (n 75) 15.
The government uses its consulates abroad in order to create and maintain regular dialogue with the countries that are known to serve as points of origin or points of departure for irregular immigration and to build effective channels of co-operation with the countries offering resettlement schemes to persons with asylum status in order to facilitate the transfer of such persons from Malta to their new adoptive country.826 Most of the irregular immigrants that end up in Malta on their way to European mainland start their sea voyage from the Libyan coast after having crossed various countries from the sub-Saharan region from where they originate. Malta has therefore started a dialogue with its neighbouring countries with the aim of concluding some kind of arrangement whereby irregular immigrants arriving from Libya would be repatriated to Libya as soon as possible without prejudice to any rights for refugee or humanitarian protection status that they might have under Maltese law.827 Malta has also called on the other EU Member States for support inter alia in the repatriation of immigrants whose application was rejected by the Refugee Commissioner by sharing in arrangements to return illegal immigrants to

826 Ibid 16.

827 Ibid 32 and Home Affairs Minister’s statement to Parliament’s European and Foreign Affairs Committee on 22 June 2005 as reported in The Times of 24 June 2005.
their countries of origin through joint repatriation flights and for support in the resettlement of those immigrants who have been given asylum or protected humanitarian status particularly by those Member States where controlled legal immigration is beneficial and required.\textsuperscript{828}

\textsuperscript{828} Briefing to the ambassadors of EU Member States residing in Malta on 5 July 2005, Press Release No 1038.
- CHAPTER XII -

COUNTRY REPORT THE NETHERLANDS

by
Prof. Kees Groenendijk,
Universiteit Nijmegen
Developments in the Return Policy
and Regularizations in the Netherlands
(1999-2005)

Karina Franssen
Kees Groenendijk

Centrum voor Migratierecht
Nijmegen, 2005
Contents

Return Policy in the Netherlands (1999-2005)

1. General Dutch return policy under the Aliens Act 2000 1
   1a. Dutch return policy related to different groups: rejected asylum seekers 2
   1b. Dutch return policy related to different groups: illegal aliens 7
2. Assistance and support by IOM and NGO’s 7
   2a. Various departure programmes and projects: 7
   2b. Statistics IOM 9
3. Other statistics 10
4. Obstacles to an effective Dutch return policy 13
5. Cooperation with countries of origin in order to bring about readmission and return 15
6. Readmission agreements 17
7. Implementation of some EU measures regarding return of aliens 18

Regularization in the Netherlands 1999-2005

1. Regularization under the 1965 Aliens Act (before April 2001) 21
2. Regularization measures under the Aliens Act 2000 (after April 2001) 22
3. Concluding remarks 27
Return Policy in the Netherlands (1999-2005)


The Aliens Act 2000 governing the admission and expulsion of non-nationals came into force in April 2001. The essence of the law is that aliens who have been rejected and have no further recourse to the courts can no longer avail themselves of state benefits and have an obligation to leave the country within 28 days after the period of lawful residence has ended. This statutory obligation to leave the Netherlands thus commences when lawful residence ends. This rule does not only apply to rejected asylum seekers, but also to aliens who have come to the Netherlands in order to live, work or study and whose residence permit has been refused, withdrawn or not extended. If a person has never been lawfully resident in the Netherlands, this legal obligation arises from the moment he or she enters the Netherlands illegally. The underlying principle of Dutch return policy is the personal responsibility of the rejected asylum seeker or illegal immigrant to leave the country on his own.

The government has taken several measures to facilitate and stimulate the process of return. One of these measures is the (financial) support for those who wish to return voluntarily by providing return and reintegration assistance. To this end the government works together with the International Organization for Migration (IOM). We will come back to this aspect of the Dutch return policy in chapter 2.

Aliens who do not leave the Netherlands voluntarily can be forcibly removed by the government. Recently, rejected asylum seekers and illegal migrants have been expelled in groups via chartered aircrafts. Some of those government charter flights are carried out jointly with other EU member states. To this end there is a close cooperation between the Dutch Immigration and Naturalization Department (IND) and the immigration authorities in other EU states.

---

829 On 26 May 2004, for the first time a joint government organized charter flight of the United Kingdom, Germany, France, Belgium and the Netherlands left Schiphol Airport in order to return 44 rejected asylum seekers to Togo and Cameroon (Press Release Ministry of Justice, 27 May 2004). Such joint government charter flights also take place in the framework of the Benelux.
In practice expulsion can only take place, when the identity and nationality of the alien is known and the alien is in possession of a valid passport or other travel document. Sometimes problems arise because of the reluctance of the alien to cooperate in establishing his or her identity. Sometimes difficulties arise because of the unwillingness of the country of origin to readmit its nationals and to cooperate in providing travel documents when lacking. Further, according to the Aliens Act 2000 expulsion will also not take place when it is not safe to travel due to the health conditions of the aliens or one of their family members.830


The policy which is contained in this document can be seen as a confirmation of the above mentioned principle that those who are not allowed to stay have to leave the country. Responsibility to go back lies with the alien himself. The government only facilitates the return and uses its powers to enforce return in case the alien does not want to leave the country voluntarily. In the document a number of measures are proposed for a more effective implementation of this Dutch policy on return. The aim is to ensure that aliens without residence status depart in greater numbers from the Netherlands. Firstly, the policy document is in favour of improved border control and a greater emphasis on the responsibility of carriers to remove aliens who have been refused at the border. Secondly, a number of measures focus on rejected asylum seekers, such as better promotion of return at various stages of the asylum process. In order to achieve this so-called ‘orientation and return centres’ will be set up from 1 January 2005. After a first negative decision an asylum seeker will be sent to a so-called return centre. The government hopes this will give the rejected asylum seeker a clear signal that return is ‘a real option’. Furthermore, a couple of measures (in-

830 Article 64 of the Aliens Act 2000.
including more frequent identity checks) focus on aliens who entered the country legally or illegally and who no longer are lawfully resident in the Netherlands. Further, measures will be taken to ensure that the return process is organized more effectively and that support for return will be generated. In order to achieve the latter goal, the government continues to convey the message that illegal residence is unacceptable. The basic supposition is that whoever wants to return will be able to do so. Finally, measures integrating departure and return into Dutch foreign policy are considered to be necessary to make the return policy more effective.

1a. Dutch return policy related to different groups: rejected asylum seekers

As far as the return policy with regard to this group is concerned a distinction has to be drawn between asylum seekers who have lodged their asylum claim before 1 April 2001 (under the 1965 Aliens Act) and those who have lodged their asylum claim after 1 April 2001 (under the Aliens Act 2000).

I) Asylum seekers who have lodged an asylum claim before 1 April 2001

This is the category of long-staying asylum seekers which at the beginning of 2004 was estimated by the Minister of Aliens Affairs and Integration at about 26,000 and which did not qualify for a residence permit on the ground of the special amnesty which had been declared or on the ground of a special regularization policy (see the next chapter). Hence, they have to return. With regard to this group extensive measures are planned in order to make sure this group returns to its country of origin over a period of three years (the so-called Return Project). This Return Project on paper consists of a number of stages. In every stage it is possible for the asylum seeker to return voluntarily or to be removed.

Stage I

This stage which lasts for a maximum period of 8 weeks takes place whilst the asylum seeker is still housed in a reception centre. Staff of the IND and the Central Re-
ception Organization for Asylum Seekers (COA) inform and provide assistance to the asylum seeker wishing to return. When the asylum seeker has no identity documents or travel documents, his nationality and identity will be investigated. Hereto, the embassy of the country of origin will be contacted. Further, the IND and the COA will inform the asylum seeker that it is possible to get in touch with IOM. In case of a voluntary return IOM will provide for a free airline ticket and a financial contribution to support the asylum seeker during the first period after return. Moreover, when the asylum seeker returns during this first stage of the return process s/he will get an extra reintegration contribution of € 1,750 for an adult and € 875 for an accompanying family member who is a minor. A part of this contribution may be used for the transport of extra luggage. Asylum seekers who have not left voluntarily or who have not been forcibly removed by the end of this stage (e.g. he or she cannot obtain the right documentation) will be transferred to a so-called repatriation centre.

In July 2004 Minister Verdonk for Aliens Affairs and Integration opened the first repatriation centre in Vlagtwedde (Ter Apel) in the extreme northern part of the Netherlands. Since its opening this repatriation centre has housed only a few persons. Despite the capacity of the centre (400 places), in February 2005 only 65 asylum seekers stayed in Vlagtwedde. According to the Minister this is the result of the fact that many rejected asylum seekers do not want to be placed in a repatriation centre and therefore voluntarily depart in an earlier stage. Nevertheless, in March 2005 the Minister opened a second repatriation centre in Vught (350 places). A third centre planned in Amsterdam was deemed unnecessary.

**Stage II**

In the repatriation centre a further identity and nationality check is made in order to make departure from the Netherlands possible. The regime in this centre is

---

832 The COA is an agency of the Ministry of Justice that is responsible for the reception and distribution of basic reception facilities to asylum seekers. It also implements special training programmes aimed at providing skills perceived to be valuable in the country of origin.

833 The following rates apply for the financial contribution: € 570 for an adult or unaccompanied minor. A family with up to two children will receive € 800 (and € 90 for each additional child).
Country Report The Netherlands

strictly than in the reception centre. The asylum seeker is not detained, but he has an obligation to check in every day in the centre (for this purpose use will be made of biometrics) and to remain available for nationality and identity checks. In this stage the asylum seeker is still entitled to financial means afforded by the IOM. However, he cannot claim the supplementary financial contribution for reintegration.

During the eight months period between July 2004 and March 2005 a total of 13 aliens returned to their country of origin out of the repatriation centre in Vlagtwedde. Five persons were transferred to the deportation centre at the airport Zestienhoven near Rotterdam (and were expelled) and nine persons left the repatriation centre for unknown destinations.835

Stage III

In case a rejected asylum seeker still has not returned voluntarily at the end of stage II, investigations are carried in order to establish whether it is still possible to expel him within a reasonable time.

If this is not possible, his stay in the repatriation centre will be terminated. From that moment on, the asylum seeker stays in the Netherlands illegally. He is obliged to leave the country immediately, without the assistance of the government.

If the IND considers that removal is possible within a reasonable time, the rejected asylum seeker will be placed in aliens detention. If removal is possible within a short period of time (e.g. the asylum seeker only has to wait for a flight), the asylum seeker is brought to a deportation centre.

If removal is not possible within a short period of time, the asylum seeker is placed in one of the penal detention centres in the Netherlands.

Nevertheless, during this process the Minister for Aliens Affairs and Integration may decide in individual cases to grant a residence permit when the rejected asylum seeker can demonstrate that he cannot return ‘through no fault of his own’ (buiten schuld).

834 Assisted Return and Reintegration Project (Herintegratieregeling Project Terugkeer, HRPT).
835 Source: Report by the Dutch Refugee Council (March 2005).
Since the end of 2003 the Dutch government operates two deportation centres near two main airports: Schiphol-Oost (Amsterdam) and Zestienhoven (Rotterdam). These deportation centres are closed facilities, detention centres operated under supervision of the Minister of Justice. In 2004 a total of 6,468 aliens (both asylum seekers and non-asylum seekers) were expelled out of these deportation centres. From the deportation centre at Schiphol 3,283 people were removed and from the centre in Rotterdam 3,185.

**Results of the Return Project**

In November 2004 the Minister informed the Parliament that almost 5,000 rejected asylum seekers had left the Return Project, out of which 70 percent (3,300) had actually left the Netherlands. A relatively small number had been forcibly removed. The majority had been ‘administratively removed’. This term is used to indicate that the persons are no longer at their last known address and are presumed to have left for an unknown destination.

Recently, detailed information on the handling of the 26,000 ‘old’ asylum requests has been published. From this information it appears that the official Return Policy in practice is applied to only a small part of the asylum seekers. A report published by the Dutch Refugee Council (VluchtelingenWerk) in March 2005, based on data provided by the Ministry of Justice, states that by mid February 8,636 out of the total of 26,000 asylum requests filed before the entry into force of the new Aliens Act in April 2001 had been ‘concluded’. The outcome of these cases was as follows:

<table>
<thead>
<tr>
<th>Residence permit granted</th>
<th>Count (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum grounds</td>
<td>1,949</td>
</tr>
<tr>
<td>Medical grounds</td>
<td>142</td>
</tr>
<tr>
<td>Long administrative delay (“three-years-rule”)</td>
<td>642</td>
</tr>
<tr>
<td>Humanitarian circumstances</td>
<td>349</td>
</tr>
<tr>
<td>No possibility of return</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td><strong>3,503</strong></td>
</tr>
</tbody>
</table>

---

838 This information is based on the outcome of the debate on the budget of the Ministry of Justice in parliament (3 November 2004).
Country Report The Netherlands

Other grounds (e.g. family reunion)  407

**Left for unknown destination**  3,085  (36%)

**Controlled departure**  2,030  (24%)

Expulsion (forcible removal)  244
Department controlled by frontier police  275

“Voluntarily” with IOM assistance  1,511

Naturalization  9

Death  9

**Total**  8,636  (100%)

From these data it is clear that 40% of these asylum seekers after four years or longer received a residence permit on various grounds. More than one third disappeared. They either left the country or continue to stay in the Netherlands without the requested documents. Only one in four had left the country in a controlled way, three quarter of them with the assistance of IOM. Only a tiny majority (244, i.e. 3 %) is actually expelled by airplane or boat or in another way to a country that has no common border with the Netherlands. The whole policy of opening various removal or detention centres in the end is applied at a rather small percentage of rejected asylum seekers. The large majority either receives a residence permit or disappears in another way.

II) Asylum seekers who have lodged their first asylum claim after 1 April 2001 and who received a negative (court) decision before 1 January 2005

From the outset of the asylum procedure these asylum seekers are given a clear warning by the immigration authorities that there is a real chance of not being admit-

---

839 Interestingly, earlier empirical research also established that of the asylum seekers that filed their request in the late 1980s and early 1990s and against of all the asylum seekers that filed their asylum requests in the years 1995-1997 between 40 and 45% had been granted an asylum status or another form of lawful residence, see L. Doornheim and N. Dijkhoff, Toevlucht zoeken in Nederland, Arnhem 1995 and N.Doornbos and C.A. Groenendijk, Uitkomsten van asielprocedures: een cohortonderzoek, Nederlands Juristenblad 2001, p. 245-253. This belies the impression created by certain politicians that only a small percentage of asylum seekers in the Netherlands actually need and receive protection.
ted to the Netherlands. The government expects them to start making preparations for their return from the moment of the first negative decision. When the asylum claim has been definitely denied the asylum seeker has 28 days to actually leave the Netherlands. After these 28 days the reception facilities will be automatically terminated and if the asylum seeker has not left on his own, he will be expelled. Nevertheless, if the asylum seeker can objectively demonstrate that he wants to return on his own, but that he simply needs more time to obtain the necessary travel documents, it is possible for him to receive additional reception facilities in an emergency location for a maximum period of 8 weeks. If, after the expiration of the 8 weeks period, return is still not possible, the asylum seeker will end up in the street. No such reception facility exists for the asylum seeker whose asylum status is denied in an accelerated 48 hours procedure (in this case he or she will end up in the streets 48 hours after rejection), and neither for the asylum seeker who lodges a repeated asylum request nor for the asylum seeker who submits a regular claim. Approximately 40% of all asylum requests filed in 2003 and 2004 had been rejected in this accelerated procedure.

III) Asylum seekers who have lodged a first asylum claim after 1
April 2001 and who received a negative (court) decision after 1
January 2005

According to the Policy document on Return of November 2003 asylum seekers who are waiting for a first decision will initially be housed in so-called orientation centres. When they receive a negative decision on their application they will be transferred to a so-called return centre for a maximum period of 28 days. In these return centres all facilities and services are aimed at preparing the asylum seeker for a future in his country of origin. The Dutch government hopes that by transferring an asylum seeker from an orientation centre to a return centre the asylum seeker comes to recognize that the government has decided that he or she is not entitled to a resi-

---

1b. Dutch return policy related to different groups: illegal aliens

According to the government’s policy document of May 2004, a successful return policy depends to a large extent on the policy on illegal aliens. An alien who will be confronted with measures that make an eventual illegal stay less attractive will be more inclined to leave the Netherlands. Special policy measures on this issue have been announced in the *Illegalennota* (policy document on illegal aliens). According to this policy document more attention has to be given to border control (and the direct return of people who are not allowed to enter) and intensified control within the territory. Moreover, more effective efforts must be made to confront and fine those who make illegal residence possible, such as human traffickers, employers and landlords.  

2. **Assistance and support by IOM and NGO’s**

2a. Various departure programmes and projects:

_Departure programme REAN (Return and Emigration of Aliens from the Netherlands)_

Since 1992 IOM offers support to aliens in the Netherlands who would like to return to their country of origin. The support provided by IOM based on the REAN programme consists of the following:

- information on return issues;
- assistance at Schiphol airport;
- an airline ticket to the airport nearest to their end destination;
- remuneration of the costs for travel documents;
- a financial contribution to help during the first period after leaving the Netherlands.

---

Conditions for eligibility for support based on the REAN programme, the person is not a citizen of one of the EU member states, he or she wished to settle in the Netherlands, he or she no longer has or never has had a residence permit, he or she cannot pay for the journey himself or herself and when he or she has a valid travel document (passport or laissez passer). IOM requests information from the IND to determine whether there are any objections to providing resources for return or reintegration in relation to those aliens who apply for voluntary departure.

Departure programme REAN-plus

At the moment the IOM carries out three country-specific REAN-plus projects to stimulate the reintegration of persons returning to their country of origin (Afghanistan, Angola and Iraq). This means that returnees are eligible for the assistance provided by the REAN programme as well as additional provisions in the area of reintegration.

The REAN-plus programme concerning Iraq started as from October 2001. The programme particularly entails assistance in obtaining travel documents. From October 2001 until December 2004 182 people returned to Iraq under this programme.843

The Angolan REAN-plus programme merely concentrates on returning (ex-) unaccompanied minors. The IOM can assist an unaccompanied minor in tracing family members in his country of return. The programme started as from January 2003. From January 2003 until December 2004 in total 508 people returned to Angola with a reintegration contribution.844

The Afghanistan programme also started in January 2003. Afghans who return from EU countries can attend training courses, such as computer courses or more

843 Information provided by IOM staff member (24 March 2005).
844 Information provided by IOM staff member (24 March 2005).
vocational courses. From January 2003 until December 2004 a total 204 Afghans returned with a reintegration contribution.845

Assisted Return and Reintegration Project (Herintegratieregeling Project Terugkeer, HRPT)

Aliens who have first applied for asylum under the Aliens Act 1965 (before 1 April 2001), and have continuously had some form of reception organized by the Dutch authorities may be eligible for a special scheme, the Assisted Return and Reintegration Programme. (Rejected) asylum seekers that meet the HRPT conditions will receive an additional amount of money on top of the REAN programme provisions; a so-called reintegration grant. This project started as from June 2004 and by mid February 2005 a total number of 997 persons have left with the benefit of this extra contribution.846

Mediation by IOM after a specific request from an alien

Examples of individual mediation are the arrangement of temporary accommodation, providing information regarding the availability of medical facilities or the employment market in the country of origin. IOM focuses these extra services especially on the needs of vulnerable groups such as unaccompanied minors, victims of human trafficking and persons with health problems.

Randstad Return Initiative

From 1 September 2003 until 1 January 2005 IOM cooperated with non-governmental organizations in four large cities in the Netherlands. In Rotterdam IOM cooperated with the Pauluskerk, in Utrecht and The Hague with the Dutch Refugee Council and in Amsterdam with various organizations. The objective of this project called ‘Randstad Return Initiative’ was to strengthen the cooperation with

845 Information provided by IOM staff member (24 March 2005).
846 Report by the Dutch Refugee Council (March 2005).
regard to information provision and assisted voluntary return. This was achieved by inviting native counsellors to IOM consultation hours in these cities. Native counsellors are social workers from the main regions of origin of asylum seekers. From September until December 2003 15 (rejected) asylum seekers returned under this project from Rotterdam to their country of origin.\textsuperscript{847}

Mediation bureau Maatwerk bij Terugkeer (Tailor-made Repatriations)

In 2001 Cordaid took the initiative to establish this bureau.\textsuperscript{848} Aliens can apply for mediation in the field of medical assistance, reception and housing, work and credit, safety etcetera. From December 2001 until January 2005 the Bureau received 570 requests for mediation. These requests resulted in 261 individuals returning to their countries of origin.\textsuperscript{849}

2b. Statistics IOM

The website of IOM The Netherlands provided the following statistical information on the total numbers of aliens assisted with their return:\textsuperscript{850}

\begin{center}
\begin{tikzpicture}
\begin{axis}[
    title=Aliens leaving the Netherlands with the assistance of the IOM,
    xlabel=Year,
    ylabel=Number of departing aliens,
    ytick={0,1000,2000,3000,4000,5000},
]
\addplot coordinates {
    (1997,500)
    (1998,600)
    (1999,2500)
    (2000,2500)
    (2001,2500)
    (2002,2500)
    (2003,2500)
    (2004,2500)
};
\end{axis}
\end{tikzpicture}
\end{center}

\textsuperscript{847} Annual Report 2003 IOM Nederland, p. 17.
\textsuperscript{848} Cordaid is a catholic private organization specialized in development-aid projects.
\textsuperscript{849} Preparatory study on the listing of return projects for (ex-) asylum seekers by the Advisory Committee on Aliens Affairs (ACVZ) (January 2005).
Country Report The Netherlands

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of departing aliens</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>826</td>
</tr>
<tr>
<td>1998</td>
<td>889</td>
</tr>
<tr>
<td>1999</td>
<td>4,136</td>
</tr>
<tr>
<td>2000</td>
<td>3,220</td>
</tr>
<tr>
<td>2001</td>
<td>1,775</td>
</tr>
<tr>
<td>2002</td>
<td>2,194</td>
</tr>
<tr>
<td>2003</td>
<td>2,555 *</td>
</tr>
<tr>
<td>2004</td>
<td>2,750 **</td>
</tr>
</tbody>
</table>

\* Adjusted estimate as of 1 November 2003

\** Provisional unofficial estimate

3. Other statistics

![Graph of Actual departure of asylum seekers]

<table>
<thead>
<tr>
<th>Period</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

580
### Expulsion

<table>
<thead>
<tr>
<th>Year</th>
<th>Expulsion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>2.523</td>
</tr>
<tr>
<td>2000</td>
<td>2.027</td>
</tr>
<tr>
<td>2001</td>
<td>2.112</td>
</tr>
<tr>
<td>2002</td>
<td>2.276</td>
</tr>
<tr>
<td>2003</td>
<td>1.713</td>
</tr>
<tr>
<td>2004</td>
<td>1.488</td>
</tr>
</tbody>
</table>

### Supervised departure

<table>
<thead>
<tr>
<th>Year</th>
<th>Supervised departure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>3.981</td>
</tr>
<tr>
<td>2000</td>
<td>3.188</td>
</tr>
<tr>
<td>2001</td>
<td>1.253</td>
</tr>
<tr>
<td>2002</td>
<td>1.537</td>
</tr>
<tr>
<td>2003</td>
<td>2.221</td>
</tr>
<tr>
<td>2004</td>
<td>2.354</td>
</tr>
</tbody>
</table>

### Total

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>6.504</td>
</tr>
<tr>
<td>2000</td>
<td>5.215</td>
</tr>
<tr>
<td>2001</td>
<td>3.365</td>
</tr>
<tr>
<td>2002</td>
<td>3.813</td>
</tr>
<tr>
<td>2003</td>
<td>3.934</td>
</tr>
<tr>
<td>2004</td>
<td>3.842</td>
</tr>
</tbody>
</table>


**Administrative departure of asylum seekers**

- Address control
- Notice after aliens detention
- Others
- Total
### Administrative departure of asylum seekers

<table>
<thead>
<tr>
<th>Period</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address control</td>
<td>11.247</td>
<td>10.871</td>
<td>11.967</td>
<td>16.875</td>
<td>17.557</td>
<td>10.662</td>
</tr>
<tr>
<td>Notice after aliens detention *</td>
<td>585</td>
<td>462</td>
<td>510</td>
<td>483</td>
<td>351</td>
<td>364</td>
</tr>
<tr>
<td>Others</td>
<td>0</td>
<td>41</td>
<td>100</td>
<td>37</td>
<td>37</td>
<td>19</td>
</tr>
<tr>
<td>Total</td>
<td>11.832</td>
<td>11.374</td>
<td>12.577</td>
<td>17.395</td>
<td>17.945</td>
<td>11.045</td>
</tr>
</tbody>
</table>

* The number of 585 (1999) includes both notice after aliens detention and mobile border supervision


### Actual departure of non-asylum seekers

<table>
<thead>
<tr>
<th>Period</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expulsion</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
</tr>
<tr>
<td>Supervised departure</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
</tr>
<tr>
<td>Mobile border supervision</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
</tr>
<tr>
<td>Total</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
<td>[Bar chart data]</td>
</tr>
</tbody>
</table>
### Expulsion

<table>
<thead>
<tr>
<th>Period</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address control</td>
<td>5,308</td>
<td>8,610</td>
<td>4,783</td>
</tr>
<tr>
<td>Notice after aliens detention</td>
<td>3,341</td>
<td>3,354</td>
<td>3,720</td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Country Report The Netherlands

<table>
<thead>
<tr>
<th>Others</th>
<th>36</th>
<th>21</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>8,685</td>
<td>11,985</td>
<td>8,509</td>
</tr>
</tbody>
</table>

Source: Immigration System Report 2004

In the statistics as showed above the departure figures are itemized as to the way in which the departure has occurred. The following distinction has been made.

**Expulsion: forcible removal in a government-controlled way.**

**Supervised departure: the alien reports himself at a time and place (near the border) agreed on. The frontier police will take care that the alien actually leaves the country.**

**Mobile border supervision: an illegal alien or a rejected asylum seeker is arrested by the frontier police near the border and is subsequently handed over to the German or Belgian authorities.**

**Address control: the Aliens Police establishes that a person has left his registered address while his destination remains unknown.**

**Notice after aliens detention: if the aliens police or the court comes to the conclusion that there are no longer legal grounds for the continuing of the aliens detention with the result that the alien thus has to be released, the alien will receive notice to leave the country on his own.**

The figures show that over the past four years there has been a decline in the number of asylum seekers actually being expelled from the country, whereas the number of aliens that are registered as having left the country ‘under supervision’ has gradually increased during the period 2001-2004. A reason for this drop in the number of expulsions can be the simple reason that there are less asylum requests since the Aliens Act 2000 entered into force. But on the other hand, the IND is still busy dealing with
26,000 asylum requests filed under the old Aliens Act. A relatively high number of asylum seekers is registered as ‘administratively departed’ (1999-2004). It is unclear whether these (rejected) asylum seekers are still in the Netherlands without a legal status or that they have left for other (European) destinations. However, it must be said that the number of asylum seekers reported as being ‘administratively removed’ in 2004 is much lower than in the preceding years (from 17,945 in 2003 to 11,045 in 2004), but in comparison with the actual departure of asylum seekers (3,934 in 2003 and 3,842 in 2004) the number remains relatively high. The total number of actual departures of non-asylum seekers has decreased from 21,783 in 2003 to 18,499 in 2004. The same is true for the administrative departure of non-asylum seekers. This number has also declined.

4. Obstacles to an effective Dutch return policy

1. The statutory Advisory Committee on Aliens Affairs (ACVZ) on its own initiative described in its report of January 2005 some important obstacles to the Dutch return policy. Asylum seekers often disappear from the view of immigration authorities. It appears that many rejected asylum seekers leave their reception location before the fixed 28 days have expired and depart for unknown destinations, making it impossible to tell whether they have left the country or continue their stay without the required documents. The same is true for asylum seekers whose application has been refused in the accelerated 48 hours procedure: for them the reception facilities immediately end with the negative decision. Hence, in order to evaluate the effectiveness of the actual implementation of the government’s return policy more information is needed about where those rejected asylum seekers go. Do they leave the Netherlands (for another Schengen country or their country of origin or another third country) or do they remain in the country illegally?

According to investigations carried out by the Aliens Police only 6-8 percent of the persons arrested for residence without the required documents in the period July - September 2004 were rejected asylum seekers. Striking is that the number of asy-

---

851 The ACVZ is an independent commission that gives advice on immigration law and policy. It offers the Minister of Aliens Affairs and Integration and the Parliament asked and unasked advice.

lum seekers arrested in the rural areas was higher than in large cities. This may indicate that this figure represents rather the relative (in)activity of the police in looking for illegal residents, rather than their actual presence in the country. Another research shows however that at least part of the people who depart for unknown destinations stay in the country or leave for another European country.\textsuperscript{853}

The ACVZ mentions that in theory there is a solution to the problem described above, namely to put asylum seekers in aliens detention at the moment they receive a (final) negative decision. But this ‘solution’ shows little sense of reality. Firstly, alien detention is only possible when there is a real prospect of return and the government does participate actively in this return.\textsuperscript{854} Secondly, there is only limited detention capacity. The total capacity for aliens detention on 1 January 2005 was 2,500 places in different detention centres, such as the Koning Willem II Barracks in Tilburg and two detention boats in Rotterdam. Moreover, aliens detention has a relative effectiveness. The longer the detention takes, the less chance there is on a successful return.\textsuperscript{855}

2. According to the ACVZ the government has to recognize that not all rejected asylum seekers can be removed. This may be due to the fact that there is no country which is willing to admit the person. A distinction has to be drawn between aliens who refuse to cooperate in establishing their identity and thus deliberately frustrating the return process and those aliens who do cooperate, but cannot return because of the reluctance of some countries to accept their returning nationals and cooperate in providing return documents. This last group of aliens, according to the policy, should be able to qualify for a regular temporary residence permit, if the return is not possible ‘through no fault of one’s own’.\textsuperscript{856} In such cases the alien has to demonstrate that

\textsuperscript{853} Research by A.M. van Kalmthout, University of Tilburg, on Possibilities of Return of Aliens in Alien Detention, December 2004.
\textsuperscript{854} Article 57 Aliens Act 2000.
\textsuperscript{855} According to a research by A.M. van Kalmthout, University of Tilburg, on Possibilities of Return of Aliens in Alien Detention, December 2004.
\textsuperscript{856} Until mid February 2005 only 14 persons out of the group of 26,000 long-staying asylum seekers received such a permit (Report by the Dutch Refugee Council, March 2005).
he has done everything which could reasonably be expected in order to leave the country which is often hard to prove.\textsuperscript{857}

3. Finally, a number of municipalities have expressed their concerns regarding the government’s return policy. They fear a threat to public order in those cases where the government does not succeed in expelling rejected asylum seekers from the country. These asylum seekers are excluded from reception services and they consequently remain without legal sources of income in the municipality. In the debate with the Minister of Aliens Affairs and Integration the municipalities advocate to use the new system of repatriation and return centres. Municipalities then can refer rejected asylum seekers to these centres. But on the other hand problems remain if it turns out that after a stay in a repatriation or return centre the rejected asylum seeker still cannot be removed. Then the municipality will again be confronted with the rejected asylum seekers.

5. \textit{Cooperation with countries of origin in order to bring about re-admission and return}

In its document on return policy of November 2003 the Dutch government stated that return requests to countries of origins of the rejected asylum seekers and illegal migrants for cooperation on return are often more persuasive when they are made in a wider framework, for example in the framework of the EU. Therefore the Dutch government supports the development and implementation of a common EU return policy. However, the government states, in some cases a request for cooperation on return can be more persuasive when it is properly tailored to the country of origin in question and takes account of the relationship between the Netherlands and that country. This approach requires time and capacity and cannot be taken towards all countries of origin. Dutch efforts in this area therefore focus primarily on eleven key

\textsuperscript{857} Conditions which have to be fulfilled are to be found in the letter the Minister for Aliens Affairs and Integration sent to the parliament on 14 December 2004 (letter 5319399/04 DVB). In this letter the Minister informs the parliament that the major part of those who obtained a “buiten schuld” residence permit were stateless persons.
countries: Afghanistan, Algeria, Angola, China, Democratic Republic Congo (DRC), Guinea, Iran, Nigeria, Serbia and Montenegro, Somalia and Syria.\(^{858}\)

Further the government hopes that coherent comprehensive policies developed by the EU on these countries will also increase the impact of Dutch efforts. Departure and return are therefore considered to be integral aspects of Dutch foreign policy.

Another form of cooperation with countries of origin is the conclusion of Memoranda of Understanding (MoU). These are arrangements between the Dutch IND and immigration authorities in the country of origin. The Minister of Foreign Affairs supports the IND in concluding these arrangements. Those MoU do not need formal parliamentary consent.

An example of such MoU is the MoU with Bulgaria (November 2003). A group of illegally resident Bulgarians was caught working illegally in the Netherlands. The IND instituted a cooperation with Bulgarian immigration authorities with the aim to prevent these persons from returning to the Netherlands by way of withdrawal of their passport by the Bulgarian authorities for a period of two years. Another example is the MoU with Democratic Republic of Congo (DRC) (October 2002). This MoU is an agreement between the IND and the Congolese DGM (Direction Générale de Migration) in order to welcome repatriated persons by a ‘joint Congolese-Dutch welcome committee’ on the airport in DRC and transport them to their place of destination. This MoU has been heavily criticised by different political groups. The DGM is said to be a secret service: a service that keeps files of people in order to collect (incriminating) information. According to the Minister of Aliens Affairs and Integration the DGM is only an immigration service.\(^{859}\) The Minister declared that it might be possible that this service performed some tasks which bear resemblance to the task of a secret service during the civil war, but since the end of the war the DGM’s main focus is on border control. In a Dutch television programme (Factor), broadcasted on 11 June 2004, attention was given to the fact that rejected asylum seekers upon return in the DRC were registered by the DGM and that they

---


\(^{859}\) Letter of the Minister of Aliens Affairs and Integration to ASKV, Autonoom Centrum en Docu Congo d.d. 30 maart 2004.
Country Report The Netherlands

were subsequently detained for at least 48 hours and obliged to pay ransom money. In a recent documentary (Netwerk), broadcasted on television on 10 January 2005, the Dutch immigration authorities were accused of providing confidential information on the rejected asylum seekers to the Congolese authorities. The IND uses so-called return documents showing which arrangements and procedures are applicable with regard to each country of origin. According to the return document on the DRC the Congolese authorities require a copy of the asylum account report. In reaction to this assertion the Minister for Aliens Affairs and Integration explained that the return document on the DRC is only used as a guideline to the Aliens Police and the Royal Netherlands Military Constabulary who enforce expulsions in close cooperation with the IND. This return document only states that these organizations have to supply a copy of the asylum account report to the IND. This copy will not be presented to the Congolese authorities.  

For quite a long time the Dutch government availed itself of a disputed way of expelling rejected Somali asylum seekers to the northern (safe) part of Somalia. Rejected Somali asylum seekers were expelled by airplane to Somalia via Nairobi (Kenia) or Dubai (UAE). With a view to this journey the Dutch government provided the asylum seeker with the standard travel document for the expulsion of third country nationals from the territory of the European Union (or EU Travel Document) which is valid for a single journey. During this journey the asylum seeker was escorted by the Royal Netherlands Military Constabulary. On arrival in Nairobi or Dubai the asylum seeker was handed over respectively to the Kenyan or UAE authorities. These authorities made sure that the asylum seeker boarded the plane to Somalia, but they did not escort the asylum seeker during this last part of the journey which was also covered with the EU-laissez-passer. Until early 2004 it occurred that the journey Nairobi – Somalia was covered with Somali national passports provided by SMI, a private company specializing in the return of aliens. Because doubts arose as to the authenticity of these passports this practice was terminated.

---

In the period January 2003 – mid November 2003 eight rejected Somali asylum seekers were expelled via Dubai and 18 via Nairobi. At the end of December 2003 a total of 475 rejected asylum seekers stayed in the Netherlands. Lawyers of these rejected asylum seekers did not agree with their expulsion and contended that the way in which this expulsion took place violated Article 3 of the European Convention on Human Rights. They asked the President of the European Court of Human Rights (ECHR) to take interim measures to make sure that these rejected asylum seekers were not expelled from the Netherlands until further notice. Early 2004, the President took the first of a series of such interim measures. At first these interim measures were not motivated, but later on the ECHR President began to motivate the interim measures. The President was not convinced of the fact that the northern (safe) part of Somalia was safe enough for specific groups of Somali (i.e. Somali who belong to a minority and who have no family or clan ties in northern Somalia). The President of the ECHR further noted that there was no guarantee that rejected asylum seekers would indeed be admitted to northern Somalia.\(^\text{862}\) As a result the Dutch Council of State decided in its judgments of 28 May 2004 that such an interim measure stands in the way of sending these specific groups of Somali back to Somalia\(^\text{863}\). In June 2004, the Minister of Aliens Affairs and Integration implemented, in reaction to this judgment, a so-called ‘departure moratorium’ for Somali who belong to a minority and have no family or clan ties in northern Somalia\(^\text{864}\). The effect of such a decision is that the departure of a certain group of asylum seekers can be postponed for a maximum period of one year. According to a recent judgment of the Council of State (17 December 2004) the latest interim measure by the President of the European Court of Human Rights has to be explained in a way that also Somali who belong to a majority, but who do not originate from northern Somalia, cannot be expelled until further notice.\(^\text{865}\) Until now the Minister of Aliens Affairs and Integration sees no reason to extend the departure moratorium to this group.

\(^{862}\) Interim measure of 3 May 2004 (application no. 15243/04).

\(^{863}\) ABRs 28 May 2004 (200403186/1, 200403216/1 and 200402373/1), JV 2004/278.

6. Readmission agreements


Early 2004 negotiations are still in progress between the Benelux and Albania, Algeria, Armenia, Azerbaijan, Czech Republic, Federal Republic of Yugoslavia (agreement signed in 2002), Formal Yugoslav Republic of Macedonia (FYROM), Georgia, Hungary (agreement signed in 2002), India, Kyrgyzstan, Mali, Moldova, Nigeria, Slovakia (agreement signed in 2002), Switzerland and Ukraine.867 At the end of 2004 negotiations with the following countries are still in progress: Albania, Algeria, Armenia, Azerbaijan, Georgia, India, FYROM, Mali, Moldova, Ukraine, Nigeria en the Czech Republic. Also readmission agreements with Cyprus and France are in preparation.868

In the framework of Schengen, the Netherlands concluded a readmission agreement with Poland.869

In the framework of the EU, agreements have been concluded between the European Commission and Hong Kong and between the EU and Macao. Agreements are reached with Sri Lanka and Albania and negotiations with Morocco, Russia and Ukraine are still in progress.

7. Implementation of some EU measures regarding return of aliens

According to the Dutch government the implementation of Directive 2001/40/EC does not require any change of the national legislation or practice in the Netherlands. In October 2002 the Minister of Aliens Affairs and Integration published a formal notice in the Government Gazette explaining why in his view no amendment of the national law was necessary. The system of the Dutch Aliens Act 2000 does not require a separate decision on expulsion of an alien. The competence of the immigration authorities to actually expel an alien, under the system of the Act, follows automatically from the fact that the alien does not (or no longer) have lawful residence in the Netherlands. In case the authorities conclude that there are no barriers against expulsion under Dutch law, they can proceed with the expulsion and at the same time (implicitly) enforce the expulsion decision of the other member state.

- Dublin Convention and Dublin II Regulation 343/2003 (18 February 2003): the number of asylum seekers sent back to the Member State responsible for examining the asylum application

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dublin claims out*</td>
<td>3408</td>
<td>2434</td>
<td>1689</td>
<td>1723</td>
<td>1862</td>
</tr>
<tr>
<td>Dublin claims in**</td>
<td>...</td>
<td>...</td>
<td>2170</td>
<td>2983</td>
<td>3385</td>
</tr>
</tbody>
</table>

* Total number of requests presented by the Netherlands to other Dublin states
** Total number of requests addressed to the Netherlands by other Dublin states

The table above indicates that in 2000 the Netherlands presented 3408 requests to other Dublin states. At the end of 2000 357 requests (10.5 %) still had to be dealt

---

872 OJ 2003 L 50/1.
with, 222 requests (6.5%) were refused, 96 (2.8%) were either withdrawn or expired and a number of 2733 requests (80.2%) were accepted.\textsuperscript{873}

In 2001 the Netherlands presented 2434 requests to other Dublin states. At the end of 2001 246 requests (27%) still had to be dealt with, 127 requests (5%) were refused, 280 (12%) were either withdrawn or expired and a number of 1546 (64%) were accepted.\textsuperscript{874}

In 2002 the Netherlands presented 1689 requests to other Dublin states. At the end of 2002 583 requests (34.5%) still had to be dealt with, 189 requests (11.2%) were refused, 153 (9.1%) were either withdrawn or expired and a number of 764 (45.2%) were accepted.\textsuperscript{875}

Unfortunately, in the Immigration System Reports 2003 and 2004 the number of requests presented by and addressed to the Netherlands was no longer itemized as to the way in which the requests have been dealt with. For the period 2000-2002 it becomes clear that while in 2000 the total of accepted requests presented by the Netherlands were very high, in 2001-2002 the total number of accepted requests declined and the total number of refused requests increased. The absolute number of requests accepted by other Dublin states declined considerably from 2733 in 2000 to 764 in 2002. One has to keep in mind that the requests accepted only partly result in actual transfer of the asylum seekers to the other Dublin state.

In general, from these data it becomes clear that the number of requests presented by the Netherlands to other Dublin states gradually declines over the past four years. The total number of requests addressed to the Netherlands on the other hand is on the increase. It would be interesting to find out whether these claims concern people out of the group of 26,000 asylum seekers who have lodged an asylum claim before the Aliens Act 2000 entered into force and who have left the Netherlands for unknown destinations.\textsuperscript{876}

\textsuperscript{876} Report by Dutch Refugee Council (March 2005).
Country Report The Netherlands

- Joint government organized charter flight in order to expel rejected asylum seekers

The Minister for Aliens Affairs and Integration indicated at the beginning of 2004 during a meeting in Dublin that she wanted to strengthen cooperation between European countries in returning failed asylum seekers. According to the Minister, such joint deportations are more efficient and increase the number of countries to which aliens can be deported. However, since the first joint government organized charter flight in May 2004 (see paragraph 1 above) only a few of such joint government flights with other EU member states have actually taken place. Most of the joint government flights that take place are carried out in the framework of the Benelux or with a single neighbouring country, mainly Belgium.  

- EU Travel Document

The EU Travel Document has been used in order to expel rejected asylum seekers in case where it proved impossible to obtain a passport or travel document from the country of origin. The use of this document in order to expel rejected asylum seekers to Somalia gave rise to public debate and several court cases (see paragraph 5 above).

---

877 On 9 September 2004 a joint government organized charter flight of the Netherlands and Belgium left Schiphol Airport in order to return 25 rejected asylum seekers to Nigeria and Guinea (Press Release Ministry of Justice, 9 September 2004).
Regularization in the Netherlands 1999-2005

1. Regularization under the 1965 Aliens Act (before April 2001)

Before the Aliens Act 2000 entered into force in April 2001, there were two kinds of regulations concerning the regularization of aliens without a residence permit.\(^{878}\)

In 1999 the government, after long pressure by municipal authorities and immigrant organizations adopted a regulation measure concerning illegal aliens able to prove long residence in the Netherlands. It was called ‘long term illegals’ or ‘white illegals’ policy (*Witte illegalen beleid*).\(^{879}\) The policy measure aimed at aliens who had worked and lived in the Netherlands for many years without the proper documents and who had been treated like other lawful inhabitants. They were included in the tax system and social security system and they had paid their income and other taxes. Due to the Linking Act 1998, which establishes a link between the lawfulness of the residence and the aliens’ access to public and social services, these long-staying undocumented aliens were excluded from the receiving of the social benefits and services for which they paid their contributions and had built up rights during their years of stay in the Netherlands.

Applications under the ‘white illegals’ regulation could be filed between 1 October 1999 and 1 December 1999. Illegal aliens who wanted to qualify under this regulation had to file a request with the Immigration and Naturalization Department (IND). The IND investigated whether the request fulfilled the following criteria: s/he must prove that s/he has resided uninterruptedly in the Netherlands since 1 January 1992, had a social-fiscal number since 1 January 1992 until 1 July 1998, holds a valid passport, has not have been physically removed from the country since 1992, has not possessed or used false documents, has submitted incorrect data and does not have a criminal record. After the IND had checked that these criteria were met, it would forward the file to the Committee of Mayors, composed by the mayors of the four major cities in the Netherlands (Amsterdam, Rotterdam, The Hague and


\(^{879}\) The detailed rules of this measure are to be found in a circular of the Ministry of Justice: TBV 1999/23.
Country Report The Netherlands

Utrecht). This Committee investigated the extent of social integration of the applicant. In case the advice of the Committee was positive, the IND would grant the applicant a residence permit on humanitarian grounds.

Approximately 7000 illegal aliens filed a request under this regulation measure. In the end, only 2000 received a residence permit. The majority of the applications were rejected as a result of the restrictive manner in which the ‘objective criteria’ were checked by the IND. Those cases were not referred to and investigated by the Committee of Mayors. Hence, neither the presence of humanitarian grounds nor the extent of social integration was taken into consideration in the majority of the cases. The strict selection by the IND considerably restricted the role of the Committee of Mayors in practice. It also resulted in a large number of appeals to the Aliens Chambers of the District Court. Many of those cases are still pending before the courts in 2005.880

The second regulation that was in force during this period was the so-called ‘three-years policy’ allowing for regularization of aliens who have been staying in the Netherlands for three years or more while awaiting the outcome of their immigration procedure. This policy has been described in detail by Spijkerboer (2000). The central rule of this policy was that a residence permit would be granted, once the immigration procedure had lasted more than three years since the application for a residence permit had been submitted, provided that the alien had stayed in the Netherlands with consent of the administration, had not unduly delayed the procedure and had no serious criminal record. This policy applied both to both asylum cases and other (regular) immigration cases.

2. Regularization measures under the Aliens Act 2000 (after April 2001)

2001

One of the main objectives of the Aliens Act 2000 was to simplify the asylum procedure and to inform asylum seekers as soon as possible whether they could stay or would have to return. The new Act introduced several major changes in Dutch immigration law. It strictly distinguishes and separates the procedures for ‘asylum seekers’ and those for aliens applying for permission to stay on other grounds (‘regular aliens’). Further, the Act introduced one single asylum status, replacing the three different statuses under the old legislation. However, the grounds on which asylum seekers can be admitted to the Netherlands remain largely the same as under the previous Aliens Act. The aim of the single asylum status was to stop asylum seekers who had been granted one status from appealing for a more secure status. The Act also introduced a new temporary residence permit which can be replaced after five years by a permanent status (‘for an indefinite period’). Procedural changes include the possibility of a limited higher appeal from the Aliens Chamber of the District Court to the Council of State and the introduction of a more comprehensive rejection of the application (the so-called ‘meeromvattende beschikking’), that next to the rejection of the asylum request also stipulated that all reception facilities will end and that the rejected asylum seeker must leave the Netherlands or will be expelled. Separate court procedures against these legal consequences of a rejection of an asylum request would no longer be possible. However, no regularization of illegal immigrants took place in relation with the coming into force of this new immigration legislation.

2002-2003

Shortly before his murder in May 2002, the populist politician Pim Fortuyn pleaded for a regularization. But the right wing coalition government that was formed after the elections, which were held a few days after the murder, and that consisted of

---

881 The access to this court is not open in all cases and the procedure before it has been restricted. For example, the Council of State can declare an appeal unfounded without motivation if it wants to and the
CDA, VVD and Pim Fortuyn’s party (LPF) did not include a regularization measure in its ‘Strategic Agreement’. On the contrary, this agreement explicitly excluded the possibility of a general or specific pardon for undocumented immigrants. The main argument given by the government was that a regularization would undermine the restrictive character of the admission policy and the recent Aliens Act 2000. Moreover, under the new act asylum and immigration procedures would be completed far more speedily and long delays would be a thing of the past.

The Minister of Aliens Affairs and Integration Nawijn of Pim Fortuyn’s party (LPF) decided to abolish the ‘three-years policy’ mentioned above on 1 January 2003. According to the Minister, this policy did not fit with the new restrictive immigration policy in which a short and swift status determination was to be a central element. The heart of the restrictive asylum policy, according to the government, is that protection is only granted to those who need it. The fact that the length of the asylum procedure rather than the flight motives are the essential condition for a residence permit under the three years policy is inconsistent with the governments policy aim. The ‘three-years policy’ no longer applies to cases in which the three-years period had been completed after 1 January 2003. Both the official Advisory Committee on Aliens Affairs (ACVZ) and the Dutch National Ombudsman have expressed the view that, also under the new Aliens Act 2000, there are still many (asylum) cases in which the IND after a long time has not reached a decision. Hence, it is still necessary to continue exerting pressure on the IND to decide within the statutory time limits.

January 2003

At a national protest manifestation of the Dutch Refugee Council on 14 January 2003, the Minister of Aliens Affairs and Integration Nawijn (LPF) stated that he was prepared to use his inherent power to grant residence permits under the Aliens Act,
poignant cases of asylum seekers who may or may not have exhausted all legal remedies and have already resided in the Netherlands for a long time.\footnote{885} He promised to have a fresh look at urgent humanitarian cases and to grant residence permits if a case was considered to be as ‘urgently humanitarian’. As a result of this statement, between January and October 2003 the Minister received almost 9800 so-called 14/1 letters of aliens applying for this special consideration of their case.\footnote{886}

About the same time, Stari Most, a political-humanitarian action group, called attention for the fate of a group of Bosnian Muslims in the Netherlands who claimed to have witnessed the fall of the Srebrenica safe haven in Bosnia (under the eyes of the Dutch UN soldiers) and who were refused a residence permit. Minister Nawijn expressed his willingness to re-examine a limited number of individual files to be submitted by Stari Most on the basis of the asylum criteria as laid down in the Aliens Act 2000. One year later, the successor to Minister Nawijn, Minister Verdonk (VVD) stated that she had checked all these cases for special personal or humanitarian circumstances and that 17 people received a residence permit.\footnote{887}

The first government with Balkenende (CDA) as Prime-Minister had to step down due to persistent quarrels between ministers from Pim Fortuyn’s Party (LPF) and new elections were held in January 2003. The second Balkenende II government, a coalition of CDA, VVD and D66, took office in May 2003. Its coalition agreement contained a reference to an once-only measure (‘eenmalige regeling’) as a reaction to the demands voiced by the public, the press and municipal authorities, wanting to find a solution for asylum seekers who have been in the Netherlands for a long time. The reason behind the introduction of this policy measure was that infinite postponement of a decision by the government cannot be tolerated. The application of criteria laid down in this measure, eventually, would result in less than 800 asylum seekers receiving a residence permit.

\footnote{884}Opinion of the ACVZ in its letter to the Minister of 4 December 2002 (www.acvz.com).
\footnote{885}The Minister, who was a former head of the IND and was forced to resign from that post a few years earlier, referred to the general statutory rule that administrative decisions are rendered in accordance with the current policy rules. Nevertheless, the Minister may make an exception in cases where the consequences of adherence to a policy rule would disproportionate for the interested party (article 4:84 of the General Administrative Law Act, Algemene wet bestuursrecht).
\footnote{886}TK 2003–2004, 19 637, no. 793.
\footnote{887}TK 2003–2004, 19 637 and 29 344, no. 793, p. 3.
In July 2003 the IND started to process the 14/1 letters. The exact criteria used by the IND in order to establish ‘urgent humanitarian reasons’ remained unclear for a long time. However, a current affairs TV program, NOVA, in January 2004, broadcasted a checklist prepared for use by the IND for this purpose. This checklist contained a number of special ‘factors’ (the IND refused to speak of ‘criteria’) the IND should take into account, such as a very long stay in the Netherlands, medical factors, family circumstances and other humanitarian reasons. Cases which the IND considers to be ‘urgent humanitarian’ had to be presented to the Minister of Aliens Affairs and Integration. The Minister then decides whether or not to use her discretionary power to grant a residence permit. The Minister however promised the Lower House of Parliament that all distressing cases would be reviewed once more ‘from the heart’. Early 2004, consideration of the 9,800 letters written to the Minister after the 14/1 statement had resulted in 220 aliens being granted a residence permit.  

**August 2003**

Continuing protest against the statement of the new Minister of Aliens Affairs and Integration of her intention to organize the return of 26,000 asylum seekers who had applied for asylum under the 1965 Aliens Act (before April 2001) and the pressure by a number of (non-)governmental organizations and in the press to widen the scope of the ‘once-only measure’ mentioned in the coalition agreement, the government agreed with a more liberal policy at the end of August 2003. The policy was applicable to aliens who met all of the following objective, verifiable criteria:

- aliens who have requested political asylum for the first time in the Netherlands before or on 27 May 1998;
- aliens who are still awaiting a final decision on their first asylum application on 27 May 2003. This includes the situation where the alien is awaiting a final decision on granting, revoking or not extending the conditional residence permit (vvtv) issued in the context of the asylum procedure;

---

888 TK 2003-2004, 19 637 and 29 344, no. 793, p. 3.
889 TK 2002-2003, 19 637, no. 754.
- aliens who have resided in the Netherlands without any interruption from the start of this first application for asylum up to and including 27 May 2003;

- the residence will not be issued if there are contra-indications (threat to public policy or national security, provision of incorrect information or the withholding of information which would have resulted in the rejection of the application or serious doubts about the identity of the alien);

- the residence permit will be granted if the alien withdraws all of his current statutory procedures concerning the residence permit.  

Since the reference date was in May 1998, i.e. three years before the entry into force of the new Aliens Act, the scope remained limited. The new policy measure remained in force until 31 December 2003.

In order to ensure that the arrangement would not attract new immigrants or entail new procedures, the residence permit would be granted ex officio, which means that the alien does not need to apply for the permit. The Minister estimated that 2,200 aliens would be eligible for assessment against the criteria.

After intensive parliamentary and public debate about the scope of the ‘once-only measure’, the parliament approved this restrictive form of the regularization. Early 2004, the Minister made public that 2,097 persons had received notice that they were eligible for residence permits as they met the criteria of this policy measure.  

The statutory Advisory Committee on Aliens Affairs (ACVZ) in a letter of February 2004 offered the Minister an unasked advice as to the scope of the ‘once-only measure’.  

In this advice, the ACVZ attached great importance to the extent of social integration and the knowledge of the Dutch language of those asylum seekers who have been in the Netherlands for five to seven years. It also attached value to the position of the children of those asylum seekers who are born and raised in the Netherlands. In a reaction to this advice the Minister declared that the extent of social integration is a subjective criterion which in practice is hard to verify. The Minister referred to the problems regarding the ‘white illegals’ regulation. In order to avoid

---

892 Opinion of the ACVZ concerning the ‘once-only measure’ (9 February 2004).
such problems, only objective, verifiable criteria, like the lapse of time or ‘contra-indications’ (having a criminal record), are included in the policy measure.\footnote{TK 2003-2004, 19 637 and 29 344, no. 807.}

2004-2005

During most of 2004 the debate on the policy of the new Minister of Aliens Affairs and Integration Verdonk on the (forced) return of 26,000 former asylum seekers continued. In the public debate this number of 26,000 was perceived as referring to rejected asylum seekers. Thus, repeated statements that a large percentage (up to 40%) was granted a residence permit caused considerable surprise. It appeared that the return policy was yet another regularization program, but in disguise. However, as explained above, a report published by the Dutch Refugee Council in March 2005 made it clear, that the number of 26,000 referred to asylum requests filed under the old Aliens Act (before April 2001). In most of those cases a (final) decision on the asylum applications had not yet been made. Thus, the asylum seekers were staying lawfully rather than illegally in the Netherlands. According to this report, 8,600 cases were decided by mid February 2005 and 3,500 asylum seekers had received a residence permit, mostly on asylum grounds, but almost 650 asylum seekers did receive a residence permit under the old ‘three-years-policy’, which was abolished in January 2003, but still applies to old cases.

The return policy is yet another form of regularization, to a limited extent only.

At the time the policy was introduced, few of the 26,000 asylum seekers concerned were illegally in the country after their asylum requests had been finally rejected. The policy, thus, appears to be mainly a way of politicians blaming asylum seekers for long delays in processing old asylum applications and an institutionalized way of pressuring asylum seekers to return ‘voluntarily’ to their country of origin.

During 2004, the legal status of the processing of the 14/1 letters was a subject of debate among politicians and lawyers. From the outset, the Minister voiced the opinion that these letters could not be considered as formal applications for a residence permit. Hence, a negative reply to such a petition was not considered as a deci-
sion against which legal remedies were possible. At first, this position appeared to be shared by the Council of State, the highest court in immigration cases. However, in a judgment of 19 November 2004 the Council of State decided that most of the thousands of 14/1 letters should be regarded as applications for a residence permit and the answers are decisions against which administrative review or appeal are available. This means that each case may now have to be reviewed a couple of times. Moreover, it will still be possible to file new applications for this purpose. By mid March 2005 a total of nearly 2,350 appeals have been filed in response to the letters replying to the 14/1 letters.

According to the Government, this will increase the risk of misuse of the immigration procedures and it will enlarge the burden for the immigration authorities and the courts. In order to tackle these undesirable consequences of the decision of the Council of State, the Minister of Aliens Affairs and Integration has announced to take a number of measures. New 14/1 letters will be treated as a new application for a regular residence permit. This means that high fees will have to be paid for the application and that the applicant has to return to his country of origin in order to file the application at the Dutch embassy in that country. Other measures aimed at limiting the use of the immigration procedures are under consideration. At the time of writing (March 2005), these measures have not yet been approved by the parliament.

3. **Concluding remarks**

In the period under review (1999-2004) there has been a major reform of the immigration legislation without an accompanying large scale regularization of ‘old cases’. We observe rather a series of small scale regularization measures, each covering only a limited group of aliens living for considerable time in the Netherlands without the required documents: the white illegals policy (1999), the 14/1 letters (2003-2005), Stari Most group (2003) and the once-only measure (2003-2004). Each of those measures was introduced after considerable public and political pressure. In several instances the pressure of local authorities visible influenced the regularization

---

Generally, the introduction of those measures was justified by the long residence of the persons concerned, by their actual integration in Dutch society (speaking Dutch, children born or educated in the Netherlands), by humanitarian grounds related to the circumstances of the persons concerned, or by the fact that expulsion to the country of origin was de facto not possible. Moreover, the long duration of the asylum or immigration procedure was the central justification for the permanent ‘three-years-rule’ concerning the regularization of aliens whose residence had been tolerated by the immigration authorities during the procedure that lasted for several years, whilst the applicant could not be blamed for the long delay in the decision making. The abolition of this policy for new cases in 2003 will probably result in a pressure for ad-hoc measures to regularize the status of applicants whose stay has been tolerated for many years under the new Aliens Act 2000. The prolonged decision making on the 26,000 old asylum applications filed before April 2001 under the old 1965 Aliens Act illustrates that the three-years-rule still plays a considerable role as a ground for granting residence permit in practice.

Would the vociferous opposition by the German Minister of Interior Schily and the Dutch Minister for Aliens Affairs and Integration Verdonk in the Justice and Home Affairs Council against the large scale regularization that was adopted in Spain in March 2005, be partly related to the fact that Germany and the Netherlands recently had introduced a new immigration legislation without an accompanying large scale regularization of cases pending already for many years under the old legislation and that both ministers were confronted at home with pressure to adopt a generous regularization program for old cases?

---

- CHAPTER XIII -

COUNTRY REPORT POLAND

by
Dr. Michal Kowalski,
Jagiellonian University
STUDY ON REFUGEE STATUS AND RETURN POLICIES

COUNTRY REPORT ON POLAND

DR MICHAŁ KOWALSKI
DEPARTMENT OF PUBLIC INTERNATIONAL LAW
JAGIELLONIAN UNIVERSITY, KRAKÓW, POLAND

Contents:

1. Introduction
2. The draft Amendment Act
3. Involuntary returns
   3.1 General regulations
   3.2 Readmission agreements
   3.3 Aliens seeking protection
      3.3.1 General basis
      3.3.2 Asylum
      3.3.3 Refugee status
      3.3.4 Dublin II
      3.3.5 Subsidiary protection
      3.3.6 Temporary protection
4. Voluntary returns
5. Statistics
6. References
1. Introduction

Subject-matters analysed in the present country report are primarily regulated in the Aliens Act and the Act on granting protection to aliens within the territory of the Republic of Poland, both of 13 June 2003 (Journal of Laws 2003, No. 128, item 1175 and 1176 respectively; hereafter referred to as the AA and the APA respectively). Both acts entered into force on 1 September 2003. However, the process of establishing the Polish migration and asylum law, following the conversion of the political system in 1989, is still on-going [further on the development of the Polish migration and asylum law see, e.g.: Kowalski, pp. 321-322]. Adjustment to the EU standards remains a determinant in the process. Further developments are planned as the major amendment of the AA and the APA, as well as other relevant regulations, is currently in the legislative process. On 3 March 2005 the draft Amendment Act was adopted by the Sejm (the Lower House of the Parliament) and transferred to the Senat (the Upper House; the Sejm document No. 3333). The Senat is expected to start deliberating upon the draft Amendment Act on the turn of March and April 2005. The present report is based on binding regulations as of 31 March 2005. However, some relevant references to the draft Amendment Act as of 3 March 2005 will be made and general information on the draft Amendment Act is included below. Also, the report includes information kindly made available by the Repatriation and Aliens Office; the Border Guard; the UNHCR Warsaw Office and the IOM Warsaw Office.

The present country report is focused on legal aspects of refugee status and return policies as there is no public debate on the issues. No general political debate on the Polish migration and asylum policies exist either. Some authors claim that it is a positive phenomenon in the sense that the “status quo is rather beneficial for all the actors involved in the shaping of migration policy” because the public discourse on immigration issues “usually results in the radicalisation of attitudes towards ‘others’, and to growing xenophobia.” [Koryś, p. 50]. It seems, however, that - taking into account the growing numbers of migrants and asylum-seekers in Poland - the
lack of such discourse on the present stage will only result in ‘radicalisation of attitudes’ in intensified scale on later stages.

2. The draft Amendment Act

The draft Amendment Act introduces extensive changes to the AA and the APA. There are two rationales for the changes: firstly, further adjustment to the EU standards, including those recently adopted; and secondly, critical assessment of the application of both acts after one year in force.

The draft Amendment Act introduces the following directives, which were adopted following the adoption of the AA and the APA in June 2003:

- 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003);
- 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004);
- 2004/81/EC of 29 April 2004 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 (OJ L 261, 8.8.2004);

Also, the draft Amendment Act provides further adjustment to standards of the following directives:

Country Report Poland


Moreover, the draft Amendment Act introduces further provisions aimed at direct applicability of the Dublin II Regulation of 18 February 2003 (343/2003; OJ L 50, 25.2.2003) [further see below].

Taking into account the subject-matter of the present study, attention should be put on regulations concerning assistance in cases of transit for the purposes of removal by air. The draft Amendment Act introduces new Chapter 8a (Art. 100a – Art. 100j) to the AA. This regulation transposes to the AA detailed provisions of the Directive 2003/110/EC. The Border Guard is determined as the competent Polish authority in this respect.

3. Involuntary returns

3.1 General regulations

General regulations regarding the involuntary return of aliens from the territory of Poland are provided in the AA. An alien may be issued with an expulsion decision or in some cases alternatively with a decision obliging an alien to leave the territory of Poland voluntarily. However, also an alien issued with an expulsion decision is obliged to leave the territory of Poland on his or her own account within the time limit set in the decision. Thus, save the statutory exceptions, an alien is generally forcibly escorted to the border by the competent authorities (the Police; the Border Guard) only if he or she does not comply with the obligation to leave. This results in situation in which some aliens obliged to leave disappear within the country and stay illegally. The data of an alien issued with an expulsion decision, as well as a decision obliging to leave voluntarily, are placed in the register of aliens undesirable within the territory of Poland and in consequence not entitled to enter. If an alien complies with a decision obliging to leave voluntarily the data is placed for one year. If an
alien complies with an expulsion decision the data is placed in the register for three years. And if an alien is forcibly expelled (to be precise, the AA speaks more generally of a situation when the costs of expulsion are covered by the authorities) the data is placed in the register for 5 years [Art. 128.3 AA].

An expulsion decision is issued if the following premises provided in Art. 88 AA occur: a) illegal residence; b) illegal employment or self-employment; c) lack of sufficient financial means necessary for maintenance while in Poland; d) an alien’s data are in the register of aliens undesirable within the territory of Poland; e) an alien’s further stay would constitute a threat to national safety or security or the protection of public security and order or would be contradictory to national interests; f) illegal entry or an attempt to enter illegally; g) non-compliance with a decision obliging an alien to leave the territory of Poland voluntarily; h) non-compliance with fiscal obligations towards Poland; i) completion of an imprisonment sentence for intentional criminal offence or fiscal offence. The draft Amendment Act adds one more premise: final sentence of imprisonment if there are grounds for the transfer abroad procedure.

An expulsion decision must not be issued with an alien holding the settlement permit. (Art. 88.2 AA). The draft Amendment Act, which introduces to the AA the long-term residence in the EC permit, extends this provision to an alien holding the permit.

Also, an expulsion decision must not be issued, nor executed if previously issued, when the premises for granting a tolerated residence permit (which is the form of subsidiary protection; see below) occur (Art. 89 AA). The draft Amendment Act extends this provision to two new situations: firstly, to an alien who is a spouse of a Polish national or of an alien holding the settlement permit or long-term residence in the EC permit and his or her further stay in Poland does not endanger national safety or security or the protection of public security and order, save the cases in which the
marriage was aimed at avoiding the expulsion; and secondly, to asylum-seekers while in the refugee procedure (in this respect see below).

An expulsion decision may be given an order of immediate enforceability (i.e. an appeal does not have the suspensive effect) for reasons regarding national safety or security or the protection of public security and order, as well as national interest (Art. 90.2 AA).

An expulsion decision sets a time limit of maximum 14 days for leaving the territory of Poland. The decision may also determine a route to and the place of crossing the border, as well as may oblige the alien concerned to stay in a determined place and report to the relevant authority until the execution of the decision (Art. 90 AA). The alien must not leave the place determined without the consent of the authority which issued the decision.

An authority competent for issuing an expulsion decision is voivod (wojewoda; a local representative of government; Poland is divided into 16 regions named voivodships /województwo/). Voivod issues the decision ex officio or upon the request of listed authorities including: the Minister of National Defence, the Chief of the Internal Security Agency, the Chief of the Intelligence Agency, the Commandant in Chief of the Border Guard, the Commandant in Chief of the Police, the commanding officer of the Boarder Guard Division, the commanding officer of the Voivodship Police Headquarter, the commanding Officer of the Border Guard checkpoint or Customs Service Agency (Art. 92.1 AA). The Head of the Repatriation and Aliens office is the appellate authority.

An alien issued with an expulsion decision may be escorted to the border of a state to which he or she is to be expelled if he or she has not left the territory of Poland within the time limit set in the expulsion decision or if it is necessary for reasons regarding national safety or security or the protection of public security and order, as
well as national interest. The Police is competent to escort an alien to the state-border and the Border Guard is competent to escort an alien from the state-border to the border (an airport, a seaport) of the state to which an alien is to be expelled (Art. 95.1-3). The draft Amendment Act widens the catalogue of situations in which escort to the border may take place. Under this regulation an alien issued with an expulsion decision may be escorted to the border also if: firstly, the alien concerned has not left the territory of Poland within the time limit set in the decision obliging to leave voluntarily; secondly, the alien concerned is placed in a guarded centre or in a deportation centre.

Special guarantees refer to expulsion of minor aliens. An expulsion decision of a minor alien is executed only if it is guaranteed that the minor concerned will be under custody of his or her parents or other relevant adult persons or institutions, according to the standards of the 1989 Convention on the Rights of the Child. A minor alien is to be expelled only under custody of his or her legal representative, save the case when the minor concerned is transferred to his or her legal representative or to a representative of authorities of a state to which he or she is to be expelled (Art. 94.1-2 AA).

When the following premises for issuing an expulsion decision occur: illegal residence, illegal employment or self-employment or lack of sufficient financial means, alternatively a decision obliging an alien to leave the territory of Poland voluntarily may be issued when it is assumed that under particular circumstances an alien concerned will comply with the decision. Under the decision an alien is obliged to leave Poland within 7 days. The decision is given an order of immediate enforceability (Art. 97.1-2 AA).

An authority competent for issuing the decision obliging an alien to leave voluntarily are the commanding officer of the Voivodship Police Headquarter, the commanding officer of the district Police, the commanding officer of the Boarder Guard Division,
the commanding Officer of the Border Guard checkpoint (Art. 98.1 AA). Voivod is the appellate authority.

Both, an expulsion decision, as well as a decision obliging an alien to leave the territory voluntarily result *ipso iure* in cancellation of the visa, withdrawal of the residence permit and withdrawal of the employment permit (Art. 90.3 and Art. 97.3 AA). In the case of issuing an expulsion decision with an alien which is under obligation from the decision to leave the territory voluntarily, the latter terminates with issuing the former and the appeal procedure ceases (Art. 99 AA).

Also, the AA provides for extensive regulation on detention of aliens to be expelled. Previously the lack of precise regulations and arbitrariness of existing law in this respect resulted in the European Court’s on Human Rights judgement of 27 February 2004 in the case *Shamsa v. Poland* (*applications nos. 45355/99 and 45357/99; ECHR 2004*). The Court held that there had been a violation of Article 5.1 of the European Convention on Human Rights (hereafter referred to as the ECHR). The case regarded the situation of applicants’ detention in the Warsaw airport transit zone in 1997 (the 1963 Alien Act applied then).

Under present regulation of Chapter 9 (Art. 101 – 109) of the AA, an alien may be detained for maximum 48 hours if the premises to issue an expulsion decision occur or if he or she does not comply with the expulsion decision. An alien detained enjoys rights of a detainee in accordance with the 1997 Criminal Procedure Code (*Journal of Laws 1997, No. 89, item 555, as amended*). The Police or the Border Guard is the competent authority for detention. Further, the alien concerned may be placed in a guarded centre or in a deportation centre upon a court’s decision. The court sets the relevant time limit of maximum 90 days which may be extended, however it must not exceed one year.
Fingerprints are collected from an alien detained in order to be expelled or an alien issued with an expulsion decision (Art. 93 AA). Further, the draft Amendment Act provides for fingerprints collection from an alien issued with a decision obliging an alien to leave the territory voluntarily.

3.2 Readmission agreements

According to the data from the Border Guard as of 21 January 2005, Poland is a party to readmission agreements with: Schengen states (29 March 1991); Bulgaria (24 August 1993); Croatia (8 November 1994); the Czech Republic (10 May 1993); Germany (7 May 1993); Greece (21 November 1994); Hungary (26 November 1994); Ireland (12 May 2001); Lithuania (13 July 1998); Moldova (15 November 1994); Romania (24 July 1993); Slovenia (28 August 1996); Slovakia (8 July 1993); Spain (21 May 2002; entered into force on 23 June 2004); Sweden (1 September 1998); Ukraine (24 May 1993). They are generally considered to function satisfactorily. Also, the ratification processes of the readmission agreements with Austria (10 June 2002) and Vietnam (22 April 2004) are pending. Moreover, readmission provisions are included in agreements on abolishing visas with Estonia, Latvia and Switzerland.

Currently, readmission agreements are being negotiated with Armenia, Estonia, Finland, Kazakhstan, Latvia, the United Kingdom and Switzerland. Also, the readmission agreement with Romania is being renegotiated.

Moreover, Poland has taken initial steps in order to start negotiations on readmission agreements with Albania, Bangladesh, Belarus, Canada, China, Cyprus, India, Iran, FYR Macedonia, Mongolia, Pakistan, Sri Lanka and Russia.
3.3 Aliens seeking protection

3.3.1 General basis

The APA provides that four forms of protection may be granted to aliens within the territory of Poland: a) asylum; b) refugee status; c) subsidiary protection (known as tolerated residence; /pobyt tolerowany/); d) temporary protection.

3.3.2 Asylum

The institutions of asylum and refugee status both have constitutional basis. The 1997 Constitution guarantees in Art. 56 that aliens may be granted asylum in Poland and those seeking protection from persecution may be granted refugee status. The institutions are distinct in their legal character. The institution of asylum in Polish law originates from legal traditions prior to the accession to the 1951 Geneva Convention and 1967 New York Protocol (hereafter referred to as the Geneva Convention) in 1991. Asylum may be granted when an alien is in need of protection and cumulatively granting asylum is in the best interest of Poland. The institution is of a highly discretional character and its practical importance is marginal.

An alien granted asylum must not be obliged to leave the territory of Poland voluntarily nor to be expelled (Art. 95 and Art. 96 APA). An expulsion decision may be issued only after the withdrawal of asylum, which takes place only if grounds for granting asylum have ceased or for reasons regarding national safety or the protection of public security and order. A decision on withdrawal of asylum ipso iure obliges an alien concerned to leave the territory of Poland. In this context the general regulations on expulsion including the right to appeal provided in AA apply (Art. 91). Interestingly enough, also an alien applying for asylum may be issued with an expulsion decision and be expelled. However, an expulsion must not be put into effect if it violates relevant international obligations of Poland such as Art. 3 ECHR.
3.3.3 Refugee status

According to the APA, refugee status is granted to an alien in accordance with the Geneva Convention. The determining authority at first instance of refugee procedure is the Head of the Repatriation and Aliens Office. The appellate authority of second instance is the Refugee Council, which is an independent administrative body of quasi-judicial character. The Refugee Council is entitled to examine both points of law and facts. From the decision of the Refugee Council an appeal to an administrative court may be lodged. Since 1 January 2004 and following the reform of the Polish administrative judicial system the administrative judicial procedure consists of two instances. The administrative courts are not entitled to make decisions on the merits of a case.

Rejected asylum-seekers are alternatively either granted the tolerated residence leave (see below) or obliged to leave the territory of Poland. In the latter case the general regulations on expulsion provided in the AA apply (Art. 16.5 APA). A rejected asylum-seeker is allowed to remain on the territory during the appeal procedure before the Refugee Council (Art. 20.1.2-3 APA). Suspensive character of the appeal procedure is not restricted in the accelerated procedure either. Lodging further appeal to an administrative court is not of suspensive character. Thus, it does not result in leave to remain on the territory, however, such leave may be granted by both the Refugee Council (ex officio or on request) or the court (on request) under the 2002 Act of proceedings before administrative courts (Art. 63.1 and Art. 63.3; Journal of Laws 2002, No. 153, item 1270).

The decision obliging a rejected asylum-seeker to leave the territory provides a time limit for leaving of maximum 30 days. In case of appeal a new time limit for leaving of maximum 14 days is set in a negative decision of an appellate authority (the Refugee Council). It has been noted that the latter time limit is not in conformity with the time limit of 30 days for lodging an appeal to the administrative court [Chlebny, p. 31; Mikolajczyk, p. 173]. Surprisingly, this deficiency has not been amended in the draft Amendment Act.
Negative decision does not oblige a rejected asylum-seeker to leave the territory if he or she enjoys residence permit or settlement permit, or if previously the expulsion decision was issued, which has not been put into effect (Art. 16.3 APA). The draft Amendment Act, additionally to the adjustment of this regulation to legal institutions to be introduced (such as the long term residence in the EC permit), extends it to two new situations: first one of an alien who is imprisoned or is under the obligation not to leave the territory of Poland in accordance with the relevant criminal procedure provisions; and the second one of an alien who is a spouse of a Polish national or of an alien holding the settlement permit or long-term residence in the EC permit and his or her further stay in Poland does not endanger national safety or security or the protection of public security and order, save the cases in which the marriage was aimed at avoiding the expulsion.

If a rejected asylum-seeker does not comply with the obligation to leave territory he or she is issued with an expulsion decision (Art. 88.1.7.a AA).

Interesting enough, an asylum-seeker may be also issued with an expulsion decision while in the refugee procedure. Under Art. 46 APA the expulsion decision is issued if the statutory premises for expulsion apply. However, the enforcement of the expulsion decision is suspended until the final decision in the refugee procedure is issued. This regulation causes serious concern. However, it is to be changed by the draft Amendment Act and under its regulation an asylum-seeker must not be issued with an expulsion decision while in the refugee procedure.

No official statistics exist but it is estimated that a significant number of rejected asylum-seekers who do not comply with the obligation to leave the territory are not expelled as they disappear within the territory and stay illegally. Prevention of such practices was, *inter alia*, the rationale for introducing to the Polish legal system extensive regulations on detainment of asylum-seekers in the 2003 APA. Although the
regulation is based on the principle that generally asylum-seekers should not be detained, it allows for far-reaching exceptions. An asylum-seeker is to be detained and placed in a guarded centre or in a deportation centre if he or she: a) submits an application at the border being not entitled to enter; b) submits an application while staying illegally within the territory; c) illegally entered or attempted to enter before submitting an application; d) was issued with a decision obliging him or her to leave or with an expulsion decision before submitting an application; e) was issued with an expulsion decision after submitting an application (Art. 40 APA). Asylum-seekers who are unaccompanied minors, disabled or victims of torture must not be detained (Art. 47.5 and Art. 54.3 APA respectively). The draft Amendment Act modifies the premise mentioned under e) above, as under the draft Amendment Act an asylum-seeker must not be issued with an expulsion decision while in the refugee procedure. The modified provision provides for detainment if the premises for issuing an expulsion decision occur after submitting an asylum request.

Also, the APA provides for a regulation obliging asylum-seekers while lodging an asylum request to deposit his or her travel documents (as well as travel documents of other family members covered by the request) with the Head of the Repatriation and Aliens Office. The documents are returned to asylum-seekers concerned after issuing the final decision in the refugee procedure. However, if an asylum-seeker decides to quit the refugee procedure and leave voluntarily, the travel documents are returned at the border checkpoint [further on voluntary return, see below]. Additionally, if a rejected asylum-seeker is to be expelled, the travel documents are returned at the border checkpoint in which he or she is being expelled, or on the border of a state to which he or she is to be expelled, or at the airport or the seaport of that state if the expulsion decision is put into effect (Art. 31 APA).

An alien who has been granted refugee status generally must not be issued with a decision obliging to leave the territory of Poland nor with an expulsion decision. Generally, it is allowed only if refugee status is firstly withdrawn. The only exception is the case in which circumstances referred to in Art. 32 and Art. 33 of the Ge-
neva Convention take place (Art. 72 APA). An expulsion decision may be challenged in appeal procedure (it must not be given an order of immediate enforceability) and obviously a refugee must not be expelled if his or her expulsion could lead to violation of Art. 3 ECHR and/or other relevant international obligations. Nevertheless, the lack of direct reference to international obligation in Art. 72 APA causes some concern.

A decision on withdrawal of refugee status may be issued if Art. 1C of the Geneva Convention applies (Art. 38.1 APA).

### 3.3.4 Dublin II

The Dublin II Regulation (343/2003), as well as the EURODAC Regulation (2725/2000) have been applicable to Poland since the day of accession on 1 May 2004. Moreover, Poland has adhered to the Dublin Convention which is applicable in relations with Denmark. As expected, the Dublin rules and the EURODAC have led to an increase in the number of asylum-seekers in Poland. Figures for 2004 show a disproportion of incoming requests (1361 submitted requests and 357 persons transferred to Poland) and outgoing requests (54 submitted requests and 10 persons transferred from Poland) [further on statistical data in this respect see below]. The tendency seems to continue and further increase may be expected. It is noticeable in this context that Poland with 8080 asylum requests in 2004 (the highest on record) faced the increase of 17 per cent in comparison to 2003, whereas the 25 EU Member States recorded 19 per cent fewer asylum requests. The fall in asylum requests in the 10 new Member States was smaller, however still of 12 per cent [UNHCR, pp. 4-5].

Both Dublin rules and the EURODAC seem to function effectively. The special Polish Dublin Office has been established within the Repatriation and Aliens Office to deal with the requests. The Border Guard proved to be prepared in this respect too.
What causes serious concern, however, is the APA regulation stating that if another state-party to the Geneva Convention is responsible for examining an asylum request according to the relevant international agreement, this is a premise to refuse asylum as manifestly unfounded (Art. 14.1.4 APA). The accelerated procedure for manifestly unfounded applications applies accordingly (30 days for decision in the first instance and three-day time limit to appeal). This regulation, which omits the procedural character of determination of a state responsible, is contradict to the Geneva Convention as it provides for additional premise to refuse asylum. It is not in conformity with the Dublin rules either. As such it is not applied in practice: if Dublin rules apply the refugee procedure ceases and an asylum-seeker is issued with a decision on transfer within Dublin rules. An asylum-seeker may appeal under regular basis from the decision on transfer. So far there has been only one appeal as most cases are based on family reunification premises. Fortunately, the draft Amendment Act cancels the provision of Art. 14.1.4 APA. The draft Amendment Act introduces further provisions (such as on exchange of information in this respect among the Police, the Border Guard and the Repatriation and Aliens Office or on collecting data on family members), aimed at applicability of the Dublin rules. Also, the draft Amendment Act provides for statutory regulation allowing - if necessary - to escort an asylum-seeker who has been issued with a decision to be transferred under Dublin rules, to the border or to the border (an airport; a seaport) of the state to which he or she is to be transferred. The Police is to be competent to escort an asylum-seeker to the state-border and the Border Guard is competent to escort an asylum-seeker from the state-border to the border (an airport, a seaport) of the state to which an asylum-seeker is to be transferred. Moreover, the draft Amendment Act provides that travel documents of an asylum-seeker to be transferred under Dublin rules are to be returned at the border checkpoint in which he or she is being transferred, or on the border of a state to which he or she is to be transferred, or at the airport or the seaport of that state if he or she is to be escorted in transfer. As it was stated above, the APA obliges an asylum-seeker while lodging an asylum request to deposit his or her travel documents with the Head of the Repatriation and Aliens Office.
3.3.5 Subsidiary protection

A rejected asylum-seeker, alternatively to being obliged to leave the territory, may be granted a tolerated residence leave, which is a form of subsidiary protection. The subsidiary protection has been comprehensively introduced to the Polish legal system only by the 2003 APA. The status of persons enjoying tolerated residence leave generally approximates to that of recognised refugees. However, the former, e.g., are not issued with a travel document and are not entitled to receive means of support and integration facilities.

A tolerated residence leave is granted in the refugee procedure, as well as in the context of the expulsion procedure. It is granted to an alien who cannot be expelled because: a) an expulsion would be possible only to a state in which an alien’s rights defined in Arts. 2-7 of the ECHR would be endangered; b) it is impossible to put an expulsion decision into effect for grounds independent on relevant authority or an alien; c) an expulsion would be possible only to a state to which an alien must not be extradited under a judicial decision on the inadmissibility of the extradition or under a decision of the Minister of Justice denying extradition; d) an expulsion would be based on grounds other than being a threat to national security or defence or to public security and order, and an alien is a spouse of a Polish national or an alien who has been granted a settlement permit (Art. 97 APA).

The draft Amendment Act modifies the premises slightly. It cancels the premise mentioned under d) above as it amends the AA by introducing the regulation providing that an expulsion decision must not be issued, nor executed while previously issued, if an alien is a spouse of a Polish national or of an alien holding the settlement permit or long-term residence in the EC permit and his or her further stay in Poland does not endanger national safety or security or the protection of public security and order, save the cases in which the marriage was aimed at avoiding the expulsion (draft Art. 89 AA), as well as modifying the regulation on granting the residence permit in this respect (draft Art. 57 AA). Moreover, the premise mentioned under c)
above is modified so that a tolerated residence leave may be granted to the alien concerned on his or her request.

The binding regulation, as well as the regulation under the draft Amendment Act cause some concern. The criteria of selecting only some human rights seem to be unclear. Also, it has been pointed out that it is unclear why only international obligations under the ECHR have been taken into account [Białocerkiewicz, 156; Kowalski, p. 337]. Also, there is serious concern whether standards of Art. 8 ECHR are met [Kmak, p. 93]. The question remains indeed doubtful also in the light of the draft Amendment Act.

An alien who has been granted a tolerated residence leave must not be obliged to leave the territory of Poland nor to be expelled (Art. 101 APA). Nevertheless, in a decision on withdrawal of a tolerated residence leave, an alien - who has not been issued with an expulsion decision that was not put into effect - is obliged to leave the territory of Poland in time limit of maximum 14 days set in the decision concerned. The general regulations on expulsion provided in the AA apply. A tolerated residence leave is to be withdrawn if: a) grounds on which it is based have ceased to exist; b) an alien voluntarily applies for protection of his or her country of origin; c) an alien has permanently left the territory of Poland; d) it is necessary for reasons regarding national safety or the protection of public security and order. If a decision granting a tolerated residence leave was based on the premise that it is impossible to put an expulsion decision into effect for grounds independent from relevant authority or an alien, a decision on withdrawal is of immediate enforceability character (102 APA).

As it has been correctly pointed out, the regulation allowing for withdrawal of a tolerated residence leave when it is necessary for reasons regarding national safety or the protection of public security and order contradicts international obligations of Poland under Art. 3 ECHR [Zdybska, p. 90].
3.3.6 Temporary protection

Temporary protection was introduced into the Polish law only in 2001. The 2003 APA introduced an extensive regulation on temporary protection in Chapter 3 (Art. 106-118). The regulation is based on the directive on temporary protection of 20 July 2001 (2001/55/EC). The draft Amendment Act provides further adjustments with standards of the directive concerning the right to family reunification. The regulation on temporary protection has not been applied in practice so far.

Under Art. 118 APA, when the temporary protection regime terminates, the Head of Repatriation and Aliens Office takes steps aimed at making it possible for the beneficiaries to return to the country of origin or to the country they have arrived from possible. Beneficiaries are to be informed about all circumstances relevant in taking a decision on return. If the return is not possible due to the state of health of the alien concerned, he or she is granted a residence permit until the circumstances making the return impossible cease. Also, it should be noted that aliens covered by the temporary protection regime retain the right to apply for refugee status, which is not suspended.

4. Voluntary returns

The APA regulations on voluntary returns are rather modest, however, asylum-seekers who decide to quit refugee procedure and leave voluntarily may be granted assistance. Art. 57.2 APA extends assistance granted to asylum-seekers to cases of voluntary return and Art. 68 APA provides that an asylum-seeker who has withdrawn a refugee request may be granted, on his or her request, assistance in leaving the territory of Poland voluntarily. Assistance, which may be also granted to asylum-seeker’s spouse and children, may cover the cheapest travel costs, administration fees, as well as, partly, maintenance while in travel. Such assistance is to be granted only once for two years.
The authority responsible for granting assistance is the Head of the Repatriation and Aliens Office, which runs a voluntary return programme. However, in previous years only limited numbers of asylum-seekers applied for assistance in voluntary return. In 2004 the assistance was granted to 57 aliens only [further see statistics]. No special governmental programmes promoting voluntary return exist.

Also, the International Organisation for Migration Warsaw Office (hereafter referred to as the IOM WO) is engaged in voluntary return of asylum-seekers. The IOM WO runs the return programme which started in late 2004 within the framework of the European Refugee Found. The programme is aimed at voluntary return of asylum-seekers in the refugee procedure, as well as at return of rejected asylum-seekers. The latter are not granted any assistance under the APA and are obliged to leave the territory of Poland within 14 days on their own account. The Repatriation and Aliens Office is a partner in the project and rejected asylum-seekers are referred to the IOM WO.

An agreement regarding institutionalisation of the co-operation between the Repatriation and Aliens Office and the IOM WO has been being negotiated for a considerable period of time now and is expected to be concluded in recent future.

The Repatriation and Aliens Office welcomes the engagement of the IOM WO in voluntary returns as it ensures that asylum-seekers assisted in voluntary return are not subsequently returned to Poland. The position of the IOM WO has been taken into account in draft amendment of the APA. Under current regulations asylum-seekers who have withdrawn a refugee request and in consequence been granted the final decision ending the refugee procedure, may be granted a 14-day extension of the regular assistance. The 14-day time limit on many occasions proved to be inadequate for providing all arrangements necessary to leave (such as obtaining relevant
visas or permits). Therefore the draft Art. 56.2.2 APA extends the time limit to maximum of one month.

5. Statistics

5.1

Number of aliens transferred or expelled from Poland [excluding aliens transferred under Dublin rules] in 2004 amounted to 6199 [based on the data from the Border Guard].

Number of aliens transferred or expelled from Poland by nationality: 1998-2004 [Kępińska, p. 92; based on the data from the Border Guard]

<table>
<thead>
<tr>
<th>Artikel II. Nationality</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004 Jan-Aug</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>160</td>
<td>274</td>
<td>42</td>
<td>8</td>
<td>27</td>
<td>65</td>
<td>14</td>
</tr>
<tr>
<td>Armenia</td>
<td>481</td>
<td>366</td>
<td>243</td>
<td>334</td>
<td>272</td>
<td>289</td>
<td>165</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>34</td>
<td>32</td>
<td>81</td>
<td>16</td>
<td>12</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>300</td>
<td>38</td>
<td>9</td>
<td>9</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Belarus</td>
<td>193</td>
<td>295</td>
<td>335</td>
<td>397</td>
<td>341</td>
<td>274</td>
<td>244</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>874</td>
<td>704</td>
<td>623</td>
<td>552</td>
<td>769</td>
<td>579</td>
<td>309</td>
</tr>
<tr>
<td>China</td>
<td>16</td>
<td>31</td>
<td>14</td>
<td>7</td>
<td>151</td>
<td>108</td>
<td>56</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>286</td>
<td>196</td>
<td>348</td>
<td>342</td>
<td>286</td>
<td>424</td>
<td>121</td>
</tr>
<tr>
<td>Georgia</td>
<td>44</td>
<td>120</td>
<td>94</td>
<td>67</td>
<td>19</td>
<td>30</td>
<td>46</td>
</tr>
<tr>
<td>India</td>
<td>90</td>
<td>51</td>
<td>23</td>
<td>21</td>
<td>68</td>
<td>111</td>
<td>66</td>
</tr>
<tr>
<td>Iraq</td>
<td>42</td>
<td>19</td>
<td>29</td>
<td>93</td>
<td>10</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Lithuania</td>
<td>95</td>
<td>64</td>
<td>52</td>
<td>87</td>
<td>74</td>
<td>76</td>
<td>32</td>
</tr>
<tr>
<td>FYR Macedonia</td>
<td>58</td>
<td>21</td>
<td>11</td>
<td>30</td>
<td>17</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Moldova</td>
<td>313</td>
<td>426</td>
<td>647</td>
<td>397</td>
<td>186</td>
<td>273</td>
<td>195</td>
</tr>
<tr>
<td>Mongolia</td>
<td>45</td>
<td>63</td>
<td>41</td>
<td>53</td>
<td>50</td>
<td>51</td>
<td>39</td>
</tr>
<tr>
<td>Pakistan</td>
<td>91</td>
<td>26</td>
<td>12</td>
<td>21</td>
<td>2</td>
<td>49</td>
<td>52</td>
</tr>
</tbody>
</table>
5.2


Outgoing requests

<table>
<thead>
<tr>
<th>Country</th>
<th>1976</th>
<th>1033</th>
<th>906</th>
<th>856</th>
<th>303</th>
<th>263</th>
<th>129</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romania</td>
<td>179</td>
<td>250</td>
<td>267</td>
<td>181</td>
<td>185</td>
<td>189</td>
<td>108</td>
</tr>
<tr>
<td>Russia</td>
<td>64</td>
<td>28</td>
<td>11</td>
<td>7</td>
<td>6</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Serbia and Montenegro</td>
<td>84</td>
<td>115</td>
<td>79</td>
<td>72</td>
<td>83</td>
<td>102</td>
<td>25</td>
</tr>
<tr>
<td>Slovakia</td>
<td>14</td>
<td>4</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>Somalia</td>
<td>180</td>
<td>55</td>
<td>6</td>
<td>3</td>
<td>8</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Turkey</td>
<td>41</td>
<td>17</td>
<td>13</td>
<td>25</td>
<td>38</td>
<td>44</td>
<td>22</td>
</tr>
<tr>
<td>Ukraine</td>
<td>1027</td>
<td>1999</td>
<td>2559</td>
<td>2032</td>
<td>1701</td>
<td>2581</td>
<td>2288</td>
</tr>
<tr>
<td>Vietnam</td>
<td>131</td>
<td>87</td>
<td>141</td>
<td>134</td>
<td>47</td>
<td>123</td>
<td>73</td>
</tr>
<tr>
<td>All other</td>
<td>262</td>
<td>204</td>
<td>260</td>
<td>210</td>
<td>178</td>
<td>278</td>
<td>181</td>
</tr>
<tr>
<td>Total</td>
<td>7079</td>
<td>6518</td>
<td>6847</td>
<td>5954</td>
<td>4836</td>
<td>5943</td>
<td>4185</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>submitted to:</th>
<th>total number of requests</th>
<th>based on EURODAC</th>
<th>total number accepted</th>
<th>total number refused</th>
<th>total number transferred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>8</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>11</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Ireland</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lithuania</td>
<td>11</td>
<td>7</td>
<td>9</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Hungary</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Austria</td>
<td>9</td>
<td>0</td>
<td>4</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>UK</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Norway</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>54</td>
<td>12</td>
<td>22</td>
<td>13</td>
<td>10</td>
</tr>
</tbody>
</table>
Incoming requests

<table>
<thead>
<tr>
<th>submitted by:</th>
<th>total number of requests</th>
<th>based on EURODAC</th>
<th>total number accepted</th>
<th>total number refused</th>
<th>total number transferred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>181</td>
<td>154</td>
<td>171</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>170</td>
<td>162</td>
<td>148</td>
<td>12</td>
<td>174</td>
</tr>
<tr>
<td>Germany</td>
<td>438</td>
<td>339</td>
<td>396</td>
<td>28</td>
<td>126</td>
</tr>
<tr>
<td>France</td>
<td>153</td>
<td>140</td>
<td>140</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>7</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Austria</td>
<td>337</td>
<td>202</td>
<td>268</td>
<td>49</td>
<td>21</td>
</tr>
<tr>
<td>Slovakia</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Sweden</td>
<td>27</td>
<td>17</td>
<td>22</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>UK</td>
<td>5</td>
<td>3</td>
<td>5</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Norway</td>
<td>34</td>
<td>32</td>
<td>31</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1361</strong></td>
<td><strong>1056</strong></td>
<td><strong>1190</strong></td>
<td><strong>115</strong></td>
<td><strong>357</strong></td>
</tr>
</tbody>
</table>

5.3

Aliens readmitted to Poland: 1998-2004 [based on the data from the Border Guard]
Aliens readmitted to Poland by nationality: 1998-2004 [Kępińska, p. 89; based on the data from the Border Guard]

<table>
<thead>
<tr>
<th>Artikel IV. Nationality</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004 Jan-Aug</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>427</td>
<td>546</td>
<td>337</td>
<td>451</td>
<td>293</td>
<td>83</td>
<td>6</td>
</tr>
<tr>
<td>Armenia</td>
<td>144</td>
<td>23</td>
<td>49</td>
<td>150</td>
<td>39</td>
<td>17</td>
<td>6</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>21</td>
<td>62</td>
<td>138</td>
<td>87</td>
<td>10</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>58</td>
<td>24</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Belarus</td>
<td>53</td>
<td>51</td>
<td>63</td>
<td>63</td>
<td>14</td>
<td>38</td>
<td>26</td>
</tr>
<tr>
<td>China</td>
<td>7</td>
<td>4</td>
<td>20</td>
<td>15</td>
<td>53</td>
<td>135</td>
<td>25</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>39</td>
<td>36</td>
<td>30</td>
<td>50</td>
<td>8</td>
<td>28</td>
<td>1</td>
</tr>
<tr>
<td>Georgia</td>
<td>39</td>
<td>100</td>
<td>79</td>
<td>37</td>
<td>6</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>India</td>
<td>48</td>
<td>38</td>
<td>3</td>
<td>13</td>
<td>136</td>
<td>140</td>
<td>55</td>
</tr>
<tr>
<td>Iraq</td>
<td>117</td>
<td>29</td>
<td>33</td>
<td>133</td>
<td>75</td>
<td>28</td>
<td>3</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>4</td>
<td>9</td>
<td>31</td>
<td>14</td>
<td>9</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Lithuania</td>
<td>49</td>
<td>7</td>
<td>3</td>
<td>10</td>
<td>4</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>FYR Macedonia</td>
<td>69</td>
<td>17</td>
<td>7</td>
<td>29</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Moldova</td>
<td>275</td>
<td>318</td>
<td>452</td>
<td>221</td>
<td>108</td>
<td>188</td>
<td>83</td>
</tr>
<tr>
<td>Pakistan</td>
<td>65</td>
<td>32</td>
<td>20</td>
<td>8</td>
<td>39</td>
<td>76</td>
<td>35</td>
</tr>
<tr>
<td>Romania</td>
<td>1</td>
<td>2</td>
<td>8</td>
<td>87</td>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Russia</td>
<td>78</td>
<td>144</td>
<td>446</td>
<td>283</td>
<td>461</td>
<td>454</td>
<td>251</td>
</tr>
<tr>
<td>Serbia and Montenegro</td>
<td>462</td>
<td>112</td>
<td>11</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>342</td>
<td>80</td>
<td>6</td>
<td>20</td>
<td>34</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>Turkey</td>
<td>32</td>
<td>21</td>
<td>15</td>
<td>11</td>
<td>27</td>
<td>20</td>
<td>19</td>
</tr>
<tr>
<td>Ukraine</td>
<td>268</td>
<td>310</td>
<td>476</td>
<td>270</td>
<td>220</td>
<td>601</td>
<td>884</td>
</tr>
<tr>
<td>Vietnam</td>
<td>42</td>
<td>29</td>
<td>88</td>
<td>194</td>
<td>231</td>
<td>182</td>
<td>41</td>
</tr>
<tr>
<td>Artikel V. All other</td>
<td>177</td>
<td>78</td>
<td>96</td>
<td>77</td>
<td>80</td>
<td>55</td>
<td>28</td>
</tr>
</tbody>
</table>

| Artikel VI. Total       | 2817 | 2072 | 2414 | 2224 | 1856 | 2086 | 1481         |
5.4

Asylum-seekers granted assistance in voluntary return by the Repatriation and Aliens Office [based on the data from the Repatriation and Aliens Office]

<table>
<thead>
<tr>
<th>country of origin</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>-</td>
<td>4</td>
<td>-</td>
</tr>
<tr>
<td>Armenia</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>12</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Belarus</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Cuba</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Estonia</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Georgia</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Iraq</td>
<td>-</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Lithuania</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Russia (the Chechens)</td>
<td>474</td>
<td>77</td>
<td>42</td>
</tr>
<tr>
<td>Russia (others)</td>
<td>5</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Senegal</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Slovakia</td>
<td>8</td>
<td>-</td>
<td>6</td>
</tr>
<tr>
<td>Ukraine</td>
<td>4</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Uzbekistan</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>516</strong></td>
<td><strong>85</strong></td>
<td><strong>57</strong></td>
</tr>
</tbody>
</table>

6. References


• Mikołajczyk B., Osoby ubiegające się o status uchodźcy: ich prawa i standardy traktowania [Asylum-seekers: Their Rights and Standards of Treatment], Wydawnictwo Uniwersytetu Śląskiego, Katowice 2004.


• Zdybska K., Instytucja pobytu tolerowanego w świetle zakazu tortur, nie-ludzkiego lub poniżającego traktowania i karania z art. 3 EKPC [The Institution of Tolerated Residence in Light of the Prohibition of Torture or Inhuman or Degrading Treatment or Punishment under Art. 3 ECHR], Miscellanea Iuris Gentium VII/2004, pp. 81-92.
- CHAPTER XIV -

COUNTRY REPORT PORTUGAL

by
Prof. Maria Constanca
Dias Urbano de Sousa,
Universidade Autonoma Lisboa
Study on return policies – Portugal

Constança Urbano de Sousa*

1. Trends in Immigration in Portugal (Facts and figures)

1.1 The quantitative changes in immigration flows: From Emigration to Immigration Country

1.1.1 Immigration

Up until the mid 1980’s, Portugal was primarily a country of emigrants. The number of legally-resident immigrants in Portugal rose from 50,750 in 1980 to 107,767 in 1990 and 207,607 in 2000. In 2001, the number of legal immigrants was 350,503, which then rose to 434,548 in 2003. This abrupt increase of the number of legal immigrants residing in Portugal in 2001 and 2002 was a direct cause of Decree-Law 4/2001, which introduced amendments in the Decree-Law nº 244/98 (hereinafter Aliens Act) creating a stay permit for all illegal immigrants working in Portugal at the time. This new regime adopted on 15 January 2001 made legalization possible for 183,655 immigrant workers until 2003.

![Legal Immigrants](chart.png)

Source: Aliens and Borders Service

* Professor at Universidade Autónoma of Lisbon; Guest Professor at Law Faculty at Universidade Nova de Lisboa; Member of CEDIS.
Hence, from the existing 434,548 legal immigrants in 2003, 183,851 were holders of a “stay permit” while 250,697 were holders of a “residence permit”.

In March 2003, Decree-Law 34/2003 came into force and amended the 1998 Aliens Act. It repealed the existing policies regarding permanence authorization no longer allowing the legalization of immigrant workers in illegal situations. It only contemplated the extension of the stay permit granted until 2003 as long as the permit holder had a work contract and had made all the required tax and social security payments.

1.1.2 Asylum

Immigration in Portugal is essentially economic and family-based. As a consequence, the number of asylum-seekers is very low with a tendency to decrease, despite the legal definition of asylum and subsidiary protection as a subjective right.

Source: Aliens and Borders Service (Asylum and Refugees Unit)

897 Source of statistical data: The Aliens and Borders Service (SEF), available in www.sef.pt
Between 1998 and 2001 the number of applications fell steadily. Thus, 338 asylum applications were submitted in 1998, 277 in 1999, 202 in 2000 and only 193 in 2001. In 2002 this number increased to 245 asylum applications and fell drastically to 116 in 2003.

1.2 Return and repatriation

There are no specific figures available about the number of foreigners obliged to return to their country of origin after rejection of an asylum claim or a claim for subsidiary protection (termination of subsidiary protection; withdrawal of refugee status). The data on these categories of aliens are included (without specification) in those relating with expulsion in generally.

In Portugal there is no public debate on return and repatriation and we assists to a toleration of the authorities upon illegal immigrants. The number of deportations is relatively low, if compared with the large number of illegal immigrants staying in Portugal.

![Deportations](chart.png)

*Source: Aliens and Borders Service*
The success rate of the enforcement of an expulsion order is very low. In 2000 the Aliens and Borders Service initiated 3,271 expulsion proceedings and deported 414 aliens. 13% of the expulsion proceedings ended with an effective deportation. In 2003, 1,948 administrative expulsion proceedings against illegal aliens were initiated. Only 420 expulsion orders were enforced and 60 take the form of supervised departure. 25 % of all expulsion procedures ended with effective deportation.

Source: Aliens and Borders Service

2. Legal status of aliens obliged to return

2.1 Legal status of rejected asylum seekers and persons claiming subsidiary protection

The Law 15/98, dated 25 March 1998 (hereinafter Asylum Law), establishes the legal framework for asylum and protection of refugees. The right to political asylum is guaranteed by article 33 (8) of the Portuguese Constitution as a human right. As defined by the 1951 Geneva Convention, refugees are entitled with a subjective right

898 Published in the Official Journal (Diário da República) n. ° 72, of 26 March 1998.
of asylum in Portugal (article 1 (2) of Asylum Law)\textsuperscript{899}. According to article 8 of the Asylum Law, foreign citizens not covered by the refugee definition have the right to a residence permit on humanitarian grounds, when they are or feel unable to return to their country of origin, as a result of armed conflicts or systematic violation of human rights (subsidiary protection).

The 1998 Asylum Law defines two stages in the asylum procedure, which is applicable to subsidiary protection (single procedure): a preliminary stage for assessing the admissibility of the application, and if admissible, the stage for establishing refugee status (granting asylum) or granting subsidiary protection (residence permit on humanitarian grounds).

In the first stage of the asylum procedure it is the director of the Aliens and Borders Service (which reports back to the Minister for Home Affairs) who is responsible for taking a well-founded decision on the admissibility of the application. The aim of the stage is to quickly identify those applicants who manifestly do not require protection, and those whose application should be analyzed. Should the application be turned down, the Asylum Law provides two levels of appeal: the first is an administrative appeal to the Office of the National Commissioner for Refugees (ONCR). By a negative decision of the ONCR a judicial appeal can be lodged without suspensive effect\textsuperscript{900}. That is to say, the applicant must voluntarily leave the Portuguese territory within 10 days. After this period he or she is subject to immediate expulsion\textsuperscript{901}.

Should the application be admitted, the applicant may stay in national territory with a provisional residence permit and enjoy asylum seeker legal status (social aid, health care, legal aid, etc.) until the final decision. The Minister of Home Affairs is responsible for taking the final decision on granting asylum or humanitarian residence, on the basis of the National Commission for Refugees' proposal.


\textsuperscript{900} Article 16 (2) Asylum Law.

\textsuperscript{901} Article 15 (1) Asylum Law.
A judicial appeal against the Home Affairs Ministry's refusal of asylum or subsidiary protection can be lodged with automatic suspensive effect. Should the Court confirm refusal, the applicant may remain in national territory for up to 30 days, after which he shall be subject to the Aliens Act. This means that he shall be subject to expulsion under the terms and effects of the Aliens Act. To avoid expulsion the rejected asylum seeker can opt for voluntarily return on the basis of a Return Program organized by the IOM and financed by the Portuguese State.

2.2 Refugees whose status has been terminated

When the refugee looses his or her right to asylum, he or she may be liable of being expelled, because his or her right of residence expires.

The Minister of Home Affairs is the competent authority to declare the loss of asylum in following cases: renunciation of the asylum right by the refugee; the voluntary re-settlement in the country he or she left or out of which he or she stayed for fear of persecution; the decision of expulsion of the refugee taken by the court; voluntarily departure of national territory by the refugee, thus settling in another country.

Only the Court of Appeal (second jurisdiction court) can declare the loss of the right of asylum in following cases: practice of forbidden activities by the refugee; when the alien obtained asylum by fraudulent means; the existence of facts which, had they been known at the time of granting asylum, would have implied a negative decision; the request and the obtaining by the refugee of the protection of the country of his or her nationality; the voluntary re-acquisition of the nationality he or she had

---

902 Article 24 (1) Asylum Law.
903 Article 25 Asylum Law.
904 Articles 39 (1) and 36 (a), (g), (i) and (j) of the Asylum Law.
905 These activities are defined in article 7 of the Asylum Law as being: Interference, in a way forbidden by law, in the Portuguese political life; performance of activities which might turn to be harmful to the internal or external safety, to public order or that might endanger Portugal's affairs with other States; acts there are contrary to the objectives and principles of the United Nations, or of Treaties or Conventions of which Portugal is a party or adheres to.
lost; the voluntary acquisition of a new nationality, if he or she enjoys the protection; the voluntary re-settlement in the country he or she left or out of which he or she stayed for fear of persecution; the cessation of the reasons which justified the grant of asylum.

If the loss of the asylum is due to the refugee’s illegal activities, the Court will determine the immediate expulsion (article 37 (1) of the Asylum Law). If the Court decides on the loss of the right to asylum because previous reasons that justified the granting of asylum ceased to exist, then the alien in question becomes entitled to a residence permit. In all other cases, the loss of asylum shall determine the subjection of the alien concerned to the provisions of the general law concerning the stay of aliens within national territory. Should he not be covered by provisions foreseen in the Aliens Act for legalizing his stay, (for example, marriage with a Portuguese national), the end of refugee status means that the foreign national will be subjected to expulsion.

906 Article 37 (3) of the Asylum Law and article 87 (1) (c) of the Aliens Act.
2.3  Persons whose humanitarian residence permit has been terminated

Those benefiting from humanitarian residence permit can only enjoy the status for a maximum of 5 years, which is renewable\(^{907}\). Humanitarian residence permit can only be renewed following an analysis of the situation in the country of origin by the Ministry of Home Affairs, on the basis of a sound opinion from the National Commissioner for Refugees\(^{908}\).

Non-renewal of the residence permit on humanitarian grounds places the concerned alien in an illegal situation and therefore can be expelled from the country.

The Aliens Act, however foresees a plethora of ways to legalise the situation under the terms and effects of article 87. Pursuant to article 87 of the Aliens Act residence permits will be issued to third-country nationals who suffer from prolonged illness, preventing them from returning to their country of origin; live in partnership with a Portuguese national, a national of the EEA or a third-country national holding a residence permit; have undertaken scientific, cultural or economic activities, considered to be of vital interest to the country; have minor children with residence permit in Portugal or with Portuguese nationality. Should he not be covered by any of the situations which the Aliens Act foresees for legalising his stay, the end of subsidiary protection status means that the foreign national will be subject of expulsion. Nevertheless, in order to avoid expulsion, which results in a minimum five year ban from entering Portuguese territory, the alien can leave voluntarily the Portuguese territory\(^{909}\).

\(^{907}\) Article 8 (2) of the Asylum Law.

\(^{908}\) Articles 8 (3), and 34 (1) of the Asylum Law.

\(^{909}\) Article 100 of the Aliens Act.
2.4 Persons whose temporary protection has been terminated

The Council Directive 2001/55/EC of 20 July 2001 on temporary protection\(^910\) was transposed into the Portuguese legal order by Law no. 67/2003, dated 23 August\(^911\). According to Article 4 of Law no. 67/2003, the implementation of temporary protection depends on declaration “of a mass influx of displaced persons” established by a Council Decision adopted according to the EC Directive (EC procedure of temporary protection). This declaration triggers the enforcement of the measures foreseen in Law no. 67/2003, which is co-ordinated by an inter-ministerial committee to be established by the Government whenever the Council adopts such a declaration\(^912\). Law no. 67/2003 is also applicable, with the necessary adaptations, to cases of national procedure of temporary protection (irrespective of an EU Council Decision), when decided by a Resolution of the Portuguese Government\(^913\).

The provisions of Article 7 of Law no. 67/2003 concerning the duration of temporary protection, are similar to those of Article 4 of the Directive: one year, that may be extended automatically by six monthly periods for a maximum of one year, without prejudice to the EU Council’s Decision which terminates temporary protection (or Cabinet decision, when temporary protection is a national procedure). Temporary protection can only be extended for a year maximum, beyond the two years’ limit, based on continued grounds for temporary protection, recognised by a decision of the EU Council (or the Cabinet when it is a national temporary protection procedure)\(^914\).

Article 8 of Law no. 67/2003 governs cessation of temporary protection, in the same terms as Article 6 of the Directive. In other words, temporary protection shall come to an end “when the maximum duration has been reached; or at any time, by EU Council Decision (or resolution of the Portuguese Cabinet, in the case of a na-

\(^{910}\) Hereinafter, the Directive.


\(^{912}\) Articles 4(2) and 5(1) of Law no. 67/2003.

\(^{913}\) Article 4(3) of Law no. 67/2003.

\(^{914}\) Article 7 (2) of Law no. 67/2003
Country Report Portugal

tional procedure\textsuperscript{915}, based on the fact that the situation in the country of origin permits the safe and durable return of those granted temporary protection”.

When temporary protection ends, the sponsor has the duty to voluntarily return to his country\textsuperscript{916}, and falls under the terms and effects of the general law on aliens\textsuperscript{917} (that is to say, the Immigration Act\textsuperscript{918}), without prejudice to the provisions on voluntary return\textsuperscript{919} or on enforced return\textsuperscript{920}. Implementation of the general law on aliens’ protection – as required by Article 20 of the Directive– is not explicitly foreseen. Nevertheless, a displaced person whose temporary protection has ended can always apply for asylum or subsidiary protection in Portugal, under the terms of the Asylum Act\textsuperscript{921}. According to Article 1 of the Asylum Act refugees have the subjective right to asylum, protected in the Constitution as a fundamental right\textsuperscript{922}. Furthermore, a foreign national who does not meet the criteria for recognising refugee status and that is prevented or feels unable to return to the country of his nationality or habitual residence, for reasons of serious insecurity as a result of armed conflicts or from repeated outrage of human rights that occurs therein, have a subjective right to a residence permit on humanitarian grounds (subsidiary protection), guaranteed by Article 8 of the Asylum Act.

Article 23 of Law 67/2003 governs voluntary return during the duration of temporary protection whilst it does not contain any specific provision on voluntary return of those whose temporary protection has ended. Thus, in accordance with Article

\footnotesize
\textsuperscript{915} For the termination of temporary protection decided by the Portuguese Government, the law does not set a similar requirement to the one in Article 6 (2) of the Directive regarding the equivalent Council Decision, namely, that such decision complies with human rights and fundamental freedoms and the principle of non-refoulement.

\textsuperscript{916} Article 22(2) of Law no 67/2003.

\textsuperscript{917} Article 22(1) of Law no. 67/2003.


\textsuperscript{919} Article 23 of Law no. 67/2003.

\textsuperscript{920} Article 24 of Law no. 67/2003.


\textsuperscript{922} Article 33(8) of the Constitution.
23(1) and (3) sponsors of voluntary protection have the right to voluntarily return to their country and the Portuguese state must facilitate their return with respect for human dignity and assess any requests to return and the grounds on which they are based. Article 23(2) foresees that a decision to return be taken with a free and clear conscience.

These provisions of Article 23 of Law 67/2003 do not fully transpose the obligations imposed by Article 21 of the Directive concerning voluntary return of sponsors of temporary protection. Firstly, with the exception of paragraph 2 (which could be applicable to decisions to return voluntarily after temporary protection has ended) Article 23 of Law 67/2003 only governs voluntary return before temporary protection ends, and does not foresee any measures for facilitating the voluntary return of those persons whose temporary protection has ended, with respect for human dignity, as required by Article 21(1) of the Directive. Article 23(3) of Law 67/2003, which stipulates that a request for voluntary return and its grounds be assessed is only applicable when the persons are exercising their right to voluntary return before temporary protection has ended – because once it has ended, it is not a right but, in accordance with Article 22(2) of Law no. 67/2003, a duty. This provision does not comply with Article 21(2) of the Directive which stipulates a request be assessed “on the basis of the circumstances prevailing in the country of origin”, since it only requires assessment of the request for voluntarily return solely on the grounds on which the request is based or, in other words, the personal motives of the applicant. Now, the return of the beneficiary of temporary protection, during protection or when it has ended, can only occur with respect for human dignity\textsuperscript{923} or with due respect for human rights and fundamental freedoms and obligations regarding non-refoulement\textsuperscript{924}, if, prior to this, States have checked to see if the prevailing conditions in the country of origin will allow a safe and durable return. This, however, is not expressly foreseen in Law no. 67/2003.

Secondly, Article 22(2), although it foresees the obligation of the Portuguese competent authorities – which are not defined in the Law – to certify that the indi-

\textsuperscript{923} Article 21(1) of the Directive.
Individual decision to voluntarily return is taken with a free and clear conscience, this is not enough to meet the obligation imposed on the Portuguese State by Article 21(1) to ensure that such a decision is taken “in full knowledge of the facts”. In fact, if this provision of the Directive were to be fulfilled, a provision with greater regulatory detail, would have to be adopted in order to guarantee that the persons in question be supplied reliable information about the specific situation in their country of origin, including the possibility of exploratory visits (this facility is foreseen in Article 21(1) of the Directive, which the Portuguese legislator has not taken up).

Lastly, Law no. 67/2003 does not contain any provisions concerning special incentives for voluntarily return. Only Article 126-A(1) of the Aliens Act foresees the possibility for the Portuguese State to support voluntary return under the auspices of programs established with the IOM, applicable to foreign citizens in general. Unlike other foreign citizens, the beneficiaries of temporary protection who have benefited from support for voluntarily return through the IOM, are not, according to Article 126-A(4) of the Immigration Act, subject to a ban on entry or registration with the SIS for the purposes of non-admission. As for voluntarily return, Law no. 67/2003 does not foresee any special support programs for people who have benefited from temporary protection, nor does it contain any provision concerning the status of those who have benefited from such a program – to be created in accordance with the general regime of the Immigration Act – specifically, the possibility of continuing to benefit from rights granted to the beneficiaries of temporary protection (exercising a professional activity, social welfare, housing, medical care, etc), as foreseen in Article 21(3) of the Directive. Without such incentives for voluntarily return, it would be very difficult to consider that the obligation which Article 21(1) of the Directive imposes on the Portuguese State “to take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended” has been fulfilled.

Regarding the enforced return of persons whose temporary protection has ended, Article 24 of Law 67/2003 – which transposes Article 22 of the Directive – refers to

---

924 Article 3(2) of the Directive.
general legislation on aliens, requiring, nevertheless, that such return be conducted with due respect for the principle of human dignity and taking into consideration “any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases”.

Whenever the return of persons who have benefited from temporary protection would seriously affect their health, article 25(1) foresees that their return be delayed and that the persons in question be granted residence in Portugal whilst this is the case. Lastly, article 25(2) of Law no. 67/2003 foresees that families who have been covered by temporary protection, whose children are minors and attend the last school period, be granted residence conditions allowing the children concerned to complete the current school year. This provision, nevertheless, is more restrictive than that of article 23(2) of the Directive, which aims to allow the school year to be completed. In Portugal the school year is divided into three terms (September to Christmas, January to Easter, and Easter to July). Only when the child in question is in the last school period, which begins after Easter, will article 25(2) of Law no. 67/2003 allow the family to stay in national territory. Since the Portuguese legislator used the faculty foreseen in article 23(2) of the Directive, it should have foreseen the family staying in Portugal in order to allow their children who were minors to complete the school year, regardless of the school period they were in.

2.5 Regularisation of illegal immigrants

2.5.1 The Decree-Law 4/2001: legalization of illegal immigrant workers

The Decree-Law 4/2001 came into force on 15 January 2001 and made substantial amendments to 1998 Aliens Act. The “stay permit” was the cornerstone of the Decree-Law 4/2001 and was created for the purposes of solving the illegal situation of thousands of foreign citizens, who over the past few years, have entered Portugal to take up paid employment.

The stay permit was issued to all foreign citizens working in Portugal whether they have entered Portugal legally (for example, on a tourist or short stay visa, which
Country Report Portugal

does not allow the holder to take up a professional activity) or illegally (for example, without a visa or those who have stayed beyond the expiry date)\textsuperscript{925}. This new regime made legalization possible for 183,655 immigrant workers until 2003.

2.5.2 The Decree-Law 34/2003: the restriction of admission of immigrants


The most significant amendment had to do with the restriction of economic immigration. Firstly, this new regulation repealed the right to a stay permit with the intention of preventing the legalization of immigrant workers in Portugal. Secondly, it implemented the obligation of an annual limit of concessions to work visas, defined by the Government (quota system).

2.5.3 The increase of illegal immigration and the regulation of illegal immigrants in 2003 and 2004.

The repeal of the stay permit established by Decree-law 34/2003 did not contemplate the existence of thousands of immigrant workers in Portugal and as a consequence, prevented the possible regulation of their situation.

With the existing elevated number of illegal immigrants of Brazilian nationality and the diplomatic pressure exerted by the Brazilian Government, in July 2003 an Agreement was established with Brazil which allowed the legalization of Brazilians who had entered Portugal up to 11 July 2003. By 8 September, which marked the final date of the registration period for all Brazilian workers wishing to regulate their situation, 29,486 Brazilian workers had already manifestly demonstrated this intention.

However, this exceptional regulation was viewed critically by other Immigration Associations which claimed it discriminated against illegal immigrants of other nationalities. Hence, a Regulation 6/2004 implementing the Aliens Act was approved in 2004 which established an exceptional regulation process for all immigrants working without a residence permit, stay permit or work visa.

Only aliens who had regularly come into Portugal until 12 March 2003 (with a tourist visa or an exemption from visa within a 3 month stay period) and had paid their tax and social security on their earnings would be allowed to benefit from this regulation.

In order to organise this regulation process, the High Commissioner for Immigration and Ethnic Minorities implemented a pre-register obligation which ran until 14 June, 2004. About 47,000 illegal immigrant workers manifested the intention to regulate their situation. Excluded from this process were all the aliens who came to Portugal after 12 March 2003, as well as those who worked in a parallel working market without making any social security or tax deductions.

3. Legal and administrative arrangements concerning return and repatriation

3.1 Competences and procedures for deportation decisions

Portuguese law differentiates between various kinds of decision pursuant to which an alien may be required to leave the territory.
Country Report Portugal

First, the kind of measures adopted depends whether the alien is in Portugal or is at the border and wishes to enter the Portuguese territory. Secondly, measures are differentiated in regard to the status of the alien (asylum seeker, legal immigrant or illegal immigrant). Thirdly, all measures have different effects regarding the prohibition of re-entry the Portuguese territory within a defined period of time and enrolment in the Schengen Information System.

3.1.1 Refoulement at the Border

Refoulement is immediately enforceable (within a 48 hours period or a soon as possible) and takes place at the boarder post in two cases: by an administrative order of refusing entry (article 22 Aliens Act) or by a decision on the inadmissibility of an asylum or subsidiary protection application introduced at the Portuguese border (article 20 of the Asylum Law). The competent authority to decide is the Aliens and Borders Service.

Aliens who do not meet requirements for entering national territory may submit an application for asylum or humanitarian residence at the border post, and await the decision there. Asylum applications are exanimate in a single procedure. The director of the Aliens and Borders Service must take a well-founded decision on the application within 5 days, following the 48-hours period given to the Portuguese Refugee Council (the representative of UNHCR in Portugal) to give its opinions and interview the asylum seeker. Should the application be turned down, the applicant may request re-assessment within a 24 hour period by the National Commissioner for Refugees, with suspensive effect. He, in turn, has 24 hours to give his final decision. If the National Commissioner for Refugees does not turn in the request within this time, it is deemed admissible and the applicant may enter and stay in national territory. Should the National Commissioner for Refugees deem the

---

926 Article 18 of the Asylum Law.
927 Article 19 (1) of the Asylum Law.
928 Article 20 (3) of the Asylum Law.
application inadmissible in his final decision, the applicant must leave immediately
and is allowed a 48 hour maximum stay, to allow him to get a lawyer to lodge a
judicial appeal. If his return is not possible, the decision to detain the rejected
asylum seeker at the accommodation centre at the airport has to be adopted by a
judge. According to article 20 (1) of the Asylum Law, the Law 34/94 on provisional
accommodation centres is applicable during the detention of asylum seekers at the
border post (international zone of the airport or port).

There are no legal provisions on ban from Portuguese territory or register in the
Schengen Information System for the purpose of non-admission in case of
refoulement at the frontier. Thus, the refoulement at the frontier does not prevent the
rejected foreign citizen to return legally to Portuguese territory.

This is the most important measure of forced departure. In 2003, the Aliens and
Borders Service took 3 700 refusal of entry decisions. The main grounds for the
refoulement at the border are the lack of visa (1443), the insufficiency of subsistence
means (986) and the lack of proof on the purposes of the entry (558).

3.1.2 Transfer of rejected asylum seekers under the Dublin Regulation.

An application for asylum may be rejected if another EU Member State is
responsible under the Dublin Regulation. Once another EU Member State accepts
this responsibility, the director of the Aliens and Borders Service shall, within five
days, render the decision of transfer of the application to this State and the applicant
shall be notified (article 29 (3) and (4) of the Asylum Act).

The asylum seeker shall leave the Portuguese territory voluntarily. Otherwise, the
Aliens and Borders Service shall enforce the decision of transferring the applicant
(article 30 of the Asylum Act).

There are no legal provisions on ban from Portuguese territory or register in the
Schengen Information System for the purpose of non-admission in case of transfer of

---

929 Article 20 (2) and (4) of the Asylum Act.
rejected asylum seekers under the Dublin Regulation. Thus, such a transfer does not prevent the rejected foreign citizen to return legally on the Portuguese territory.

3.1.3 Immediate expulsion of rejected asylum seekers

The rejection of an application for asylum submitted in national territory shall be notified to the asylum seeker within twenty four hours, mentioning that he or she must leave the country within 10 days. If the rejected asylum seeker doesn’t voluntarily leave the Portuguese territory within this period of time, he or she shall be immediately subject to expulsion under the terms and effects of article 15 (1) of the Asylum Law.

There is no need for a decision on expulsion. Thus the expulsion in this cases is an ex lege consequence of the rejection of the asylum application and immediately enforceable.

For this type of expulsion there are also no provisions on ban from Portuguese territory. Thus, the rejected asylum seeker can return on the Portuguese territory if he or she meets the legal conditions for entry set down in the Aliens Act.

3.1.4 Refoulement in the framework of readmission agreements

An illegal immigrant can be expelled on the basis of readmission agreements. Portugal has concluded readmission agreements with France (1993), Spain (1994), Bulgaria (1997), Lithuanian (1999), Hungary (2000), Estonia (2001) and Romania (2002). Portugal is also part of the Schengen Group- Poland readmission agreement. These agreements provide for readmission of own nationals and foreigners that are illegal in Portugal.

In the framework of these readmission agreements, the immediate removal of aliens who illegally enter or stay in Portugal is possible. According to article 129 of the Aliens Act, the Aliens and Borders Service is the competent authority to make the readmission application, and falls this request is admitted to enforce the
readmission decision. An expulsion procedure only takes place in case of refusal of readmission.

The readmission of the illegal foreigner implies the ban of entry the Portuguese territory for 3 years (article 133 of the Aliens Act) and register in the national list of persons prohibited to entry (article 25 (2) of the Aliens Act).

The immediate removal on the basis of the agreement with Spain seems to be effective. Thus, 2003 85 removals were made to Spain and only 5 to France. There is no available data to evaluate the impact of other readmission agreements.

### 3.1.5 Order of leaving the national territory

The order of leaving the national territory takes place when a foreigner enters or stays illegally in Portugal and is an alternative to an expulsion proceeding. According to article 100 (1) of the Aliens Act in well founded cases a illegal immigrant may not be detained and expelled but only notified by the Aliens and Borders Service to leave the country voluntarily within a 10 to 20 day period. If he contravenes this order to voluntarily leave the Portuguese territory he will be liable to administrative expulsion.

If the notified alien leaves the territory voluntarily, an expulsion order will not be signed and therefore he or she will not be under a formal ban from re-entry to the Portuguese territory. The ban from re-entry within a period of at least 5 years will be ordered only if the alien leaves Portuguese territory with the financial aid of a return program established by the IOM with the financial support of the Portuguese State (article 126-A (2) of the Aliens Act).

2003, 2007 aliens were notified to leave the Portuguese territory. The main nationalities were Brazilian (449), Ukrainian (390), Romanian (265) and Angolan (121).
Country Report Portugal

3.1.6 Supervised departure (escort to the boarder)

If an illegal alien is detained by the police, the detention must be validated by a court. During the judicial hearing of the alien, the judge must inform the alien that he can opt to leave the territory, instead of being subject of an expulsion proceeding (article 126 (1) of the Aliens Act).

If the detainee declares the wish to leave the territory the judge will order the supervised departure (escort to the border), that must be enforced as soon as possible (article 126 (2) of the Aliens Act). The main benefit of this alternative measure is that an expulsion order will not be signed and the alien will be banned from re-entry during only one year\(^{930}\) (and not at least 5 years as prescribed for expulsion orders). He will be also subject of a registration in the Schengen Information System for non-admission purposes. In 2003, 60 expellees opt for this kind of deportation.

3.1.7 Expulsion

Under the terms and effects of article 102 of the Aliens Act expulsion orders may be adopted by an administrative or by a judicial authority.

According to article 109 of the Aliens Act expulsion can be decided by a judicial authority when it is an accessory sanction by conviction of a criminal offence or when the alien concerned has entered or stayed legally in Portuguese territory, holds a valid residence permit or is a asylum seeker, whose application was not rejected. In the first case the expulsion is part of a criminal sentence. In the second case, the expulsion decision is autonomous. An alien subject to an administrative or judicial order of expulsion is banned from re-entry into Portuguese territory for a defined period of time, not less than 5 years (article 105 of the Aliens Act). The enforcement of the expulsion order implies the enrolment of the expellee in the Schengen Information System or in the national list of non-admissible persons (article 114 (2)

---

\(^{930}\) Article 126 (2) of the Aliens Act.
of the Alien Act). The expellee must be notified of his or her register in the Schengen Information System (article 114 (3) of the Alien Act).

3.1.7.1 Administrative expulsion of illegal staying immigrants

An administrative expulsion is only admissible if the alien concerned entered or stayed illegally in Portugal (article 99 (1) (a) and 117 (1) of the Aliens Act) and only takes place when there is no notification to leave the Portuguese territory voluntarily or no judicial order of escort to the border, taken by option of the expellee.

If he became illegal, because his residence permit was cancelled, he can only be expelled by a judicial decision. According to Article 33(2) of the Constitution of the Portuguese Republic, any foreign citizen who has entered or is staying legally in Portugal has a basic right to only be expelled via a judicial decision. Provided that the third country national has entered Portugal legally, the Constitution stipulates that expulsion must be determined by a judicial decision. In such circumstances, Portuguese case-law, in particular rulings handed down by the Court of Appeal, has considered that it should be a court of law and not the Aliens and Borders Service that expels a foreign citizen whose residence permit has expired. If this is so, it is even more applicable when a residence permit has been cancelled.

The administrative expulsion proceeding begins with the detention of the illegal immigrant by the police. Within a maximal term of 48 hours the detainee must be present to the criminal judge for validation of the detention and application of coercive measures, if an escort to the frontier is not decided on the request of the detainee (Article 117 (1) of the Aliens Act). The criminal courts (or, where they are not available, the first instance courts) can apply all measures ruled in the Criminal Process Code (preventive arrest, house arrest, bail, etc.) and the specific coercive measures ruled in the Immigration Laws: periodical presentation before the Aliens

---

and Borders Service and detention in a temporary accommodation centre (article 106 of the Aliens Act). Because of the lack of accommodation centres the most commonly coercive measure is the preventive arrest in a penitentiary institution. If the judge decides the provisional arrest of the illegal alien, the Aliens and Borders Service must commence administrative expulsion proceedings (article 117 (2) of the Aliens Act). The duration of the preventive arrest in a penitentiary institution is limited to the necessary time to conclude the expulsion procedure and cannot exceed 60 days.

The hearing of the alien during the proceeding is guaranteed by article 118 of the Aliens Act. The director of the Aliens and Borders Service is competent to sign the expulsion order (article 119 of the Aliens Act). The alien must be notified of the decision. The notification must includes the elements set out by the article 114: explanation of the grounds; his duties (especially of leaving the country within a defined period of time); the duration of the interdiction of re-entry; the indication of the country, where the alien cannot be expelled if he benefits from the non refoulement guarantee (article 120 (1) of the Aliens Act). Furthermore, the notification makes reference to the right of appeal and his term, and indicates the enrolment of the alien in the Schengen Information System or in the national list of non-admissible persons (article 120 (2) of the Aliens Act).

3.1.7.2 Judicial expulsion

If the alien is legally in Portugal he or she may only be subject to a judicial expulsion order. According to article 33 (2) of the Constitution “Expulsion of persons who have entered, or staying legally in, the national territory, who have obtained a residence permit, or who have lodged an application for asylum that has not been refused, shall be determined by a judicial authority only”.

Legal immigrants residing in Portuguese territory can be the subject of a judicial expulsion order if they act against national security, public policy or public moral; their presence or activities in Portugal constitute a threat to the interests or the
dignity of the Portuguese State or its nationals; they make abusive interference in the exercise of political rights reserved to nationals; or they have practiced acts which would have prevented their entry in Portuguese territory if they had been previously revealed (article 99 (1) of the Aliens Act).

The competent court to adopt an autonomous expulsion order is the criminal court of first instance where the alien resides or he or she was found. When this kind of court does not exist, the order is taken by the courts of first instance with general competence.

The director of the Aliens and Borders Service is the authority with competence to initiate a judicial procedure for expulsion (article 103 of the Aliens Act).

Once the case has been received, the judge will set the trial which should take place within 5 days in the presence of the alien in question. The alien has the right to appeal, provide witnesses and the necessary evidence to defend himself or herself.\textsuperscript{932} Trial may be postponed up to a maximum period of 10 days upon the alien’s request or in other situations namely if he or she is unable to attend the hearing, if witnesses considered indispensable are still to be found or if the judge finds it necessary to provide additional evidence.\textsuperscript{933}

An expulsion decision will necessarily make reference to the provisions stated in Article 114 (1): grounds, legal obligations of the expellee, a ban of entry from national territory with indication of its expiry date, indication of the country to which the alien who benefits from non-refoulement should not be deported to, right if appeal.

According to article 101 of the Aliens Act, expulsion may also be ordered by a court along with criminal sanction whenever the illegal or legal immigrant has committed a crime. According to the jurisprudence of the Supreme Court of Justice and the Constitutional Court the accessory sanction of expulsion can not be an automatic consequence of a criminal conviction. This jurisprudence is based on article 30(4) of the Constitution. This regulation read as follows: “no sentence shall

\textsuperscript{932} Article 112 of the Aliens Act.
\textsuperscript{933} Article 113 of the Aliens Act
Country Report Portugal

involve, as an automatic consequence, the loss of any civil, occupational or political rights”.

Article 101 of the Aliens Act contains special rules protecting some categories of non-deportable aliens from the accessory sanction of expulsion and a “sliding scale” based on the length of the prison sentence and the duration of the residence. The longer is the period of residence, the more serious the breach of public order needs to be to give rise to the possibility of an accessory sanction of expulsion. Thus, according to article 101 (1) a foreigner who don’t hold a residence permit (illegal immigrant or holder of a visa or a stay permit) may be deported if he or she committed a crime punished with a 6 or more months prison or with an alternative fine sanction.

A foreign citizen who holds a temporary residence permit may be expelled if he or she has been sentenced to more than one year prison. When the court applies the accessory sanction of expulsion to resident aliens, it has to take into account the gravity of the crime committed, the personality of the alien, the risk of repetition, the degree of his or her integration in the Portuguese society, the time of residence and special prevention (the need of the accessory sanction to prevent the alien from committing more crimes)\(^934\).

If the alien concerned has a permanent residence permit (obtained after 8 years residence or after 5 years, if he is national from a Portuguese Speaking country) he may only be subject of an accessory sanction of expulsion, if his behaviour constitutes a sufficient serious threat to the public order or to national security\(^935\).

The accessory expulsion sanction is immediately enforced when the alien has accomplished 2/3 of the period of the imprisonment punishment. When he accomplished half of the period of the imprisonment punishment, the enforcement of the expulsion can be ordered by the judge\(^936\).

\(^934\) Article 101 (2) of the Aliens Act.
\(^935\) Article 101 (3) of the Aliens Act.
\(^936\) Article 101 (5) of the Aliens Act.
According to article 34 of the Law 15/93, when foreigners are sentenced for crimes related with drug traffic the court may apply an accessory sanction of expulsion and order the ban of the territory for 10 years.

Lastly, if an alien re-enters the Portuguese territory during the ban of entry he can be sentenced to 2 years prison or an alternative fine. The court may also apply an accessory sanction of expulsion (article 136-B of the Aliens Act).

The accessory sanction of expulsion is responsible for the largest number of judicial expulsions of legal aliens. Most of them were convicted to crimes related with drug trafficking. Thus, 2003 from the 91 judicial expulsions enforced, 60 were decided on the basis of a sentence for drug trafficking (66 %).

3.2 Measures to secure enforced return

3.2.1 Coercive measures during the expulsion proceeding

According to article 117 of the Aliens Act any alien who illegally enters or stays in Portugal (because he doesn’t have a visa, residence permit or stay permit, or because he didn’t leave the Portuguese territory voluntarily after the expiration of validity of his visa, residence permit or stay permit) may be detained by the police and is taken to the custody of the Aliens and Borders Service. Within 48 hours the alien must be presented before a judge for the validation of the detention\(^{937}\). This judge decides on the application of coercive measures, like the placement in a provisional accommodation centre during the expulsion proceeding (article 106 (1) (b) of the Aliens Act).

Law 34/94 establishes the legal regime of the provisional accommodation centres. Aliens may be held in these centres for humanitarian (measure of social support\(^{938}\))

\(^{937}\) Article 28 (1) of the Constitution provides that “Detention shall, within forty eight hours, be subject to the scrutiny of a judicial authority; the judicial authority shall order either the release of the person concerned or a suitable coercive measure”.

\(^{938}\) According to article 2 of the Law 34/94 the following categories of aliens can be accommodating in these centres: asylum seekers without means of subsistence during the procedure and rejected
or security reasons (detention measure). For security reasons, accommodation in these centres is a detention measure decided by a judge. According to article 3 (1) of the Law 34/94 and article 4 the detention of an alien in these centres can be decided by the judge in one of following situations:

- To ensure the enforcement of an expulsion decision;
- To punish the disobedience of a judicial order of periodic presentation to the authorities;
- To ensure the presence of the alien before a judicial authority;
- When an alien attempts to illegally enter Portuguese territory and stays in the international zone of the port or airport for more than 48 hours.

The detention on security grounds is maintained until the alien obtains residence permission or until the enforcement of an expulsion decision or of a decision on *refoulment* at the border. In any case, the detention cannot exceed 2 months and has to be re-examined by a judge every 8 days (article 3(2) of the Law 34/94).

Despite the legal regulation of provisional accommodation centres by the Law 34/94 of 14 September 1994, this Law has not yet been implemented. Administrative detention centres to accommodate aliens in case of refusal of entry (Decree-Law 85/2000) can only be found at international areas of airports. Thus, in Portuguese territory provisional accommodation centres are not available to detain illegal immigrants. Alternatively, the judge can decide the provisional arrest or any other coercive measure foreseen in the Criminal Procedure Code, such as the periodical presentation before the authorities, home arrest conditional release, or bail. The asylum seekers during the period allowed to voluntarily leave the Portuguese territory. Accommodation is decided by the Aliens and Borders Service on the request of the alien.

Pursuant to Decree-Law 85/2000 of 12 May specific areas in the international zone of the airports are provisional accommodation centres ruled by Law 34/94, where aliens who are subjected to a decision of refusal of entry, are detained before the administrative order of refoulement is enforced. According to article 22 (1) and (2) of the Aliens Act, the decision to deny entry is adopted after hearing the alien concerned, and has to be notified to him with reference to the grounds of refusal and to his right of appeal. The alien can be expelled within 48 hours. Should the immediate deportation not be possible within 48 hours, the judge must decide on his or her detention in the accommodation centre at the airport.

Article 106 of the Aliens Act.
most used measure is the preventive arrest in one penitentiary institution during the administrative expulsion proceeding. That means that illegal immigrants (who haven’t committed any crime) are frequently detained in normal penitentiary institutions together with sentenced criminal offenders. In any way, the maximal period of the preventive arrest during the administrative expulsion proceeding is 60 days (article 117 (3) of the Aliens Act).

3.2.2 Coercive measures to enforce an expulsion decision

According to article 122 the Aliens and Borders Service is the competent authority to enforce administrative or judicial expulsion orders.

As a principle, the alien who is subject of an expulsion order must leave the Portuguese territory within the defined period of time. Meanwhile he can be subject of coercive measures decided by a judge, namely the detention in an accommodation centre or the obligation to periodical presentation before the Aliens and Boarders Service. Latter is the only measure applicable, because the accommodation centres have not been implemented until now.

If the alien doesn’t leave the territory within the term defined in the expulsion order he will be detained and the officials of the Aliens and Borders Service will escort him to the border within a term of 48 hours. If the escort to the border within this time limit is not possible, than according to article 124 (2) the judge must decide on the detention of the alien in a temporary accommodation centre. Only this coercive measure is foreseen in the law. That means that the judge cannot apply other measures like preventive arrest. Considering that accommodation centres for aliens have not yet been implemented, there is no other mean to detain an alien longer than 48 hours with the purpose of enforce an expulsion order.

---

941 Article 123 (1) of the Aliens Act.
942 Article 123 (2) of the Aliens Act.
Pursuant to article 123 (1) of the Aliens Act, an alien sentenced to an expulsion decision must leave Portuguese territory within the period specified in the expulsion order. During this period, the judge can order the detention on an accommodation centre (but not the preventive arrest) or the obligation of periodical presentation before the Aliens and Borders Service. Only the latter measure is applicable, because, as mentioned above, the accommodation centres have not yet been implemented.

If the alien doesn’t leave the Portuguese territory within the period specified in the expulsion order, he will be detained and escorted to the border. If the forced departure is not possible within 48 hours, the detention in the accommodation centre at the frontier (international zone of the airport) must be decided by a judge\textsuperscript{943}.

### 3.3 Legal and factual barriers to enforce deportation

The lack of temporary accommodation centres and judges’ resistance in still applying criminal law measures such as preventive arrest to immigrants who have not committed any crime, are considered the two main reasons that hamper expulsion procedures.

Another factor which contributes to hamper the enforcement of an expulsion order is the lack of cooperation from the aliens’ countries of origin, which many times do not provide the aliens with the necessary documents for their expulsion. If readmission agreements were to come into force, the procedure could be much easier.

Another factor which hampers expulsion is the difficulty many times found in determining the identity or nationality of the alien in question, especially if he or she is holders of false documents\textsuperscript{944}.

The fact that provisional accommodation centres are still nonexistent makes the

\textsuperscript{943} Article 124 of the Aliens Act.

\textsuperscript{944} Oliveira, op cit., p. 455.
expulsion decision more difficult. Despite being aware of the legal reasons for preventive arrest, judges many times refuse to convict people who have not committed any crime except entering and residing illegally in Portugal with the aim of achieving better living standards. Many judges consider that placing these aliens in penitentiary institutions along with convicted criminals is inhuman and inappropriate, and for this reason, judges who are supposed to validate the detention of aliens (which may only occur within a maximum period of 48 hours) many times prefer to set them free and apply non custodian coercive measures, such as regular presentation to the Aliens and Borders Service.

These types of measures are however ineffective in ensuring the expulsion of illegal aliens. It is quite common for aliens who have been notified to abandon national territory or who have been subject of expulsion procedures to disappear.

3.4 Requirements as to the conditions in the country of origin

Both article 38 of the Asylum Law and Article 104 of the Aliens Act do not allow foreign nationals to be expelled to a country where the foreign national might be persecuted for the reasons on which the law based the granting of asylum. To benefit from this guarantee, the expellee must invoke and prove the fear of persecution (article 104 (2) of the Aliens Act). If no country accepts him, there is a juridical vacuum, because there are no rules on his status (he remains in Portugal as an “official clandestine”).

These are not the only legal provisions protecting foreign national from expulsion. Articles 3 and 8 of the European Convention on Human Rights which are directly applicable in Portuguese law and above domestic law are particularly important for protecting foreign nationals from expulsion. Therefore, in accordance with the case-law of the European Court of Human Rights, article 3 of the Convention obliges the Portuguese state without derogation to not expel a foreign national, when such expulsion could lead to his being tortured or subjected to degrading or inhuman treatment.
Also, Article 8 of the convention may be used to prevent expulsion should it interfere unjustifiably in his right to a private and family life.

Although these provisions prevent expulsion, they do not mean that a legal stay permit is awarded. This means that in extreme cases illegal stay of foreign nationals may be "tolerated", without any available mean to obtain leave to remain.

3.5 Deportation of unaccompanied minors and other vulnerable persons

There is a major legal impeachment for the deportation of unaccompanied minors. According article 16(4) of the Aliens Act the departure of unaccompanied minors is forbidden, when they don’t have the permission of their legal agent. An expulsion measure against a minor in this condition can’t be enforced, and the minor may stay as a tolerated illegal alien in Portugal. There is no legal provision regarding the regularisation of minors prevented to return.

Other vulnerable persons, especially those who suffer from prolonged illness, preventing them from returning to their country of origin, can apply for a residence permit under the terms of article 87 of the Aliens Act.

3.6 Deportation by air, see and land transport

There are no different deportation procedures according the mean of transport. The most used mean is the air transport. Sometimes the alien is expelled under escort provided by the Aliens and Borders Service.

In 2003, 571 deportations were enforced: 557 by air transport, 12 by land transport and 2 by sea transport. 98% of all deportations are enforced by air transport.

All expulsions are enforced individually and to up this date, no charters have been organized for this purpose.
4. Impact of EU regulations, directives and measures on return procedures

4.1 Dublin II and Eurodac

According to the information made available from the asylum section of the Frontiers and Borders Service\textsuperscript{945}, the Eurodac system has had a positive performance within the domain it was created for. It not only identifies undocumented asylum seekers but also identifies rejected asylum seekers.

The impact of the Eurodac system on the Return Policy is, however, limited due to its application being restricted to the determination of the State Member responsible for analyzing the request, as pursuant to the Dublin II Regulations. Its application for other purposes not foreseen in article 1 of Eurodac Regulation will necessarily imply the approval of another legal instrument which will contemplate new purposes for Eurodac to become more efficient within the scope of the Return Policy.

Dublin Regulations II functions in a less satisfactory way. On the one hand, the transfer of asylum seekers to the responsible State Members in terms of Dublin Regulations II is not always enforced. On the other hand, many of the asylum seekers who are effectively transferred in pursuant to the Dublin Regulations II are not always deported in cases in which the request for asylum has been denied.

When asylum seekers are transferred to Portugal and their request is denied, they are subjected to the administrative expulsion regime foreseen in the Aliens Acts. In cases in which the asylum seeker is not taken into preventive arrest, there is a strong probability that they will try to abandon national territory and continue to request asylum in other E.U. Member States. This leads to the successive enforcement of the Dublin Regulations II\textsuperscript{946}.

Hence, Eurodac and Dublin II Regulations are not contemplated as instruments which facilitate the return of rejected asylum seekers to their countries of origin. It would be more efficient to establish an expulsion mechanism for rejected asylum

\textsuperscript{945} Interview conducted with the Aliens and Borders official responsible for processing and analyzing applications (Cláudia Rocha).
seekers which would function at a European Union level, rather than having to trans-fer these people to the State Member responsible for them under the terms of Dublin Regulations II. This way, “asylum shopping” may be avoided.

4.2 Recognition of return decisions

The Council Directive 2001/140/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals was transposed into Portuguese legal framework by Law no. 53/2003, of 22 August. However there is no available information about the impact of this new regulation in the return practice.

According to Article 1, taken together with Article 2 of Law no. 53/2003, this Act governs the recognition and enforcement in Portugal of an expulsion decision issued by an administrative authority in an EU Member State, in Iceland or in Norway against a third country national – who is not a national of any of the EU Member States, of the Member States of the European Economic Area (Iceland, Liechtenstein and Norway) or of Switzerland or who is not a family member of a citizen of the Union, of the European Economic Area or of Switzerland, who has exercised his/her right of free movement – and is on Portuguese territory.

Thus, Law no. 53/2003 merely ensures recognition and enforcement of an administrative expulsion decision against a foreign citizen who does not possess one of the aforesaid nationalities or is not related to a citizen of the Union, of the European Economic Area or Switzerland who has exercised his right of free movement. As for the scope of personal application, Portuguese law therefore does not comply with the Directive since it excludes from the obligation to enforce an expulsion decision,

946 Interview conducted with the Aliens and Borders official responsible for processing and analyzing applications (Cláudia Rocha).
947 Hereinafter, the Directive.
948 Published in the official journal, Diário da República, I Série A, no. 193, of 22 August 2003, p. 5400.
949 Article 2(a) of Law no. 53/2003.
950 Article 3(2) of Law no. 53/2003.
those against a citizen of Liechtenstein or Switzerland or the respective family member since these categories of foreigners are not included neither explicitly or implicitly in the scope of application of the Directive.

As for the nationals of Norway and Iceland, although they are encompassed by the notion of citizens of a third country given in Article 2(a) of the Directive, we could defend their exclusion from the scope of application of Law no. 34/2003, since the Directive goes beyond the Schengen acquis in relation to these States in accordance with recital no. 8.

Pursuant to Article 3(1) of Law no. 53/2003, an expulsion decision decreed by the administrative authorities of a Member State of the European Union, of Norway or of Iceland against a foreign citizen covered by this Law, will be recognized in Portugal and enforced by the Aliens and Borders
c

951 provided that the foreign citizen in question meets the following requirements:

1. he is in Portugal illegally;
2. he has been the subject of an administrative expulsion decision based on failure to comply with rules of issuing State on the entry or residence of alien in the territory of the issuing State.

Since Article 3(1)(b) of the Directive does not impose that the foreign citizen be staying illegally in the territory of the enforcing Member State – Portugal, in the case - as a pre-condition for enforcing an expulsion decision, I believe that the restriction imposed by Article 3(1) of Law no. 53/2003 goes against the aim of the Directive to allow enforcement of an expulsion decision taken by one Member State by the Member State where the foreign citizen is to be found.

Nevertheless, this can be explained because, according to the Portuguese legal order, administrative expulsion of a foreign citizen is only possible when he/she has enter and stayed in Portugal illegally. Whenever a foreign citizen enters and stays legally in Portugal – because he does not need a visa and is within the authorized period of stay, because he has a work permit, a residency permit, or some other document which allows him to stay legally in Portuguese territory – his expulsion

951 The competent entity for the enforcement under the terms of Article 4(1) of Law no. 53/2003.
can only be decreed by judicial decision and not by an administrative decision taken by the Aliens and Borders Service – even if its aim is to enforce an expulsion decision taken by another Member State of the European Union.\(^{952}\)

*Thus, in those cases in which foreign citizens are in Portugal legally, the legislator should have foreseen the possibility for a court - and not BIS – to take the necessary measures to enforce the expulsion decision taken by another Member State and, as a result, expel the citizen in question from Portuguese territory. That is the only way to fully comply with the Directive without undermining the right of foreign citizens that are legally in Portugal to not be expelled by an administrative decision as guaranteed in the Constitution.*

*It was, perhaps, an attempt to get round this constitutional obstacle which led the Portuguese legislator to partially transcribe, out of context, the second paragraph of Article 3(1)(a) of the Directive in Article 3(3) and (4) of Law no. 53/2003. According to the provision of Article 3(3) of Law no. 53/2003, if the foreign citizen in question holds a residence permit granted by the enforcing Member State or another Member State of the European Union, the enforcement of the expulsion decision can only be carried out if these States withdraw the residence permit. Article 3(4) of Law no. 53/2003 provides that “the existence of an expulsion decision provides grounds for the residence permit to be withdrawn if this is authorized by the national legislation of the State which issued the permit.”*

Several comments need to be made on the confused wording which has been taken out of context, of Article 3(3) and (4) of Law no. 53/2003, which is the result of a clumsy copy and paste of Article 3(1)(a) of the Directive.

First of all, it does not comply with the provisions of the Directive because the cases in which a residence permit to be withdrawn are those in which the expulsion order was decreed on one of the grounds foreseen in Article 3(1)(a)\(^ {953}\) of the Direc-

---

\(^{952}\) See Article 33(2) of the Constitution and Article 101 taken together with Article 109 of Decree-Law no. 244/98, of 8 August (Immigration Act).

\(^{953}\) “Serious and present threat to public order or to national security in the case of the conviction of a third country national for an offence punishable by a penalty involving deprivation of liberty of at least one year or where there are serious grounds for believing that a third country national has
tive and not in the case foreseen in sub-paragraph b) in which the expulsion decision is based on the mere illegal entry and stay of the foreign citizen in the territory of the issuing State (the only case which implies, in accordance with Law no. 53/2003, the Aliens and Borders Service’s obligation to recognize and enforce the expulsion decision).

Secondly, these provisions of Law no. 53/2003, as they are currently worded raise interpretation difficulties making their implementation illogical at times because they cover the cases in which Portugal is the issuing or the enforcing State, as well as the cases in which Portugal or another Member State (issuing State or another) was the country which granted the residence permit. In order to find some logic in Article 3(4), we should interpret it as bringing in a new legal basis for canceling a residence permit granted in Portugal – that is, an administrative expulsion decision, not from Portuguese territory, but from the territory of a Member State of the EU (and not from Norway or Iceland!). In other words, Article 3(4), of Law no. 53/2003, by allowing a residence permit to be cancelled on the basis of there merely being an expulsion decision issued by the administrative authorities of a Member State on the basis of the foreign citizen in question having merely come in and stayed in its territory illegally without the correct papers, thus - by making a third country national technically illegal in Portugal on the basis of his residence permit having been withdrawn - allows his expulsion from Portuguese territory through an administrative procedure.

However, this interpretation of the law is clearly unconstitutional. This is because, according to Article 33(2) of the Constitution of the Portuguese Republic, any foreign citizen who has entered or is staying legally in Portugal has a basic right to only be expelled via a judicial decision, which must be based on a legally relevant motive (breach of the peace, law and order, or having committed a serious crime). This right – included in the catalogue of the Rights, Freedoms and Guarantees – has additional legal protection in that the law can only restrict this right in those cases which are explicitly foreseen in the Constitution and provided that it does not reduce the scope committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State”.

669
Country Report Portugal

of the contents of the constitutional precept which enshrines it (Article 18(2) and (3) of the Constitution).

Nevertheless, even if the Constitution allowed the right enshrined in Article 33(2) to be restricted by law, the truth is that such an interpretation of Article 3(4) of Law no.53/2003 would affect the basic contents of the constitutional provision and would quash the basic right of a third country national who is in Portugal legally, to only be expelled from Portuguese territory on the basis of a judicial decision. This is because it would allow a foreign citizen with a residence permit to be expelled on the basis of an administrative decision by technically placing him in an illegal situation owing to the mere administrative decision of expulsion from another State, based on illegal entry or stay. In other words, the remote cause of expulsion of a third country national from Portuguese territory would not be a judicial decision based on a relevant national interest but an administrative expulsion decision take by another State. In any case, provided that the third country national has entered Portugal legally, the Constitution stipulates that expulsion must be determined by a judicial decision. In such circumstances, Portuguese case-law, in particular rulings handed down by the Court of Appeal, has considered that it should be a court of law and not the Borders and Immigration Service that expels a foreign citizen whose residence permit has expired\textsuperscript{954}. If this is so, it is even more applicable when a residence permit has been cancelled, particularly when not on the basis of a judicial decision, taken in view of a relevant national interest (keeping law and order or a serious breach of the peace, etc.), but following an expulsion decision taken by the administrative authorities of another country, which the foreign citizen entered or stayed in illegally.

In addition, the provisions of Article 3(3) and (4) of Law no. 53/2003, are not applicable for enforcing an expulsion decision against a third country national, who is in the country legally under the auspices of a work visa, stay permit (a legal status

which is different to a residence permit), or purely simply without a visa but within a legal period of stay.

Since one of the legal pre requisites of Articles 1 and 3(1), of Law no. 53/2003, for recognising such a decision has not been met, the illegal stay of the third country national in question in Portuguese territory, the BIS cannot enforce it, which means that Portugal will not be meeting the obligation laid down by the Directive to recognise and enforce expulsion decisions taken by another Member States. In order to transpose this obligation within the current Portuguese framework, the legislator would have had to foresee judicial competence for expelling a legally resident foreign citizen in Portugal based on the mere fact that an expulsion decision had been taken by another State.

Under the terms and effects of Article 4(3) of Law no. 53/2003, the Aliens and Borders Service is the competent entity for enforcing expulsion measures.

Article 5 of Law 34/2003, regulates enforcement of expulsion but only in the case in which the third country national is in Portugal illegally and when an expulsion decision has been taken against him, based on failure to comply with the rules of the issuing State on the entry or residence of aliens. Thus, in accordance with subsections 1 and 2 of this Article, the third country national in question will be detained and handed over to the Aliens and Borders Service, for the purposes of expulsion, and a judge should validate his arrest within 48 hours, who can impose coercive measures on him. According to Article 106 of the Immigration Act, in addition to applying coercive measures foreseen in the Code of Criminal Procedure (for example, preventive arrest, home arrest), the judge can also decide periodical presentation to the Aliens and Borders Service or place him in a temporary accommodation centre (not yet implemented). If the judge decides the preventive arrest in a penitentiary institution, this measure can only be applied for as long as it takes to enforce the expulsion decision and can never go beyond sixty days (Article 117(3) of the Aliens Act).

Article 5(3) of Law no. 53/2003 only gives the third country national in question the right to appeal against the judge’s decision which validates his detention and hands him over to the Aliens and Boarders Service custody, under the same terms as an
against a judicial expulsion decision. In other words, an appeal is made to the Court of Appeal (2nd instance) without suspensive effect (Article 116 of the Aliens Act). This Article fails to mention the right to a judicial appeal against the decision, which enforces the expulsion issued by another Member State - or, in other words, the expulsion from national territory pursuant to such a decision. *A contrario* interpretation of this provision, which would lead us to conclude that the Portuguese legislator did not want to guarantee the third country national in question, the right to appeal against an expulsion decision should be discounted: in addition to going against Article 4 of the Directive, it would breach the basic right to effective judicial protection via contesting the expulsion through the courts (Articles 20 and 268(4) of the Constitution). Thus, we can conclude that the expulsion order itself could be appealed against through the courts in accordance with the general rules on the matter. Such rules do not, however, guarantee the third country national effective jurisdictional protection of his rights - for example, of not being expelled to a country where he may suffer inhuman treatments – since the appeal does not have suspensive effect.

**4.3 Effect of EU measures on return**

There is not noticeable effect of Regulation Nr. 93 and No. 694/2003 and other EU measures (Council Decision Nr. 97/340/JAI on information for voluntary return; green paper on return policy) on the Portuguese return and repatriation policies. There is no available data how these measures were received by the NGO’s.

**5. Voluntary return**

Rejected asylum seekers and other illegal immigrants are allowed to return freely to their origin country, once they are detained by the policy. According to article 100 of the Aliens Act before detention and before a procedure of expulsion is initiated, the illegal alien can be notified by the Aliens and Borders Service to leave voluntarily the Portuguese territory within a time period from 10 to 20 days. In this case he or
she will not be subject of a ban of re-entry the territory. This is an incentive to voluntary return.

In order to encourage voluntary return, Article 126 –A of the Aliens Act foresees state aid for co-operation programmes established with IOM. At the moment, the only existing program financed by the Portuguese State is the Voluntary Return Program organised by IOM. This program was created for legal or illegal immigrants, asylum seekers or temporary protection beneficiaries who wish to return to their country of origin or to any other country who accepts them but they do not have the sufficient financial resources. The Program finances the return trip and subsistence expenses for a certain period of time. With the exception of aliens who benefit from temporary protection, the beneficiaries of the Voluntary Return Program are banned from entering Portugal within a period of at least 5 years and can be found in the Schengen Information System with the purpose of non-admission (Article 126-A (2) and (4) of Immigration Law).

There were also two other Programmes financed by the European Refugee Fund: the OIM Program for the Guinea-Bissau Citizens with Temporary Protection Status and the INDE –voluntary return program for nationals of East Timor.

There are many factors which hamper voluntary return namely the lack of information about the possibility of financial aid for the trip, insufficient financial to provide aliens with enough means of subsistence during an initial phase or the lack of travel documents. The family ties in the host country, political, economic, social, religious situation in the home country are also factors that may hamper the voluntary return. But other factors, such the economic and social situation of the illegal immigrant, his fear or shame for the failure to succeed in a better life abroad can hamper his willingness to return voluntarily.

On the other hand, there is no real policy to assist voluntary return. Firstly, the financial means provided by the Portuguese State to aid the IOM Voluntary Return Programmes are insufficient to cover all existing needs. Another important factor

\[955\] In 1998 a Cabinet Resolution no. 94/98 granted temporary protection to citizens from Guinea-Bissau who had come directly from the area of conflict, for an initial period of one year renewable on the basis of a decision from the Minister for Home Affairs, for an additional year.
that heavily dissuades the use of voluntary return programs of the IOM with the financial support of the Portuguese State, is the prohibition to enter Portuguese territory within a period of at least 5 years and the enrolment in the Schengen Information System for purpose of non-admission in any Schengen Country during this period, under the terms of article 126-A of the Aliens Act.

6. Instruments for an effective return policy

Taking into consideration the existing legal and factual barriers between each State Member in relation to the return of illegal aliens, as well as the transnational nature of this policy, measures such as the introduction of European minimum standards on return, the establishment of a closer cooperation on return of third-country nationals and the mutual enforcement of return decisions, could contribute to making the Return Policy of all State Members more efficient.

On the other hand, in order to guarantee a satisfactory Return Policy, it is necessary that the countries of origin of these immigrants comply with their readmission obligations. The amount of money brought in by these immigrants (including illegal immigrants) constitutes an important source of income and wealth for their countries of origin. It is only possible to realistically contemplate the effective enforcement of readmission rules within the framework of an aid system for the economic development of these countries. Hence, closer links should be established between economic assistance policies and the readmission obligations of third countries.

Insofar as the problem of the return of rejected asylum seekers is concerned, the implementation of extraterritorial procedures of asylum requests does not seem viable. According to the position of the Frontiers and Borders Services, the new concepts of processing asylum claims abroad create impassable difficulties for the establishment of a legal regime and competence norms which such procedures should be subjected to. Even if an agreement were to be reached in relation to these crucial issues,
namely that of establishing an applicable legislation or the competent authorities (pertaining to the State Members or to the State in which the asylum seeker is to be found), these solutions do not seem to have any additional impact in terms of return matters. In case of a negative decision, there would always be the problem of the return of the person in question, not from the territory of a State Member but from the territory of another State. If any legal, practical or financial difficulties in this state were to exist as far as the Policy of Return is concerned, then this would contribute to increasing the flux of illegal immigrants into EU territory even more.

If the political option of the European Union is to avoid asylum seekers, then it seems more viable to build up reception facilities in international protected areas or “safe” regions. This is only made relevant from the preventive perspective of the Return Policy.
- CHAPTER XV -

COUNTRY REPORT SLOVENIA

by
Neža Kogovšek, LL.M,
Peace Institute
Introduction

The regulation of return policies in Slovenia differs depending on whether return is voluntary or involuntary. While involuntary return is well regulated in domestic legislation and interstate readmission agreements, voluntary return mostly consists of ad hoc practices and provisional solutions. A very important role in carrying out voluntary return is played by non-governmental and international organizations, especially by the International Organization of Migration (IOM). The most important step forward in terms of regulating voluntary return was taken with signing a memorandum between the IOM and the Government of the Republic of Slovenia.

This report consists of three chapters. The first chapter (“Legal Framework”) sets forward both national and international legal provisions forming a basis for executing return policies. The second chapter (“Involuntary Return”) addresses basic areas of return. It examines past and present return practices for different groups of migrants (illegal migrants, foreign nationals, refugees, victims of trafficking and displaced persons under temporary refuge), describes judicial review procedure and respect for the right to appeal, deportation barriers, regularization, as well as detention. The third chapter (“Voluntary return”) describes the manner in which assisted voluntary return is carried out in Slovenia and the manner in which return practices will be carried out in the future considering the newly signed memorandum between the IOM and the Government of Slovenia.

The characteristic of the return policies in Slovenia are:

- According the statistics, approximately half of illegal migrants are returned on the basis of readmission agreements.
- The other half of illegal migrants who cannot be returned immediately are awaiting deportation in the Center for Aliens and are not forcibly returned as stipulated in the Aliens Act. Namely, while waiting, most of them decide to return to their country of origin voluntarily.
- Assisted voluntary returns are carried out by the IOM. However, the involvement of the IOM has so far depended on the availability of funds from the pilot projects.
- There is a lack of legal regulation of cases when recognized refugees decide to return to their country of origin.
- There is a lack of legal regulation of dealing with victims of trafficking, including their return.
I. Legal Framework

The legislation and international agreements regulating return policies in Slovenia are as follows:

1. National Legislation

- Constitution of the Republic of Slovenia (Official Gazette of the RS, No. 33/91);
- Aliens Act (Official Gazette of the RS, No. 108/2002, entered into force 27 November 2002);
- Asylum Act (Official Gazette of the RS, No. 134/2003, entered into force 14 August 2003);
- Temporary Refuge Act (Official Gazette of RS, No. 20/97, No. 67/2002). Temporary Refuge Act will very soon be replaced by Temporary Refuge of the Displaced Persons Act, which has already been published in the Official gazette of RS, No. 65/2004 and will enter into force on 23 July 2005.
- Penal Code (Official Gazette of the RS, No. 95/2004)

2. International Agreements

- The Convention for the Protection of Human Rights and Fundamental Freedoms;
- The European Convention for the Prevention of Torture and Inhuman or degrading treatment or Punishment;
Country Report Slovenia

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and Children,
- United Nations Convention against Organized Crime,
II. Involuntary Return

1. Scope of Involuntary Return

a. Illegal Migrants

i. Legal Provisions

Legal bases for removal of illegal migrants are provided by the Aliens Act. According to Article 47 of the Aliens Act, aliens who reside in the Republic of Slovenia illegally must leave the country immediately or within a stipulated period of time, determined by the Ministry of Interior. In determining the term in which an alien must leave Slovenia, the authority which issues a decision must take into account the time in which the alien is able to leave the country, whereby the term must not exceed three months. (Article 47/4 of the Aliens Act) The aliens who cannot be returned immediately wait for deportation in the Center for Aliens in either Postojna or Prosenjakovci (see below the section on Detention).

Aliens are considered to be residing in Slovenia illegally:

- if they entered the country without permission;
- if their visa was annulled or if the period for which it was issued has expired, or they reside in the Republic of Slovenia in contravention of the entry entitlement, or if the time for which they were allowed to reside in the Republic of Slovenia on the bases of the law or an international agreement has expired;
- if they are not in possession of a residence permit, or if the permit has expired. (Article 47/2 of the Aliens Act)
If an alien filed an application for an extension of his or her residence permit or for a further permit in due time he or she is permitted to remain on the territory of Slovenia until his or her application is decided upon. The alien is also issued a special confirmation, which serves as a permit for temporary residence until the application is decided upon. (Article 47/3 of the Aliens Act) While waiting for a decision upon his or her application for extension the alien may not be returned, since the application for extension serves as a permission to stay.

An alien, who does not leave the territory of the Republic of Slovenia pursuant to Article 47/1, is deported from the country. (Article 50/1 of the Aliens Act) An alien who must be deported from the country is brought to the state border by the police and directed across the border and handed over to the authorities of that country. (Article 50/4 of the Aliens Act) The police also bring to and direct across the state border and hand over to the authorities of that country an alien who is being deported on the basis of an international agreement (see below the section on Readmission Agreements). (Article 50/5 of the Aliens Act)

ii. Actual Situation

According to the information provided by the Ministry of Interior, the authorities refrain from executing forced involuntary returns as stipulated in Article 50 of the Aliens Act. Although these returns, according to the Ministry of Interior, are more voluntary than involuntary in nature, they are included in the section “Involuntary Returns,” since they are carried out by the Ministry of Interior and do not fall under the definition of assisted voluntary returns carried out by the IOM and described in

chapter III. However, it needs to be taken into account that in most cases these returns could and would be assisted by the IOM if there had been sufficient funds available.

Aliens accommodated in Center for Aliens on the basis of Article 56 of the Aliens Act, in the time from reception until deportation, are dealt with by a police inspector who examines each case individually. The inspector is assisted by social workers who offer psycho-social support to the alien. According to the Ministry of Interior, in these circumstances most illegal migrants choose to return voluntarily to their country of origin. At the return the aliens are accompanied by the police only in cases of group returns or at the request of the airline carriers.\(^\text{958}\) The authorities of the country of origin are not notified about the arrival of an illegal migrant.\(^\text{959}\)

Most of such returns are carried out by air (e.g. to Kosovo, Turkey, Iran and Iraq). Due to lower numbers of migrants in Slovenia the authorities use regular lines instead of charter lines. Valid travel documents are obtained in cooperation with embassies of the countries of origin.\(^\text{960}\)

Unaccompanied minors ordered to return are accompanied by their legal guardians (usually NGO representatives) from Slovenia to the country of origin. The same goes for the victims of trafficking if they are identified as such.\(^\text{961}\)

\(^{958}\) Id.

\(^{959}\) Information was obtained at the interview on 27 June 2005 with Ms. Tamara Jerman, United Nations High Commissioner for Refugees, Branch Office Ljubljana.

\(^{960}\) Id.

\(^{961}\) Information was obtained at the interview on 29 June 2005 with Ms. Alenka Malenšek, International Organization for Migration Ljubljana.
In 2004, 472 illegal migrants who were accommodated in the Center for Aliens were returned.\textsuperscript{962} Out of the total number of returned migrants in 2004, 148 were returned to Serbia and Montenegro, 102 to Albania, 44 to Bosnia and Herzegovina, 43 to Romania, 28 to both Turkey and Moldavia, 27 to Macedonia, 16 to Ukraine, 11 to Bulgaria and the rest to China, Georgia, Russian Federation, Ecuador, Lithuania, Croatia, France, Sierra Leone, Sweden, Liberia and Lebanon.\textsuperscript{963} These statistics only include returned aliens who were awaiting deportation in the Center for Aliens, while the statistics for migrants returned on the basis of readmission agreements are included in the following section (Readmission Agreement).

iii. Readmission Agreements


In the period between January 1, 2005 and December 31, 2005 the Slovenian police returned 611 persons on the basis of the readmission agreements, out of 2.116 illegal migrants that illegally entered the territory of Slovenia. Most of illegal migrants were returned at the border of Croatia (557). Their nationality was of Serbia and Montene-

\textsuperscript{962} See above, note 1.

\textsuperscript{963} See above, note 1.

In the period between January 1, 2005 and May 31, 2005 the Slovenian police returned 692 persons on the basis of the readmission agreements, out of 2,732 illegal migrants that illegally entered the territory of Slovenia. Most of illegal migrants were returned at the border of Croatia (656). Their nationality was of Serbia and Montenegro (176), Albania (156), Bosnia and Herzegovina (93), Macedonia (69) and Turkey (59). At the border of Hungary 17 persons was returned, at the border with Italy also 17 and at the border with Austria 3.\footnote{Ministry of Interior’s monthly statistics, available at www.policija.si/si/ (2 July 2005).}

\footnote{Id.}

\section*{iv. Costs of Deportation}

According to the Aliens Act, the aliens awaiting their deportation in detention who have their own funds are obliged to cover the costs of their subsistence and accommodation and the costs incurred in relation to their deportation to the amount of their own funds. (Article 62/1 of the Aliens Act) If they have no funds, the costs are covered from the budget of the Republic of Slovenia. (Article 62/2 of the Aliens Act) The costs are also covered, in solidarity, by the person who illegally transported the alien across the national border or who offered the alien illegal employment or work or enabled him/her illegal residence in the Republic of Slovenia. (Article 62/3 of the Aliens Act)
b. Expulsion of Foreign Nationals

An alien, against whom the additional sentence of expulsion from the country (for a crime) or the security measure of deportation from the country (for a minor offence) has been issued, is also deported from the country. (Article 50/2 of the Aliens Act). Additional sentence of expulsion of an alien from the Republic of Slovenia is defined with the Article 40 of the Penal Code of the Republic of Slovenia. Namely, the court may issue an expulsion of an alien from the territory of the Republic of Slovenia for the period from one to ten years. The duration of the expulsion starts with a final judgment. The time spent in detention is not included in the duration of the expulsion. 967

The procedure for them is the same as for illegal migrants and is carried out in accordance with the Aliens Act.

c. Refugees

An asylum seeker whose asylum application has been rejected by the final decision in the asylum procedure and who does not leave the territory of the Republic of Slovenia within the prescribed time is forcibly removed from the state pursuant to the Aliens Act, unless he or she enjoys a special form of protection under this law (see below, page 11). Until the decision on the special form of protection is final, the alien is accommodated in the Center for Aliens [an accommodation and detention center which forms part of the Immigration Division of the Police – authority, responsible for the removal from the State]. (Article 40/1 of the Asylum Act)

967 Article 40 of the Penal Code of the Republic of Slovenia.
However, such removal is not enforced before the asylum procedure has been closed by a final decision. (Article 40/2 of the Asylum Act) The procedure shall be deemed final:

- when the time limits for appealing against the first instance decision have expired and no appeal has been submitted, or when an appeal has been lodged after the expiry of the time limit, but no *restitutio in integrum* has been granted;

- when the time limits for appealing against the decision by the administrative court have expired and the appeal has not been lodged; or the appeal has indeed been lodged after the expiry of a prescribed time limit and the *restitutio ad integrum* has not been granted;

- when a judgment of the supreme court by which the appeal has been rejected, has been served; or

- when a decision by the supreme court by which the appeal has been rejected, has been served.

Regardless of the stage of the asylum procedure, an asylum application shall be considered withdrawn and the procedure closed:

- if the asylum applicant withdraws his asylum application;

- if in spite of a received summon, the asylum applicant fails to attend the interview or oral hearing without prior excuse;

- if the asylum applicant fails to notify the change of his address which leads to unsuccessful deliveries of summons or any other mail;

- if the asylum applicant refuses to co-operate in establishing his/her identity; or

- if it is clear from the official evidences of the competent authority conducting the procedure that the asylum applicant left the asylum home or its branch on his/her own free will and did not return there in three days after such an arbitrary departure. (Article 42/1 of the Asylum Act)
Country Report Slovenia

The asylum applicant, in cases mentioned in the second and third line of the previous paragraph, may submit a petition for *restitutio in integrum* on justifiable grounds within three days from termination of reasons causing the delay in responding to the summons or in notifying the change of his or her address or causing his or her departure from the Asylum Home or its branch for more than three days. (Article 42/2 of the Asylum Act)

In its decision the Ministry of Interior prescribes a time limit within which the asylum seeker must leave the Republic of Slovenia. (Article 42/3 of the Asylum Act)

On the 31 March 2005 a new measure was introduced at the Asylum Home where asylum seekers are accommodated. This measure amounts to a new basis for deportation of the asylum seekers. Namely, when illegal migrants express an intention to apply for asylum they are accommodated in the pre-reception area of the Asylum Home where they wait for their asylum application to be accepted. At their arrival they must sign a statement that their intention to apply for asylum will be deemed annulled if they leave the pre-reception area of the Asylum Home before their application is accepted.

This measure has no legal basis in the Asylum Act. However, it has many practical consequences. Namely, if a person signs a statement (in many cases without knowing what is being signed) and steps out of the pre-reception area of the Asylum Home, their intention to apply for asylum is deemed null and they are considered illegal migrants who, if caught by the police, are transferred into detention facilities in Postojna or Prosenjakovci (see below the section on detention) where they wait for deportation. It needs to be taken into account that “leaving” the pre-reception area does not only mean heading for Italy or Austria but also smoking a cigarette outside, outside the assigned recreation hours. Accordingly, this new measure represents a new basis for deportation from the country. Before this measure was introduced, persons who expressed their intention to apply for asylum would be accommodated in
the pre-reception area until their asylum application was accepted and could leave the premises freely.968

d. Victims of Trafficking

In Slovenia there are no special legal provisions regulating the return of victims of trafficking. Moreover, there is a lack of legally established criteria for determination of a “status” of a victim of trafficking as well as a lack of procedure for such determination. Usually the fact that someone (an asylum seeker or an illegal migrant) is a victim of trafficking is established by “common sense” of the officials or through self-identification by victims themselves.969 Similarly, it is not regulated how the state bodies must proceed after determining that a person under their authority is a victim of trafficking. A Slovenian non-governmental organization called “Ključ,” which is specialized for dealing with victims of trafficking, concluded special framework agreements with the Ministry of Interior and the Police in order to regularize (although not on the level of the legislative provisions) their activities consisting of preventive measures and education, support for victims, help line and safe house. However, these agreements do not regulate the victims’ return.

Whenever any of the victims expressed a desire to return to their country of origin and if there were sufficient funds available, the IOM took all the necessary measures to organize for their safe return home (see below).970

968 The non-governmental organizations have been calling for the removal of this measure at the Ministry of Interior, the Ombudsman and the Council of Europe Commissioner for Human Rights. See e.g. the letter to the ombudsman, 15.5.2005.

969 See above note 5.

970 See above note 5.
Country Report Slovenia

e. Displaced Persons under Temporary Refuge

There are special provisions regulating return of displaced persons. In the time of writing this report a new Temporary Refuge of Displaced Persons Act was adopted, but has not yet entered into force. The Act includes the provisions of return and repatriation of persons under temporary refuge, taking into account the specific situation of this group of people.

If the situation of a country of origin of displaced persons allows for their return the temporary protection is terminated. After the termination the Ministry of Interior must adopt a voluntary repatriation plan. (Article 44 of the Temporary Refuge of Displaced Persons Act)

In order to facilitate a decision to voluntarily return to the country of origin the Ministry of Interior provides information on the conditions in the country of origin and on the possibilities to return. (Article 45/1 of the Temporary Refuge of Displaced Persons Act) The Ministry may organize informative visits in the country of origin for displaced persons that decided to return voluntarily. (Article 45/2 of the Temporary Refuge of Displaced Persons Act) If temporary protection has not been terminated yet, the Ministry may, taking in account the UNHCR recommendations, enable the persons who voluntarily returned to their country of origin to return to Slovenia, if the circumstances in the country of origin do not allow for a safe and permanent return. (Article 45/3 of the Temporary Refuge of Displaced Persons Act) The persons who decided to return voluntarily are treated as persons under temporary refuge until the day of their actual return. (Article 45/4 of the Temporary Refuge of Displaced Persons Act)

If due to health reasons a person who decided to return voluntarily cannot return yet, his or her temporary refuge status may be extended. (Article 46/1 of the Temporary Refuge of Displaced Persons Act) Extended stay may be permitted for the unaccom-
panied minors and families with minor children until the end of the school year, if they are going to school in Slovenia. (Article 46/2 of the Temporary Refuge of Displaced Persons Act) Both groups of people (minors and their families as well as persons with health problems) have the right to enjoy the same scope of rights as other persons under temporary refuge. (Article 46/3 of the Temporary Refuge of Displaced Persons Act)

The provision providing for a forced return states that a person whose temporary refuge was terminated and who did not regulate their status, permitting them to stay in Slovenia, must leave the host country in due time, otherwise the provisions of Aliens Act will apply. (Article 47 of the Temporary Refuge of Displaced Persons Act)

There are no displaced persons under temporary refuge left in Slovenia anymore. In 2002, the remaining 2000 Bosnian refugees were given an option to either voluntarily return to Bosnia and Herzegovina (for more information see below the section on Voluntary Return) or to acquire permanent residence permits. 971

Altogether 9.058 persons were returned from Slovenia to Bosnia and Herzegovina and 1.056 to Croatia in the period from 1993 to 2003. 972 From the statistics of the Immigration Sector it is not evident how many of them returned voluntarily and how many involuntarily (with an exception of 130 persons out of 9.058 total who did return voluntarily to Bosnia and Herzegovina with the assistance of the IOM – for more information see below section Assisted Voluntary Return of Persons under Temporary Refuge). It could be established that all Bosnia refugees returned volun-

971 This opportunity was provided for them by the Amended Temporary Refuge Act of the Republic of Slovenia.

972 Immigration Sector’s yearly statistics.
2. Judicial Review of Return Orders and the Right to Appeal

In cases of asylum seekers a return order is issued by the Ministry of Interior. Against such decision an asylum seeker may file an appeal to the Administrative Court in 15 days after the receipt of a decision. If an asylum seeker is rejected and deportation order served because the asylum seeker entered Slovenia from safe third country, or his or her application is deemed manifestly unfounded, he or she may file an appeal to the Administrative court in three days after the receipt of a decision. (Article 38 of the Asylum Act)

Illegal migrants, who must await their deportation in detention, have a right to file an appeal against a decision on detention at the Ministry of Interior within a period of eight days from the receipt of a decision. (Article 58 of the Aliens Act) Against a decision of the Ministry the illegal migrants have the right to seek judicial review within a period of 30 days from the receipt of a decision.973

Persons under temporary refuge whose application was denied have the right to appeal to the Ministry of Interior in 15 days from the receipt of a first instance decision. (Article 13 of the Temporary Refuge Act) After the decision of the Ministry they have the right to seek judicial review of their case by filing a complaint to the Administrative court in 30 days from the receipt of the second instance decision.974

973 30 days is a general deadline for seeking judicial review in administrative matters. See Administrative Litigation Act.

974 30 days is a general deadline for seeking judicial review in administrative matters. See Administrative Litigation Act.
In the year 2004 there was one appeal lodged against the decision on accommodating an alien into the Center for Aliens. There were no appeals lodged against a decision on stricter police supervision.  

3. Deportation Barriers  

An alien may only be deported from the country if a decision on the basis of which the alien is obliged to leave the country is executable. (Article 50/3 of the Aliens Act) Since some aliens are not deportable due to the lack of cooperation of the country of origin, it has been reported that the competent authority at the Center for Aliens issues a permission to leave the Center (after he has already been detained for the maximum period of time) which the aliens use to leave the country. This usually happens when otherwise the maximum time for detention (six months) would be exceeded.  

a. Permission to Remain  

In general, Slovenian legislation prohibits deportation or expulsion of an alien to a country in which his or her life or freedom would be endangered on the basis of race, religion, nationality, membership of a special social group or political conviction, or to a country in which the alien would be exposed to torture or to inhumane and humiliating treatment or punishment. (Article 51/1 of the Aliens Act) Pursuant to such circumstances, remaining in the country means permission granted to an alien who has been given a deadline by which to leave the country, or to an alien who must be deported, to remain temporarily in the Republic of Slovenia. (Article 52/1 of the

\[975\] See above note 1.  

\[976\] See above note 3.
Country Report Slovenia

Aliens Act) In such case the Alien is issued a “permission to remain in the Republic of Slovenia.” (Article 52/2 of the Aliens Act) In addition, the permission to remain is also issued if deportation is not possible due to other reasons.

The permission to remain is issued by the competent authority [the police] at the request of the alien, or *ex officio*, for a period of six months; the permission may be extended for as long as the conditions for which permission to remain is granted exist. (Article 52/3 of the Aliens Act) In the decision which permits an alien to remain in the Republic of Slovenia, the Ministry of Interior determines the alien’s place of residence at a specific address. (Article 52/4 of the Aliens Act) However, the permission to remain does not cancel or in any way change the alien’s obligation to leave the country. (Article 52/5 of the Aliens Act)

Permission to remain in the Republic of Slovenia ceases to be valid immediately after the reasons preventing deportation cease to exist or if an alien acquires the permit to reside in the Republic of Slovenia on the basis of a law or an international agreement. (Article 53 of the Aliens Act)

b. **Special Form of Protection**

Pursuant to the country’s obligation to respect the principle of *non-refoulement* the Asylum Act of the Republic of Slovenia established a “special form of protection.” The difference between a special form of protection and the permission to remain is that the special form of protection can only be granted to a person who previously applied for asylum and whose application was rejected while the permission to remain can be granted to migrants with no status who did not seek asylum. In addition, the permission to remain is granted by the police while the special form of protection is granted by the Ministry of Interior, Asylum Sector.
The Asylum Act prohibits forced removal or deportation of persons to a country where their life or freedom would be threatened or to a country where he could be exposed to torture or inhuman and degrading treatment or punishment. (Article 6/1 of the Asylum Act) Persons whose right to asylum has not been recognized and may not be removed or deported, can be granted a special form of protection in the Republic of Slovenia, provided by the Asylum Act. (Article 6/2 of the Asylum Act)

The special form of protection means permission for the foreigner whose asylum application has been rejected by a final decision, to stay temporarily in the Republic of Slovenia. (Article 61/1 of the Asylum Act) The special form of protection may be granted to the foreigner by the authority that conducted the asylum procedure on his or her request or ex officio. (Article 61/2 of the Asylum Act) It is granted if:

- removal from the country would contradict paragraph 1 of Article 6 of this law (see two paragraphs above);
- conditions to protect the foreigner in the republic of Slovenia exist pursuant to another regulation or an international agreement

(Article 61/3 of the Asylum Act)

The competent authority may grant the special form of protection in Slovenia for as long as these reasons exist but for no more than six months. Upon the proposal of the alien, the special form of protection may be extended. (Article 61/4 of the Asylum Act)

The alien may lodge an appeal against the decision on the special form of protection within three days after the receipt of the decision. The competent authority to decide upon the appeal is the Government of Slovenia. The Government must decide within seven days. An administrative litigation is allowed against the decision on the appeal by filing a complaint to the Administrative Court in 30 days after the decision is served. (Article 61/5 of the Asylum Act)
With the decision by which an alien is granted special form of protection in Slovenia, the Ministry of Interior shall accommodate him/her in the asylum home or its branch or determine the alien’s domicile at a designated address. (Article 61/6 of the Asylum Act)

c. Deportation Barriers for Displaced Persons

For special provisions on deportation barriers regarding displaced persons under temporary refuge see above section on Displaced Persons, pages 9 and 10.

4. Regularization

There are no legal provisions regulating regularization of illegal migrants in the Republic of Slovenia.

However, in the late nineties the Slovenian Government decided to tackle the so-called problem of the “erased” population. Members of this population were citizens of the republics of the former Yugoslavia who were permanent residents in Slovenia at the time of Slovenia’s separation from Yugoslavia. Since for some reason they did not apply for the citizenship of the Republic of Slovenia in accordance with a newly adopted Citizenship Act, approximately 18,000 of them was erased from permanent residency registry in 1992. A 1999 Regulating the Status of Citizens of the Other Republics of the Former Yugoslavia Act was an attempt to regulate the statuses of these people by returning them their permanent residence permits.977


698
5. Detention

a. General

Until the time they are deported, but for no longer than six months, aliens who do not leave the country in due time and whom it is not possible to deport immediately for whatever reason, are ordered by the police to move to the Center for Aliens (hereinafter referred to as the “Center”) or outside the Center, until their removal from the country. (Article 56/1 of the Aliens Act) This provision is also applied in cases where the identity of the alien is not known. (Article 56/2 of the Aliens Act) If an alien is not possible to accommodate at the Center due to special reasons or needs he or she may, in agreement with the social security office and with the costs borne by the Center, be accommodated at a social security facility or provided with other appropriate institutional care. (Article 56/3 of the Aliens Act)

In 2004 there were 1.544 detention decisions issued, in 2003 1.908 and in 2002 3.272 decisions. ⁹⁷⁸

b. Stricter Police Supervision

An alien may also be accommodated under stricter police supervision in the Center. (Article 57/1 of the Aliens Act) Accommodation under stricter police supervision may be ordered by a police decision if it is suspected that the alien will attempt to avoid deportation or if the alien has already avoided such a measure, or if this is nec-

⁹⁷⁸ See above note 1.

Živanović on 04. 04. 2005.
necessary due to reasons of public order, national security or international relations. Residence under stricter police supervision is ordered for the period required for the removal of the alien, however, not exceeding six months. (Article 57/2 of the Aliens Act) Stricter police supervision shall mean the restriction of the freedom of movement to the premises of the Center and in accordance with the house regulations of the Center. (Article 57/3 of the Aliens Act)

According to the sample form used for decisions on stricter police supervision, this measure is imposed to aliens if:

- an alien was prohibited to enter Slovenia,
- expulsion from Slovenia was issued to an alien as an additional punishment for a crime;
- precautionary measure of expulsion of an alien was issued to an alien for a minor offence;
- if the identity of a foreigner was not determined.

In 2004 no decisions on stricter police supervisions were issued. In 2003 there were 8 decisions on stricter supervision issued while in 2002 there were 464 such decisions.  

\[\text{c. Procedure}\]

An alien’s accommodation at the Center or outside the Center and accommodation under stricter police supervision are ordered by the police with a decision, against which the alien may file an appeal to the Ministry of Interior within a period of eight days of the receipt of the decision. (Article 58/1 of the Aliens Act) An appeal does

\[\text{See above note 1.}\]
not withhold the execution of the decision. (Article 58/2 of the Aliens Act) An appeal must be decided upon by the minister within eight days. An administrative dispute [judicial review] may be initiated against the decision on the appeal. (Article 58/3 of the Aliens Act)

If for objective reasons it is not possible to deport an alien even after six months have passed, the police may:

- extend accommodation at the Center or accommodation under stricter police supervision for a further six months if it is realistic to expect that it will be possible to deport the alien within this time and, in particular, if the procedure for determining identity or the acquisition of documents for the deportation of the alien are still in progress, or if the extension is necessary for security reasons;
- determine another place of accommodation for the alien outside the Center until his/her deportation, where he/she must observe the rules on accommodation outside the Center; the alien may otherwise be re-accommodated at the Center. (Article 58/4 of the Aliens Act)

The police may adopt such measures even before six months have passed if, for objective reasons, it is not realistic to expect that the alien will be deported from the country within that time. (Article 58/5 of the Aliens Act)

In the last five years (2000-2004) the maximum duration of detention (six months) was never exceeded.\(^{980}\)

\(^{980}\) See above note 1.
d. More Lenient Measures

The police may, at any point in time, replace the measure of the obligatory accommodation of an alien at the Center with more lenient measures if they believe that it is possible to thereby accomplish their purpose. (Article 59/1 of the Aliens Act) On the basis of the preceding paragraph of this Article, the police may allow an alien to reside outside the Center, whereby the police may determine the place of residence. (Article 58/2 of the Aliens Act) In the event of such measure the police may restrict the movement of an alien to his or her place of residence, and impose on him or her, an obligation to report regularly to the nearest police station. (Article 58/3 of the Aliens Act)

In 2005 more lenient measures were imposed in 16 cases, in 2003 in 10 cases and in 2002 in 94 cases.\(^{981}\)

e. Minors

Alien minors who have entered the Republic of Slovenia illegally and who were not accompanied by their parents or other legal representatives, or who remained without the persons who accompanied them after they arrived in Slovenia shall be temporarily accommodated by the police at the special department responsible for minors at the Center for Aliens, and the social work centre be notified hereof, which shall, in accordance with the law, immediately designate a temporary representative for the minors, if the authority which apprehended them cannot return them immediately to the country from which they came or deliver them to representatives of the country of which they are citizens. (Article 60/1 of the Aliens Act)

\(^{981}\) See above note 1.
Such minors must not return to their country of origin or to a third country which is willing to accept them until suitable reception is provided; in no case may unaccompanied minors be returned in violation of the European Convention on Human Rights and Basic Freedoms, adopted with Protocols 3, 5 and 8 and supplemented with Protocol 2 and its protocols 1, 4, 6, 7, 9, 10 and 11 (Official Gazette of the Republic of Slovenia RS-MP, no. 7/94), the European Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Official Gazette of the Republic of Slovenia RS-MP, no. 1/94), or the Convention on the Rights of the Child (Official Gazette of the Republic of Slovenia RS-MP, no. 9/92). (Article 60/2 of the Aliens Act)

Alien minors shall, as a rule, be provided with accommodation at the Center together with their parents or legal representatives, unless it is assessed that other solutions may be better for them. (Article 60/3 of the Aliens Act) In the case of minors under 16 years of age, stricter police supervision may be only ordered exceptionally, whereby they must be accompanied by both or at least one of their parents. (Article 60/4 of the Aliens Act)

In 2004 194 minors were detained in Aliens Center, in 2003 172, and in 2002 237.982

f. Cessation of Accommodation at the Center

The accommodation of an alien at the Center shall cease when all reasons for it cease to exist or when its purpose has been achieved. (Article 61/1 of the Aliens Act) The Ministry of Interior may, with the decision by which it permits an alien to remain in the Republic of Slovenia, determine a specific address as the place of accommodation instead of accommodation at the Center. (Article 61/2 of the Aliens Act) Ac-

982 See above note 1.
Country Report Slovenia

accommodation at the Center may also be cancelled at the request of an alien if the police determine that the conditions are given for more lenient measures in accordance with this Act. (Article 61/3 of the Aliens Act)

III. Assisted Voluntary Return

If a person expresses their wish to return to their country of origin voluntarily a so-called assisted voluntary return (AVR) is organized and carried out by the International Organization of Migration (IOM).

Persons who are entitled to AVR are:

- illegal migrants,
- victims of trafficking,
- asylum seekers whose asylum application was withdrawn before final decision or was not granted a refugee status, and
- displaced persons under temporary refuge.

Similarly as for involuntary return, most of the voluntary return is carried out by air. Due to lower numbers of migrants in Slovenia the authorities use regular lines instead of charter lines. In cases of return to neighboring country the persons are sometimes returned by ground transportation. In the case of persons under temporary refuge there were also ground convoys organized in order to transfer people and their
belongings (namely, in that case people lived in Slovenia for longer periods of time and had many personal belongings to transport).  

1. Incentives Encouraging/Supporting Return

There are no provisions on incentives encouraging or supporting the return of illegal migrants or refugees.

However, when Bosnian refugees under temporary refuge were being retuned to their Country of Origin they were entitled to financial support in amount of 1000 EUR, which was decreased with time to an allowance of 416 EUR (with a purpose of encouraging early return).  

2. Assisted Voluntary Return of Recognized Refugees

The authority competent to deal with recognized refugees in Slovenia is Immigration Sector (previously called Immigration Directorate), an organizational unit within the Ministry of Interior. In 2004 they dealt with a first case of a recognized refugee (an asylum seeker who was granted a refugee status) who expressed a wish to return to his country of origin and was actually retuned. Due to the lack of legal regulation of such situation the Immigration Sector took several ad hoc measures to carry out the return.  

983 See above note 5.
984 Information was obtained at the interview on 28 June 2005 with Ms. Sonja Gole Ašanin, Immigration Sector, Ministry of Interior.
985 Id.
When the refugee expressed that he wished to return to his country of origin the Immigration Sector officials first obtained country of origin information according to which the situation there was not safe. Accordingly, the officials dissuaded him from returning. The refugee insisted he wished to return. His decision was double checked by the Asylum Sector (an organizational unit competent for processing asylum applications) and since it was established that a refugee’s decision is voluntary the Asylum Sector issued a decision on termination of his refugee status. In order to protect the refugee, no deadline to leave the country was specified in a decision since it was not clear how it would proceed.\footnote{986}

Since the Asylum Act does not regulate such situation the officials made sure that the refugee would not be prevented to enjoy his rights to which all recognized refugees are entitled (free housing, social benefits etc.) by keeping his name in the registry of recognized refugees until the actual date of his return.\footnote{987}

In the meantime (between the decision was issued and his actual return) the Immigration Sector contacted the IOM that carried out all the activities necessary for facilitating the return: counseling, providing information on his country of origin and contacting the embassy of his country of origin, obtaining valid traveling documents, purchasing a cheaper air ticket etc. At the actual return, the returnee was accompanied to the airport. The IOM arranged that the IOM in a connecting country received him and accompanied him to the connecting flight.\footnote{988}

While processing this return it became clear that the main existing legal loophole is the lack of provisions regulating the status of a refugee between the date when a statement expressing a wish for voluntary return is given and the date of the actual

\footnote{986} Id.
\footnote{987} Id.
\footnote{988} Id.
return. Namely, if certain part of the authorities strictly interpreted the decision on the termination of his refugee status he should be treated as an illegal migrant and should await his return in the Center for Aliens, which would be unacceptable. In order to avoid similar uncertain situations in the future the Immigration Sector will propose amendments to Asylum Act, stating that a refugee who stated that he or she wishes to return voluntarily to his country of origin shall be treated as a refugee in his rights and duties, until the day of his actual return. According to a different status of a person who has already had his or her refugee status recognized, it would be reasonable if the return of such person would continue to be administered by the Immigrations Sector and not the Police.989

3. Assisted Voluntary Return of Illegal Migrants and Asylum Seekers whose Application has been rejected

The IOM plays a key role in voluntary returns of illegal migrants and victims of trafficking. Again, there are no legal provisions regulating their activities, therefore all return programs were project based. IOM only administers voluntary returns and due to a constant lack of funds mostly to persons who pay for the return by themselves. On many occasions the Aliens Center contacts them and asks for assistance with voluntary return, but if no funds are allocated for such returns IOM cannot process them.990 In 2001 and 2002 IOM Ljubljana assisted 15 asylum seekers and illegal migrants. Besides, other assistance and counseling was provided to nearly 100 migrants.991

Other assistance provided by IOM Ljubljana included: providing travel documents for returning home or to resettle; providing transit assistance at the Ljubljana's airport

989 Id.

990 See above note 5.

991 IOM Ljubljana - yearly statistics.
Country Report Slovenia

for migrants traveling through Slovenia as well as counseling assistance to more than 20 other migrants who contacted IOM in 2002. Those migrants were mainly from Romania, Bulgaria, the Philippines, Iran and FRY and have asked IOM for assistance to return home. Since the Memorandum on AVR with the Government of Slovenia was not yet signed at the time, IOM Ljubljana could not return all the migrants who had asked for return assistance but only the self payees. However, the migrants were provided with all the other assistance. 992

In 2003 counseling assistance was provided to 6 migrants who were originating from Serbia and Montenegro, Bosnia and Herzegovina, Moldova and Kosovo. Mainly they were asking for the resettlement assistance. One migrant (the so called "erased") who was already residing in Slovenia was asking for the return assistance back home to Bosnia and Herzegovina. 993

4. Assisted Voluntary Return of Victims of Trafficking

In 2001 and 2002 IOM Ljubljana assisted 4 victims of trafficking. On the basis of the Project on Assisted Voluntary Return & Reintegration Program for Victims of Trafficking in Slovenia, return and reintegration assistance was offered to one victim of trafficking to return home to Ukraine in 2003, where the person was assisted with the reintegration assistance by IOM Kiev. 994

Through IOM victims of trafficking (as well as other vulnerable groups, e.g. minors) receive additional assistance in the country of origin: housing, psycho-social assis-

992 Id.
993 Id.
994 Id.
tance, education and feedback on the progress of a person from the IOM offices in countries of origin.995

5. Assisted Voluntary Return of Displaced Persons under Temporary Refugee

Since the beginning of the Pilot Project on the Assisted Voluntary Return, (2001) IOM Ljubljana assisted altogether 130 migrants to return home to Bosnia and Herzegovina (mainly to Republika Srpska) in the northern part of BiH through six convoys. The assistance was provided in cooperation and upon the request of the Governmental Office for Immigration and Refugees, Center for Aliens, Slovenian NGO's and other relevant migrant organizations.996

In order for the realization of the return of the migrants to be orderly, humane and cost effective IOM Ljubljana provided technical assistance and escort. Due to a close co-operation with the Ministries of the Interior in transit and destination countries, UNHCR and IOM Missions in Croatia and Bosnia and Herzegovina all the relevant border and other authorities have been informed about the convoys in advance. Accordingly all the migrants returned home safely. Due to IOM endeavors crossing the borders was custom-free. The returnees were received by the IOM Sarajevo and IOM Banja Luka. The costs were covered by the Immigrations Sector (at the time called Office for Immigration and Refugees).997

6. Cooperation with the Authorities

995 See above note 5.
996 See above note 35.
997 See above note 5.
Country Report Slovenia

An important step was taken on 25 July 2005 when the Government and the IOM Ljubljana signed a Memorandum between the Government of the Republic of Slovenia and the International Organization for Migration on Cooperation in the Programme of Voluntary Return of Migrants (Memorandum). The Memorandum was signed after two years of negotiations, recognizing the importance of Slovenia’s international commitments and conviction that AVR will contribute to attaining of the Slovenia’s migration policy.

The purpose of the memorandum is to set forth the cooperation between the parties as outlined in the previously concluded agreement (Agreement on Cooperation between the Government of the Republic of Slovenia and the International Organization for Migration), and particularly to define the framework of the implementation of the program for the assisted voluntary return for certain categories of migrants (Program). (Article 1/1 of the Memorandum) The parties (Ministry of Interior for the Government and IOM Ljubljana for the IOM) also agreed that in implementing the program a special attention will be give to vulnerable groups of migrants (persons with special needs and notably victims of trafficking in human beings, unaccompanied minors, unaccompanied women, the disabled, the elderly, pregnant women, single parents with minor children, victims of sexual abuse and victims of torture or organized violence). (Article 1/2 of the Memorandum)

According to the memorandum voluntary return means free and informed decision of a person to return to the country of origin freely and on his/her own will. If such return is not possible, or if a person is stateless, a voluntary return means that a person, based on his/her own will, freely returns to the country of his/her last permanent

998 See above note 5.

residence or to a country willing or having to receive him/her. (Article 4/1 of the memorandum)

The memorandum comprehensively regulates all aspects of voluntary returns since it includes the following beneficiaries:

(a) Persons illegally residing in the Republic of Slovenia;
(b) Asylum seekers who join the program on their own wish before the asylum procedure is concluded;
(c) Person enjoying temporary refugee;
(d) Victims of trafficking in human beings and unaccompanied minors;
(e) Refugees who join the program on their own wish.

(Article 4/2 of the Memorandum)

The basic provisions of the memorandum are establishing an obligation of the Ministry of Interior to inform the beneficiaries on the contents of the programs carried out by the IOM (Article 5 of the Memorandum), responsibilities of the IOM Ljubljana, such as counseling the beneficiaries in cooperation with government bodies, providing information on the country of origin conditions and on persons/entities the returnees can contact if they need additional advice or counseling. (Article 6/1 of the Memorandum)

Moreover, the memorandum specifies the contents of the assistance that the IOM in agreement with the competent bodies will provide to the beneficiaries:
(a) Assisting in obtaining valid travel documents;
(b) Organizing transport if requested by the competent authority;
(c) Whenever it is possible, organizing assistance upon departure, transit and arrival in the country of origin;
(d) Offering other forms of assistance in relation to the preceding points of this Paragraph and in accordance with its competencies and capabilities.
Country Report Slovenia

(Article 6/2 of the Memorandum)

For its services the IOM will receive funding from the state budget based on the proposed financial plan of the programs for the following fiscal year. (Article 7 of the memorandum) Currently, it is not clear what will be the scope of funding since the negotiations are still taking place. In return the IOM will have to report to the Ministry of Interior every six months. (Article 8 of the Memorandum)

This memorandum will be valid until December 31, 2005. Its validity will be tacitly extended every year.
Sources

- Aliens Act (Official Gazette of the RS, No. 108/2002, entered into force 27 November 2002);
- Asylum Act (Official Gazette of the RS, No. 134/2003, entered into force 14 August 2003);
- Immigration Sector's yearly statistics;
- Interview on 28 June 2005 with Ms. Sonja Gole Ašanin, Immigration Sector, Ministry of Interior;
- Interview on 29 June 2005 with Ms. Alenka Malenšek, International Organization for Migration Ljubljana;
- Interview on 27 June 2005 with Ms. Tamara Jerman, United Nations High Commissioner for Refugees, Branch Office Ljubljana;
- IOM and Assisted Voluntary Return: An Overview (August 2004);
- IOM Ljubljana - yearly statistics;
- Memorandum between the Government of the Republic of Slovenia and the International organization for Migration (IOM) on Cooperation in the Programme of Voluntary Return, signed on 25 June 2005;
- Penal Code (Official Gazette of the RS, No. 95/2004);
- Temporary Refuge Act (Official Gazette of RS, No. 20/97, No. 67/2002).
- CHAPTER XVI -

COUNTRY REPORT SPAIN

by
Prof. Christina Gortazár,
Universidad Pontificia Comillas,
Madrid
RETURN AND REPATRIATION:

EU POLICIES AND NATIONAL PRACTICES

****************************************************************************

Prof. Dr. Emiliano Garcia Coso
Prof. Dr. Cristina. Gortazar
Assistance Lecturer Irene Claro Quintans

1. Foreigners obliged to return to their home Country
2. The impact of the EU Directives on return and repatriation policies
3. Dublin II and EURODAC
4. Legal administrative barriers for enforcement of return (deportation)
5. Conclusions
1. **Foreigners obliged to return to their home country**

The removal policies and practice in Spain give the same treatment to all aliens, whether they are refused asylum seekers or illegal alien on other grounds. This will be the point of view to understand the following explanation of the Spanish system.

The asylum procedure -or other kind of international protection- is only applied to aliens who clearly ask for asylum or international protection, either at the Spanish border or inside the Spanish territory. The procedure applied to those persons is described by 1994 Asylum Act and its 1995 Implementation Rules. If they do not obtain the refugee status or other subsidiary protection status (that is, international protection), the asylum authorities finish their tasks by notifying the refused asylum seeker the request to voluntarily leave the Spanish territory in 15 days.

At this moment the refused asylum seekers fall under the 2003 Aliens Act and the 2004 Implementation Rules to that Act. Thus, if they do not leave the Spanish territory in the established period of time, and provided that they are not able to regularise their status as legal aliens through the 2003 Aliens Act, they incur into a grounds of expulsion and an expulsion order may be delivered against them. They become irregular aliens in the same way as other irregular aliens who never have applied for asylum (i.e.: those who managed to enter the Spanish territory irregularly or those who entered the Spanish territory regularly but incurred into an irregularity sur place).

It is to be noted that in practice most irregular aliens in Spain (“sin papeles”) manage to remain into the Spanish territory even if they have incurred into grounds for expulsion due to their irregular residence. Quite often those irregular aliens find a job in the black market and sometime afterwards an important num-

---

ber of them reaches some kind of regularisation, either because they are in the list of preferences to obtain a work permit, or because they obtain a temporary permit due to the figure of “arraigo” (irregular residence during a time period of three years jointly with special links in Spain).

Moreover, there have been already five extraordinary regularisation procedures in Spain since first 1985 Aliens Act\(^\text{1002}\) was approved. Currently (April, 2004) the sixth extraordinary process is open and the Spanish Government thinks that around 800,000 irregular worker immigrants could obtain their work permit during this process, however, nearly to finish it, only some 350,000 have acceded to the procedure.

Hence, it is to be said that most of irregular aliens in Spain are not removed. The practice in Spain is that the expulsion orders are executed when the irregular alien commits a summary crime or is involved in acts contrary to public order, otherwise the practice is a kind of unofficial “toleration” of irregular immigrants.

Following the task to explain the characteristics of Spanish removals policies and practice, it is useful to describe, on the one hand, the different legal regime to be applied on immigration and asylum cases, and on the other hand, the single removal procedure for every kind of irregular immigrants (refused asylum seekers or others).

It must be remarked that Spanish legislation refers that the foreign no community citizens can be divided in two groups:

A. The first group consists of all aliens, in general sense. This group includes all aliens that come to Spain wanting to work and improve their living conditions (the so


called economical migrants who applied for or are granted residence and labour permits), but also includes all tourists and students (both beyond the regime “to stay”), and finally the aliens who do count with a residence permission but are not allowed to have a lucrative activities.

The rules that regulate the stay and residence of these aliens is mainly compiled in the 2003 Aliens Act and the 2004 Implementation Rules.

B. The second group of foreign citizens refers to asylum seekers. Obviously, this group represents a minor group compared with the earlier mentioned group of aliens.

The Spanish legislation regarding the situation of the foreigners who apply for asylum is ruled by the 1994 Asylum Act and the 1995 Implementation Rules.

It is necessary to clarify that the Spanish legislation does not include a special system of sanctions concerning expulsion for failed asylum seekers. After denying the application, the asylum seekers will be treated according to the general 2003 Aliens Act, including the rules concerning removals, expulsions and devolution, that is, the sanction rules of the 2003 Aliens Act and the 2004 Implementation Rules.

According to the Spanish Law a failed asylum seeker, in the terms described above, will be considered as a normal migrant, and will be ruled by the normal regulation for aliens at all effects and will not be anymore ruled by the asylum legislation. That is why in Spain the procedures and the statistical figures about removals, expulsions, devolution and returns refer not only to those aliens who have once applied for the asylum status that has been denied (the failed asylum seeker), but also to those who have never had any juridical relationship with asylum, like a foreign worker in irregular situation, a foreign student without permission, etc.
It is very important not to forget these facts in order to understand the Spanish legislation concerning rights, duties and liberties of the foreigners in Spain and the practical application of the rules. In the study, we will be obliged to refer to both groups defined above, because this is the only way to produce a complete and integrated study of the policies and practices of removals, expulsions, devolution and voluntary returns of foreign persons from Spain.

Every refused asylum seeker who does not regularised his/her situation or does not leave the Spanish territory in the 15 days time period, becomes an irregular immigrant and therefore an alien who has incurred into a grounds for expulsion.
2. The impact of the EU Directives on return and repatriation policies

The Spanish legislator has made several modifications to Spanish legislation in order to comply with its obligations as a Member State of the EU. Specifically, with regard to the legislative modifications, the Spanish legislator refers to the adaptation of Directive 2001/51 of June 28, 2001, whereby the provisions of article 26 of the Application Convention for the Schengen Agreement (hereinafter the Carrier Directive), to Directive 2001/40 concerning the mutual recognition of the decisions as regards the expulsion of nationals from third countries and Directive 2002/90 of November 28 intended to define the aid given on entry, to the movement and the irregular stay, and to this end one of the sanction classifications stipulated in the law is perfected. This Directive was completed with the Framework Decision of July 19, 2002 concerning the fight against the trafficking of human beings\textsuperscript{1003} (hereinafter Framework Decision 2002) which has meant modifications to the Spanish criminal legislation framework in order to reinforce the administrative area.

In addition, a brief reference will be made to the adaptation of Directive 2003/9 of January 27, 2003 whereby minimum norms are approved concerning the reception of asylum, applicants in the Member States and Directive 2004/81 of April 29, 2004, concerning the issue of a residence permit to the nationals of third countries who are the victims of the trafficking of human beings or who have been aided as regards illegal immigration and cooperate with the competent authorities.

The implementation of the first three Directives is carried out through the approval of Organic Law 14/2003 of November 20 on the Reform of Organic Law 4/2000 of January 11, on the rights and liberties of aliens in Spain and their social integration, modified by Organic Law 8/2000 of December 22. However, the adaptation of the 2002 Framework was made through Organic Law 11/2003 of September 29 on spe-

\textsuperscript{1003} OJEC, 1.8.2002. L203/1.
cific measures regarding the security of citizens, domestic violence and the social integration of aliens. 1004

The Implementation of Directive 2001/51:

In Organic Law 14/2003, the legislator provides reinforcements for the combat against the so called legal smuggling carried out by some transport companies and tries to eliminate the incentives by applying the Directive through two reforms in the context of the LOE and its Royal Decree. The former considers certain conduct of the transport companies as very serious infringements of article 54 of the LOE. The latter establishes specific obligations for the carriers pursuant to article 66 of the LOE.

In relation to the first reform, this is established within the very serious infringements of article 54.2 of the LOE, where we find that there are a number of obligations for the legal persons and, specifically, for the companies involved in the transport of passengers, and failure to comply with these gives rise to this infringement of the LOE. Both section 2 and section 3 are aimed at the transport companies. The referential legislation for these obligations affecting the carriers derives from the signing of the Application Convention of the Schengen Agreement by Spain on June 19, 1990 and Directive 2001/51 which completes the Schengen Agreement.

In consonance with this international obligation contracted by Spain, the Spanish legislator considers this as a very serious infringement in 2 of article 54 of the LOE:

---

2. The following are also very serious infringements:

a) Failure to comply with the obligations laid down for carriers in article 66, sections 1 and 2;

b) The transport of aliens by air, sea or land to Spanish territory by the persons responsible for the transport when they have not checked that the passports, travel entitlements, relevant identity documents and possible visas held by the aforementioned aliens were valid or in force.

c) Failure to comply with the obligation the carriers have to immediately take charge of the alien transported, who is not authorised to enter Spain due to deficiencies in the aforementioned documentation.

This obligation will include the cost of maintaining the alien and, if the authorities in charge of controlling the border so request, the costs deriving from the transport of the alien, which must be carried out immediately either by the company sanctioned or, failing this, by another transport company, to the State he was brought from or to the State which issued the travel document he has used to travel or any other State where he is guaranteed admission.

What is established in the previous two letters is also understood as regards the cases in which the air or sea transport takes place from Ceuta or Melilla to any other point in Spanish territory.

3. Notwithstanding the provisions in the previous articles, the fact that an alien is transported to the Spanish border and this alien submitted his application for asylum without delay and this application is admitted to processing in accordance with the stipulations of article 4.2 of Law 5/1984, of March 26, modified by Law 9/1994 of May 19 de mayo, this will not be considered to be an infringement of this Law.

The requirements in Directive 2001/51 as regards carriers is fully consolidated with the stipulations in article 66 of the LOE:

1. When the Spanish authorities determine this as regards the routes from outside the Schengen Area where the intensity of the migratory flows makes it necessary, in order to combat illegal immigration and guarantee public safety, any company, transport firm or transporters will be obliged to send the Spanish authorities responsible for controlling entry the information concerning the passengers who are to be transferred by air, sea or land, independently of the fact that the transport is in transit or to the final destination, to Spanish territory. This must be done when boarding has been completed and before departure.

The information will include the names and surnames of each passenger, their dates of birth, nationalities, passport numbers or travel documents which accredit their identities.

2. All the companies, transport firms and transporters will be obliged to notify the Spanish authorities responsible for entry control of the information on the number of
return tickets not used by the passengers they might have previously brought to Spain by air, sea or land from routes proceeding from outside the Schengen Area. When the Spanish authorities determine so, under the terms and for the purposes stated in the previous section, the information will also include the names and surnames of each passenger, their dates of birth, nationalities, passport numbers or travel documents which accredit the identities of passengers who are not citizens of the European Union, the European Economic Area, or from countries which have an international convention which extends the legislation stipulated for the citizens of the States mentioned.

The information stated in this section must be sent within a period no greater than forty-eight hours from the date of expiry of the ticket.

3. In addition, all companies, transport firms and transporters will be obliged to

Duly check the validity of the relevant passports, travel documents or ID cards and possibly the visas held by aliens;

Immediately take responsibility for the alien they may have transported to the air, sea or land border with Spanish territory if the alien has been refused entry due to deficiencies in the documentation required to cross the borders;

Take responsibility for the alien who might have been transferred in transit to an air, sea or land border with Spanish territory if the carrier who must take him to his country of destination refuses to allow him to board, or if the authorities in the country of destination have refused him entry and returned him to the Spanish border through which he had passed.

Transport the aliens referred to in letters c) and a) of this section to the State from where he was transported either to the State which issued the travel document with which the alien travelled or to any other State where he is guaranteed entry.

4. What is stipulated in this article, is also understood to refer to cases where the air or sea transport is from Ceuta or Melilla to any other point in Spanish territory.”

In relation to this infringement and the obligations of the carriers, several critical considerations, which are closely related to each other, must be made. In the first place, the party obliged to comply with the conditions imposed by article 26 of the Schengen Agreement is the Spanish State, and possibly, the public powers ascribed to the Administration or functionally dependent on this. Specifically, the State security forces and corps of the State. In the second place, if the party responsible is the State in all its extension, it is criticisable that they oblige the various modalities of transport companies to replace the position of the State, granting them police powers which must only correspond to the Administration, with the threat that they will oth-
erwise incur a very serious infringement. In the third place, the transport companies do not have the qualified personnel required to check and evaluate whether the accrediting documents required to permit entry to the Schengen Area valid, in force and authentic.

Royal Decree 2393/2004 develops the rules covering the obligations of the carriers both as regards the control of documents and the forwarding of information such as in the case of refusal of entry in articles 14 to 16 of Royal Decree 2393/2004.

Another infringement which the transport companies can incur is the one stipulated in letter c) of section 2 of article 54, which is accumulative due to its scope. This statement is sustained by the fact that, when an alien transported to Spanish territory is not authorised to enter, not only will he have incurred the infringement in a), analysed above and subject to sanction, but this sanction may be increased if the transport company responsible does not assume the maintenance costs of the alien in question in the so called “waiting areas”.

Furthermore, if the border authorities request, they must commit themselves to assuming the cost of returning the alien, either directly or by subcontracting the return journey to the State the alien left from, or to the State which issued the travel documentation, or to any other State which guarantees admission, to another transport company. This final question does not lack critics, taking into account the difficulties and problems which arise not only to guarantee admission, but also that the country be a safe one.

The only possibility the transport companies have not to incur the infringements described and to be exempt from administrative responsibility is that the alien transported apply for asylum on arrival at the Spanish border and without delay and that this application be admitted to processing as stipulated is section 3 of article 54 of the LOE.
The inconvenience is that two circumstances must exist which do not depend on the transport company. The first is that the alien transported wishes to apply for asylum. Moreover, this must take place without delay, which excludes applications made once a certain period of time has elapsed. The second circumstance is that the competent authority accept the application for processing so that it can be studied. In any case, if one of these objective conditions does not arise, the transport company will be responsible for the infringement and will be sanctioned.

**The implementation of Directive 2001/40 on the mutual recognition of expulsion decisions:**

Through the reform introduced by Organic Law 14/2003, the Spanish legislator complies with the aim of this Directive. Thus, section 3 of article 64 of the LOE, in relation to the execution of the expulsion sanctions establishes that, when an alien is detained on Spanish territory and it is verified that a Member State of the EU has dictated an expulsion resolution against him, the resolution will be executed immediately with no need to file new expulsion proceedings. In addition, the Instruction Judge can be requested to commit him to an internment centre in order to ensure the expulsion sanction.

**The implementation of Directive 2002/90 and the Framework Decision of November 28, 2002:**

Directive 2002/90 imposes the obligation on the Member States to adopt sanctions which are effective, proportionate and dissuasive on all persons who intentionally or for financial reasons assist a non-Community national to enter, pass through or reside in a Member State, in violation of the laws of the States affected by this entering, passing through and illegal residence. In the event that this is humanitarian aid, each State can decide whether this conduct should be punished or not. The person who
instigates, participates or attempts to carry out such actions will also be punished.\textsuperscript{1005} The Framework Decision establishes the penalties and the sanctions related to this conduct and these must be effective, proportionate, dissuasive and can even mean extradition. The Spanish legislator has complied with both European norms through the reform of the LOE, through Organic Law 14/2003, and the Spanish Criminal Code, through Organic law 11/2003.

From the point of view of Directive 2002/90 and its implications of an administrative nature, the Spanish legislator has adapted the objective of the Directive in article 54 of the LOE. Specifically, article 54.1.b) of the LOE is the rule which defines the conduct of subjects, individually or forming part of an organisation which is profit making and induces, promotes, favour or facilitate the smuggling of persons in transit through or whose destination is Spanish territory or residence in Spain on condition that it does not constitute an offence as a very serious infringement.

In order to determine whether the criminal type is involved, it is necessary to take into account the stipulations of article 318 \textit{bis} of the Spanish Criminal Code, which omits induction and stipulates that the aliens who promote, favour or facilitate the illegal trafficking of persons are criminally responsible. The extension of this criminal provision means that there is little margin for an administrative infringement of this nature. Thus, there could be an administrative infringement if the alien does not form part of an organisation or if the organisation is not a profit making one. Otherwise, it would be of a criminal type.

As the Spanish legislator has pointed out, although our criminal legislation had already included measures to combat this criminal activity, with the current Organic Law the Spanish government complies with its Community commitments and substantially increases the penalties laid down against the illegal trafficking of persons

\textsuperscript{1005} Articles 1,2,3 of the Directive.
with prison sentences of between four and eight years in consonance with the Framework Decisions under study.

As we stated above, the Spanish criminal legislation which combats smuggling or trafficking is article 318 bis which has been reformed in consonance with Community harmonisation. Thus, it is laid down that the person who directly or indirectly promotes, favours or facilitates illegal trafficking or the smuggling of persons from, in transit through or with Spain as their destination, will be punished with a sentence of four to eight years imprisonment. Therefore, it includes the full extension of the provisions of the Framework Decision for the fight against smuggling. In addition, as regards the persons involved in illegal trafficking or smuggling with a view to exploiting these persons sexually will be punished with a sentence of five to ten years imprisonment. This sentence complies with the requirements imposed by the Framework Decision regarding trafficking.

The Spanish legislator introduces the penalties described in their upper half, that is to say from 6 to 8 years for the cases of smuggling and from 7 to 10 years for the cases of trafficking when the conduct of the persons responsible involves the following:
In order to make profit, using violence, intimidation, deceit, abusing a situation of superiority, the special vulnerability of the victim, the victim is a minor or incapacitated, danger to the life, health or integrity of the persons.

In addition, in order to combat organised crime, when these persons belong to organizations or associations, even if this is only transitory, and these organisations or associations are involved in these offences, they will be convicted to 8 to 12 years imprisonment and possibly special disqualification as regards their professions, trades, industries or commerce during the period of conviction. If those convicted are the heads, administrators or persons in charge of these organizations or associations, the penalties imposed will be those in the upper grade which might be from 10 to 15 years or even from 15 to 22 years.
As can be seen from the penalty system, the legislator complies with Community legislation and wishes to demonstrate his commitment to the persecution, repression and conviction of the persons involved in smuggling or trafficking activities. When it is a question of legal persons involved in these offences, in accord with the drafting given by Organic Law 11/2003, article 318 establishes the same penalties but these are imposed on the Directors or those in charge of the legal person and on those who know of this and do not adopt measures to prevent such activities within the framework of business activity.

Finally, the Spanish legislator has also introduced modifications in order to provide a penal response to aliens who are not legally resident in Spain and who commit offences. Thus, the changes introduced by Organic Law 11/2003, in sections 1,2,3 of article 89 of the Spanish Criminal Code in relation to article 57.7 of the LOE, that, as regards illegal aliens who commit offences punishable with imprisonment for less than six years, the general rule is to substitute the penalty by expulsion from the territory. If the period of imprisonment is equal to or greater than six years, once three quarters of the prison term have been complied with or the person has achieved the third penitentiary grade, the expulsion of the alien will be agreed to and he will be prohibited from entering Spanish territory for 10 years.

In conclusion, the Spanish legislator has adapted Spanish criminal legislation to the agreements reached by the EU in an attempt to actively combat organised crime in Spain and in the EU, by reducing the criminal activities of smuggling and trafficking through a substantial increase in the penalties and the financial consequences. In this way, an end is put to the attractions of these offences due to their economic benefits and low penalties.
The implementation of Directive 2003/9 on the minimum standards for the reception of asylum seekers and Directive 2004/81 on the status of the victims of illegal immigration:

Directive 2003/9 has been implemented in Spanish legislation through RD 2393/2004 for the execution of the LOE, whose third final provision establishes the modifications of the Implementation Rules of Law 5/1984, of March 26, regulating the right to asylum and the condition of refugee approved by Royal Decree 203/1995 of October 10. In order to adapt this to Spanish legislation, several specific provisions of Spanish legislation on asylum and refuge have been reformed (articles 2.3.c , 3.g), 15.1 and 3, 22.2, 23.2, 30, 31.3,4 and 5).

Directive 2004/81 on the status of victims is hardly touched on in article 59 of the LOE on collaboration against organised networks, where it is stipulated that it is possible for the victims, those damaged or witnesses of an act involving the illicit trafficking of human beings, illegal immigration, or the illicit trafficking of workers or sexual exploitation will remain exempt from administrative liability and will not be expelled if he denounces those responsible to the competent authorities. As regards these victims, facilities will be given to them to return to the countries they came from or to stay and reside in Spain. This provision of the LOE is the subject of implementation rules through article 117 of RD 2393/2004.

In conclusion, it can be said that, in general, the Spanish legislator has complied with the demands imposed by both Directives.
3. DUBLIN II and EURODAC

The application in Spain of Regulation 343/2003 of February 18, 2003 known in Community jargon as “Dublin II”, whereby the criteria and mechanisms for the determination of the Member State responsible for examining the application for asylum\textsuperscript{1006}, is examined by taking into account the internal regulations on the right to asylum and its development in case law.

The entry into force of the Dublin II Regulations in March 2003 restricts the scope of this analysis as it does not allow us to draw sufficient conclusions to evaluate their possible efficacy.

Spanish Legislation

The entry into force of the Dublin Convention in Spain on September 1, 1997, replacing the provisions of the Schengen Application Convention of 1990 does not mean the approval of any legal or regulation norms. Despite this, current Spanish legislation as regards asylum stipulates that the cases in which the examination of the applications for asylum does not correspond to Spain pursuant to the international conventions it is a party to is the reason for the non-admission of these applications to processing.

Among its main novelties, the reform of Spanish Asylum Law made in 1994\textsuperscript{1007} introduced a procedure for the non-admission to processing of all asylum applications which are considered to be manifestly without grounds to be carried out by the Inte-

\textsuperscript{1006} DOCE Law 50/1 of February 25, 2003.
\textsuperscript{1007} Law 5/1984 of March 26, regulating the right of asylum and the condition of refugee, modified by Law 9/1994 of may 19 (hereinafter, Asylum, Law).
Country Report Spain

The Ministry once there has been a previous hearing of the High Commissioner of the United Nations for Refugees (ACNUR). The fundamental effect is the rejection at the border or the compulsory exit in accordance with the ordinary procedure stipulated by the Law.

The Explanation of the Grounds for the Asylum Law justifies the establishment of this preliminary phase involving the examination of the applications for asylum in order to facilitate the rapid refusal of those applications which are manifestly abusive or have no grounds, those whose examination does not correspond to Spain or when there is another State in a position to provide protection.

This refusal will be made through a reasoned resolution of non-admission to processing, adopted with the necessary guarantees, in particular, the possibility of presenting a request for re-examination with a delaying effect and the participation of the ACNUR in the cases in which the resolution of non-admission to processing is made when the applicant is at the border. The entry of aliens who apply for asylum at the border to Spanish territory will be subject to the admission of their applications to processing.1008

The phase previous to admission to processing takes place when any of the reasons which are established and adjusted by article 5 of the Asylum Law. Among these reasons are those included in sections (e) and (f), which should be pointed out due to their direct or indirect relation with the Dublin Convention, and therefore with the Dublin II Regulations.

1008 Decision of the National Court of May 31, 2001. According to article 5 of the Asylum Law: “On the proposal of the body responsible for investigating the applications for asylum, once the representative of ACNUR in Spain has been heard, the Interior Minister, can refuse to admit these for processing when any of the following circumstances affect the person concerned”.

734
Section (e) of article 5(6) of the Asylum Law implies a clear allusion to the Dublin Convention which, since March 2003, must be understood to be replaced by the reference to the Dublin II Regulations – except for the relations of Spain with Denmark. The Law demands that the State declared to be competent explicitly accept its responsibility and that it provide sufficient guarantees of protection for the lives and liberties of the applicants for asylum.

Furthermore, paragraph (f) includes the application of the concept of the “safe third country”, understood to be the country where the alien obtained asylum or whose protection he might have applied for. This third State must comply with two conditions: the absence of danger to the life or liberty of the applicant and effective protection against return to the country of origin. Regrettably the examination of the application for asylum in the third country is not expressly included as a guarantee for the applicant.

When an asylum application is not admitted to processing due to the fact that its examination corresponds to another State by virtue of the application of the Dublin II Regulations or the concept of “safe third country”, the Spanish Administration has a maximum period of 72 hours from the submittal of the application in order to take the appropriate steps to ensure the transfer of the applicant to the third State.

Once this period has elapsed and there has been no response, the Interior Ministry will authorise the entry of the person concerned to Spanish territory. In addition, if

---

1009 According to article 5(6)(e) of the Asylum Law:
“e) When the examination does not correspond to Spain in accordance with the International Conventions it is a party to. The resolution of non-admission to processing will notify the applicant of the State responsible for examining his application. In this case, this State will have explicitly stated this responsibility and sufficient guarantees for the protection of his life, liberty and the other principles stated in the Geneva Convention in the territory of this State will be obtained”.

1010 Section (f) of article 5(6) of the Asylum Law provides for the following:
“f) When the applicant is recognised as a refugee or has the right to reside or obtain asylum in a third State, or when he comes from a third State whose protection he could have applied for. In both cases, in this third State there must be no danger to his life or liberty nor must he be exposed to torture or to
the response of the third State is negative, the proposal for non-admission will not take effect and the processing of the application will continue through ordinary proceedings\textsuperscript{1011}.

**Case Law:**

The examination of Spanish case law on the matter means that the official data on the number of resolutions on asylum dictated during 2003 and 2004 will have to be taken into account.

In 2003, 5,822 cases were resolved, affecting a total of 6,949 personas. Of these, 227 received the refugee status of the Geneva Convention of 1951 and 142 received a different protection regime, while 4,229 persons obtained negative resolutions of their applications and the asylum applications of 2,350 persons were not admitted to processing\textsuperscript{1012}.

As regards the official data for 2004, the number of asylum applicants has decreased 6.3% as compared with the previous year and amounts to 5,401, of which 161 have received the refugee status of the Geneva Convention and 163 have received residence permits for humanitarian reasons. As regards the negative resolutions and the non-admission to processing, these amount to a combined total of 6305, although the breakdown of the data has not yet been provided\textsuperscript{1013}.

\textsuperscript{1011} Although this effect of non-admission to processing is only stipulated in the abbreviated proceedings established for asylum applications presented at the border (article 22(4) of Regulation 203/1995 of the application of the Asylum Law), however, it is included in the case law concerning the ordinary proceedings as the transfer of the rules of the Schengen and Dublin Conventions of 1990.

\textsuperscript{1012} Statistical Yearbook on Aliens, 2003, Ministry of Employment and Social Affairs.

\textsuperscript{1013} Gazette of the Office for Asylum and Refuge (O.A.R.), No. 53, December 2004. The data provided by the O.A.R is being used provisionally until its Annual Report is published. The fact that there are years with a greater number of resolutions or proposals than applicants shows that at some time there was a “blockage” in the processing of dossiers at the O.A.R.
Nevertheless, the analysis of the official statistics does not shed sufficient light on the situation as these do not provide the percentages corresponding to each case of non-admission to processing as regards the total, bearing in mind that a high proportion of asylum applications are not examined as regards their merits as they are considered to be manifestly unfounded.

The analysis of case law only allows us to take into consideration those resolutions for non-admission to processing first appealed before the National Court and, before the Supreme Court.

No decision includes the appropriate reference to the Dublin II Regulations, which replaces the application of the Dublin Convention of 1990 since its entry into force in 2003 except as regards the relations of Denmark with the rest of the Member States of the EU. However, there is no record of a decision in which the applicant had established any relationship with Denmark and which justified the application of the Dublin Convention.

The examination of the case law of the judicial bodies which are competent as regards the appeals against the resolutions of the Interior Ministry which do not admit asylum applications to processing permits the differentiation of two groups of decisions.

The criteria used to establish this distinction is the reason for the non-admission to processing alleged by the Interior Ministry in its resolution: section (e) of article 5(6) of the Asylum Law, when Spain is not responsible for examining the application pursuant to the treaties on the matter, or paragraph (f) of the aforementioned article, when the concept of “safe third country” is applicable.
Nevertheless, it should be taken into account that the allegation of the reasons mentioned is not found solely and exclusively in these judicial appeals. Normally these are cited together with the absence of reasons which give rise to the recognition of the condition of refugee or the allusion to data or facts which are manifestly false or unlikely\textsuperscript{1014}.

The decisions of the first group, i.e. those which are based on reference to the Schengen and Dublin Conventions, include the cases in which Germany and France have issued the asylum seeker with a type of visa and have subsequently and explicitly accepted that it was their responsibility to take charge of this person as stipulated in the Asylum Law. The common denominator in all these is the dismissal of the appeal of the applicant and, therefore, the Supreme Court confirms the administrative resolution regarding the non-admission of the asylum application to processing\textsuperscript{1015}.

As regards the consequences of the application of article 5(6)(e) of the Asylum Law, the Supreme Court establishes that it is not possible to understand “the transfer stipulated in the aforementioned article 11.5 of the Dublin Convention as a coercive obligation of the Member States to place the asylum applicant at the disposal of the State responsible for the resolution of the application”\textsuperscript{1016}. On the contrary, it is a transfer which the applicant must carry out voluntarily. The State of residence complies by restricting itself to notifying or communicating the transfer of the responsibility to the competent Member State. The consequences of failure to submit the application to the authorities within the period of one month established fall on the asylum applicant, while Spain remains uninvolved.

\textsuperscript{1014} Sections (b) and (d), respectively, of article 5(6) of the Asylum Law.
\textsuperscript{1015} Decisions of the National Court of June 11, 1999 and January 12, 2001; Decisions of the Supreme Court of October 17 and November 20, 2003.
\textsuperscript{1016} Decision of the Supreme Court of July 29, 2004.
The second group of decisions which should be taken into account as regards the future application of the Dublin II Regulations includes those which allege the existence of a “safe third country” responsible for the asylum seeker. That is to say, the possible application the reason for non-admission to processing included in section (f) of article 5(6) of the Asylum Law to cases in which States which are parties to the Schengen and Dublin Conventions and to the Dublin II Regulations.

In these Dublin II Regulations, the content of the expression “third country” can be deduced from the concept of the national of a third country, understood as any person who is not a citizen of the European Union. In the cases covered by the Dublin II Regulations and, previously, by the Schengen and Dublin Conventions, the Spanish Administration and Courts should not apply the rule of the “safe third country” included as a reason for the non-admission to processing in section (f) of the Asylum Law.

The notion of “safe third country” assumes that the asylum applicant could and should have applied for asylum in the country he crossed en route towards the country where he finally submitted his petition. That is to say, “when he comes from a third State whose protection he could have applied for” as laid down in article 5(6)(f) of the Asylum Law.

The reiterated doctrine of the Supreme Court is that the brief transit through certain countries is considered as “an essential route to reach the border where it is possible for the appellant to apply for asylum with the necessary guarantees that his refugee condition will be known and his application attended to”.

1017 Article 2(a) Of the Dublin II Regulations.
Likewise, in the case of a family which fled from Yugoslavia and took three days to reach Spain (after crossing Italy and France), according to the Supreme Court, and for the purposes of article 5(6)(f) of the Asylum Law the transit through these countries cannot be classified “as if they came from these third States as they really fled (...) and came from Yugoslavia, and arrived at their destination in Spain three days after leaving”[1019]. Moreover, in the Decision of January 19, 2005, the Supreme Court concluded that “as regards a journey from Rumania to Spain, stays of one day in Italy and three in France cannot be classified as stays involving origin as these slow journeys may be necessary. Thus, it cannot be said that the party concerned came from Italy or France, but from Rumania”.

In these cases, the previous resolution was annulled and the admission of the asylum applications affected was ordered.

The lack of decisions is an obstacle to the analysis and evaluation of the application of the Dublin II Regulations although, due to the slowness of judicial proceedings in Spain, it can be considered as normal or usual that there is still no consolidated case law on the matter.

4. Legal administrative barriers for enforcement of return (deportation)


Spanish legislation on aliens has been modified frequently over the last few years. Thus, Law 4/2000 of January 11 on the rights and liberties of aliens in Spain and their social integration was modified by Law 8/2000 of January 14, 2000, and subsequently by Law 14/2003, of November 20, (hereinafter LOE). The legislation which affects us as regards the determination of infringements and sanctions concerning immigrants in Spain are the LOE and Royal Decree 2393/2004.

These sanctions are dealt with separately: those which involve a fine and a possible further sanction and those which involve ejecting the person from Spanish territory.

FINES:

Section 1 of article 55 LOE stipulates that:

- Minor infringements will be sanctioned with fines up to 300.51 euros.
- Serious infringements by fines from 300.51 euros to 6,010.12 euros.
- Very serious infringements from 6,010.13 to 60,101.21 euros, except for carriers who will be fined from 3,000 to 6,000 euros for each passenger or a lump sum of 500,000 euros.

Country Report Spain

The increase in fines is inoperative due to the fact that the economic immigrants cannot afford to pay these fines, and are very difficult to locate in order to collect the fines. Due to this difficulty, it appears that expulsion will be applied instead of fines.

The sanctioning authority is the Sub-Delegate of the Government in single province Autonomous Communities.

Another problem is the accrual of sanctions. In these cases the sanctions are graded as minimum, medium and maximum, within each of the infringements. However, this grading is criticised as it does not specify the specific criteria of an employment nature to determine each of these grades. It is very difficult for aliens involved to assume the thresholds laid down in section 1 of article 55 LOE, which eliminates the criteria to attend to economic necessity and opens the way to expulsion. However Royal Decree 2393/2004 establishes that the family situation of the person be taken into account.

It would make more sense if these sanctions were adapted to the principles of proportionality and responsibility.

COMPLEMENTARY SANCTIONS OF THE LOE AND ROYAL DECREE 2393/2004:

Other sanctions stipulated are the following: as regards those responsible for the illegal immigration networks, this will be a very serious infringement 1º, b) of article 54 of the LOE, the entrepreneurs who hire aliens or nationals, without work permits and finally, the sanctions for carriers.
In the case of organised networks, the vehicles, vessels, lanes and other movable goods or real estate used in the infringement can be confiscated. This measure reduces the resources of these organisations and is a way to obtain income through a subsequent auction.

As regards those employing people with no work permits, apart from the fine, the premises can be closed for 6 months to 5 years.

In the case of carriers, the authorities can suspend their activity for up to six months sureties or guarantees in the case of aliens, damages or the immobilisation of the means of transport used.
THE SANCTIONING SYSTEM TO COMBAT ILLEGAL IMMIGRATION.

Expulsion:

Due to the immigrants’ lack of funds and documents, expulsion becomes the predominant sanction. Two procedures are stipulated, which are ordinary and preferential.

Preferential Expulsion:

The reform of the LOE extends expulsion from very serious to serious infringements, and provides efficacy to the urgency procedure. This reform attributes the function of regulation and control to expulsion.

The reasons for preferential expulsion are the following:

6. Participation in activities contrary to internal security or which might damage the external relations of Spain or carrying out activities contrary to public order and classified as very serious by article 24 of the Organic Law 1/1992 on the Protection and Safety of Citizens (hereinafter LPSC).
7. Induce, promote, favour or facilitate, as part of a profit making organisation, the smuggling of persons in transit or whose destination is Spain as long as this does not constitute an offence.
8. Being on Spanish territory irregularly.
9. Failure to comply with the measures imposed as regards public security, as regards periodically reporting to an authority or as regards staying away from a border or a specific town.
10. The participation of aliens in activities which are contrary to public order and are considered to be serious in article 23 of Organic Law 1/1992, on LPSC.
When any of these constitute an offence, the criminal procedure will have preference.

As regards activities contrary to internal security or which might damage external relations, the Spanish Administration can introduce many nuances as regards these diffuse interests, therefore, the decisions must be properly reasoned, guaranteeing judicial protection, which is not safeguarded by this lack of precision.

The first reason is closely linked with the last one, but there is no clarification of the difference in the degree of seriousness.

In the second case, this does not open up the possibility of the alien collaborating against the networks to remain in Spain or return to his country of origin. More attractive measures must be established to contribute to the elimination of these networks.

The third reason for expulsion is the most discretionary and disproportionate. This equates a mere administrative infringement with much more serious cases which have criminal connotations, such as the participation in smuggling networks.

The fourth reason is repetitive as it refers to aliens whose circumstances are contrary to public security.

 Preferential expulsion is immediately executable and scant time is given for allegations and proof: forty-eight hours. This limited period makes it practically impossible to guarantee the alien’s right to effective judicial protection. Moreover, the alien cannot request the suspension of the expulsion in accord with section 2 of article 21 LOE and article 132 of Royal Decree 2393/2004.
Once the summary, preferential expulsion of the alien is adopted, he must leave Spain. This implies that he cannot enter Spain or any of the Schengen States for a minimum of three and a maximum of ten years.

Aliens in the following situations cannot be expelled:

- Those born in Spain.
- Those with a permanent residence permit.
- Those of Spanish origin who have lost Spanish nationality.
- Those who are receiving benefits for incapacity, employment accidents, unemployment or assistance.
- The family of the alien in the above situations who have resided in Spain for more than two years, and pregnant women when the expulsion supposes a risk.
- Alien victims who denounce the smuggling networks at the discretion of the authorities.

**Ordinary Expulsion:**

The reasons for ordinary expulsion can be placed in two groups: the commission of a serious or very serious offence in articles 53 and 54 LOE, and as a substitute for certain penalties imposed for the commission of a number of offences graded in sections 7 and 8 of article 57 LOE.

There is an overlapping of the infringements involving ordinary and preferential expulsion. This is resolved by stating that preferential expulsion is for those infringements in letters a) and b) of article 54 LOE, and letters a), d) and f) of article 53 LOE. Ordinary expulsion is for very serious infringements in letters c), d) and e) of article 54 LOE and serious infringements in letters b) and c) of article 53 LOE.
The sanctioning process of the LOE is characterised by the difficulty to suspend the decision. Firstly the short periods of time given. Secondly, the discretion of the judge to appreciate the suspension of the appeal or not. Thus, the alien only has the possibility of requesting asylum which would mean the suspension of the expulsion under the terms of article 141.9 of Royal Decree 2393/2004.

The alien must be notified of the expulsion resolution together with the appeals he may lodge and the competent body. The person is banned from entering the country for a period of three to ten years, increased by five years after the reform extensive to the territory of the Schengen States.

The measures for ensuring the efficacy of the final resolution are as follows:

- Periodical presentation before the competent authorities;
- Obligatory residence in a determined place;
- Withdrawal of passport
- Precautionary detention for a maximum period of seventy-two hours previous to the request for internment.
- CHAPTER XVII -

COUNTRY REPORT SWITZERLAND

Based upon
ICMPD Study on Return -
A Swiss Perspective
Switzerland and Return\textsuperscript{1021}

1. Organisation

The Federal Office for Migration (FOM)\textsuperscript{1022}, as part of the Federal Department of Justice and Police, though being relatively autonomous from it, is responsible for asylum issues. This includes shaping and applying return policy instruments in the asylum as well as in the alien sector. However, cantonal authorities are responsible for enforcing all deportations and expulsions\textsuperscript{1023}. The federal government supports the Cantons in this task with specific services through a special division, the so-called ‘Repatriation division’ (“Abteilung Rückkehr”).\textsuperscript{1024} The Asylum Appeal Commission (AAC)\textsuperscript{1025} is competent for dealing with appeals against asylum and removal decisions.

Another specialised division in the FOM, the Division for Stay and Return, is competent for the implementation of all voluntary return measures and services. The Return Assistance section within this division oversees all matters related to voluntary return assistance. Moreover, in 1999, an inter-ministerial direction for return assistance


\textsuperscript{1022} On 1st January 2005 the Federal Office for Migration was created through the merger of the Federal Office for Refugees (FOR) and the Federal Office of Immigration, Integration and Emigration (IMES).

\textsuperscript{1023} Art. 46 Abs. 1 Asylum Law and Art. 14 ANAG.

\textsuperscript{1024} Media conference of the FOR, 18 January 2002, “the return policy of the federal government”, Urs Betschart, vice-director FOR (hereafter: “the FOR return policy”).

\textsuperscript{1025} “Asylrekurskommission” (Art. 104ff. Asylum Law).
Country Report Switzerland

(ILR)\textsuperscript{1026} was created in order to define a coherent Swiss policy in the field of return assistance, as well as to monitor all return programmes. To this end, ILR mandates inter-ministerial working groups to establish return assistance programmes for specific countries of interest.

Information dissemination to potential candidates for return is provided by a network of \textit{Return Counselling Offices} (RCO), developed by FOM in coordination with the Cantons, and which, as the name suggests, also provides for counselling services. To this extent, information and support are transmitted to target groups, either directly or through Cantonal partners. In the context of information dissemination, IOM is mandated to support the Cantons through special offices and provides for specific return information. FOM also systematically disseminates general information on return assistance together with decisions on asylum requests. As for their counselling services, RCO mandates have since changed (July 2001) to include so-called ‘case management’ information activities, which have as their goal the development of a modified counselling approach to promote and enhance perspectives on return.\textsuperscript{1027}

As the use of police force and measures of deprivation of liberty are regulated at the Cantonal level, no federal body exists. As previously mentioned, these authorities are nevertheless supported by an ‘enforcement support’ division within FOM, which procures travel documents in problematic cases, thus acting as a centralised federal office for the acquisition of papers for inter alia asylum seekers. However, the competence for escorted returns exclusively lies with the Cantons, including those on the use of force which are regulated in respective Cantonal police laws.

\textsuperscript{1026} “Interdepartementale Leitungsgruppe Rückkehrhilfe”. ILR comprises FOM, the Direction for Development and Cooperation, the Ministry of Justice and Police, the Ministry of Foreign Affairs, and IOM.

\textsuperscript{1027} The RCOs are being financed performance-related from 2002 on.
SwissREPAT is a service of the federal government for the Cantons, which is run in co-operation with the travel centre of the Federal Department of Foreign Affairs (DFA)\textsuperscript{1028} and the Cantonal police of Zurich/airport police, to deal with return assistance. SwissREPAT supports the Cantons with the task of enforcing expulsion orders. It is a relatively new de-centralised unit in the federal government, a subsection of the division ‘enforcement support’ and therefore under FOM responsibility, and combines the practical and logistical aspects of return implementation at Zurich airport. Therefore SwissREPAT deals with forced return as well as voluntary return and is responsible for transport arrangements of the entire asylum and aliens sector. The unit moreover pays out a travel allowance and individual return assistance contributions to aliens leaving voluntarily.

2. RETURN RELATED ELEMENTS OF ASYLUM SYSTEMS

It is generally accepted that the duration of an alien’s stay in the respective host country is key to the implementation of eventual return obligations. It is repeatedly stated that the longer an alien stays on the territory of the host state, the less likely it becomes that he/she will return home, either voluntarily or forced, in case of a final rejection of the asylum application.

Asylum proceedings begin with the registration at a FOM reception centre. Irrespective of their way of entry, asylum seekers have to report to one of four FOM reception centres.\textsuperscript{1029} They are then requested to present their identity papers. However, according to Swiss authorities, many asylum seekers conceal their identity papers. A new legal provision was introduced in July 1998 to sanction cases in which asylum seekers cannot present their identity papers: the asylum application will only be dealt with if the alien can adequately explain why he/she is not in possession of documents, or if there are otherwise clear indications of persecution. Those who still fail

\textsuperscript{1028} “Bundesreisezentrale des Eidgenössischen Departments für auswärtige Angelegenheiten – EDA”.

\textsuperscript{1029} Chiasso, Vallorbe, Basel and Kreuzlingen.
to present their identity papers are requested to have relatives send them, or arrange for them to be sent. Otherwise the application will be rejected. In case of a negative decision, the rejectee can lodge an appeal at the AAC, a judicial body, within 30 days. The appeal has suspensive effect.\footnote{New grounds are brought forward in 10-20\% of the cases.}
2.1 Diagram of the Swiss Asylum Procedure

- Illegal entry
  - Registration
  - Medical examination at the border
  - Identification process
  - Short hearing
  - Allocations to the cantons

- Border crossing/airport
  - Asylum application at CH representation
    - Decision on entry

- Reception Centre
  - Decision to dismiss the case with immediate removal
    - Hearing on the grounds for asylum
    - Possible further clarifications
    - Decision on asylum

- Canton / Community
  - Provisional admission
    - Possible appeal
    - Granting of asylum
      - Decision to dismiss the case with immediate removal
      - Granting of asylum
        - Provisional admission
          - Execution of removal by police

- FOM
2.2. Stage of the asylum procedure at which the issue of return arises

The consequences of an eventual negative decision\textsuperscript{1031} are already pointed out to asylum seekers during the asylum procedure. Furthermore, the possibility of the using of force in case the rejectee does not leave in due-time is clearly stated\textsuperscript{1032} in the removal order\textsuperscript{1033} itself. In practice, information about voluntary and forced return is provided as soon as an asylum application is submitted.

2.3. Duration of the various procedures and its influence on the “returnability” of persons

It is widely acknowledged that the duration of asylum determination procedures bears significant influence on both integration and return and repatriation measures. Third country nationals who are genuinely in need of international protection shall be admitted as swiftly as possible so that integration measures can be taken as soon as possible after their arrival. At the same time, as experiences have proven, the longer determination procedures last the more difficult return and repatriation procedures turn out to be. On one hand, it is important to enable third country nationals who have been granted refugee status to lead life independently and without having to rely on social welfare. On the other hand, it proves to be increasingly difficult to return rejected asylum-seekers if they had to remain within the determination procedure for long periods of time. An overly long asylum procedure is additionally leading to growing backlogs and congestion, which impacts negatively upon the system’s capacity to process further asylum applications. In this regard, the duration of asylum procedures, including initial decisions and eventual appeals, is key to preserving “returnability” of third country nationals whose asylum applications eventually will be rejected. Full and effective asylum procedures, which lead to quality decisions, will

\textsuperscript{1031}“Wegweisungsentscheid”.
\textsuperscript{1032} Art. 45 Abs. 1 Bst. c Asylum Law.
\textsuperscript{1033} “Wegweisungsverfügung “.
take time, however, states have realised the importance of the time-factor and consequently strive to reduce procedural duration.

An urgent objective of the Swiss authorities is to reduce the time it takes to complete proceedings. Several steps have been taken to this end. The duration of first instance proceedings has been reduced in recent years. 80 per cent of cases between 1998 and mid-June 1999 were settled, on average, within 95 days. Within the framework of a pilot project, the length of first instance proceedings was even reduced to 45 days. This result was achieved by replacing of Cantonal hearings by hearings carried out by the FOM.1034

Since August 2002 procedural units have been established at four FOM reception centres (“Project DUO”) to accelerate the asylum proceedings at this early stage.

2.4. Procedures of determination of identity of individual claimants

The Swiss authorities make use of a special language-analysis department called LINGUA. Since its inception in May 1997 until February 2002, LINGUA has carried out almost 7000 analyses of provenance of asylum seekers covering more than 30 languages and 50 countries. Moreover, the duration of processes was shortened by 53% for those who underwent a LINGUA expertise. Additionally, the reduction is noticed in the average duration of an asylum decision, as well as the duration of an expulsion procedure: The duration of the Swiss Asylum Appeal Commission’s recourse proceedings decreases by 52% if a LINGUA examination is carried out. Moreover, in 76% of the analysed cases, the LINGUA-examination constitutes an important, even decisive element in the decision-making. In approximately 80% of the cases the expertise is taken into consideration for the determination of the country to which the asylum seeker is to be returned to. Therefore, LINGUA’s impact on asylum decisions and removals is considerable.

1034 “Asylum policy today – ways out of the dilemma” by Federal Councillor Ruth Metzler-Arnold.
Although the time saving effect of language analyses have been proven significant, it should be noted that a majority of asylum seekers (70%) who underwent a LINGUA-analysis go into hiding either directly after the interview with the expert, or after a decision has been issued. As mentioned above, of all asylum seekers who leave Switzerland in a controlled manner, 80% return to the country, as indicated by LINGUA-experts.  

2.5. Questions of status-differences, temporary protection, tolerated status

Only a relatively small percentage of asylum-seekers are granted full refugee status. A significant number of persons receive some form of humanitarian or subsidiary status. Apart from the rights and benefits normally attached to the different statuses, what is of interest in this context is the duration during which such rights will be granted, i.e. the duration an alien will be permitted to remain on the territory based on the respective protection status. Other statuses than refugee status are generally granted only for a limited time which means that after a certain period aliens will come under the obligation to return home. Hence, the various types of statuses are factors in the evaluation of a system’s emphasis of return obligations.

During the asylum procedure, the asylum seekers are allowed to stay in Switzerland under the so-called N status; they are not allowed to work in the first 3-6 months and afterwards only in limited employment areas. After recognition of their asylum application they are granted the so-called status B, which is transferred five years later in a status C, putting them on an equal legal basis with other legally in Switzerland residing aliens.

If enforcement is not possible due to objective reasons, however, a temporary status, i.e. a provisional admission (status F), may be issued for a renewable duration of 12 months, including the permission to work. Inversely, according to an ordinance, a provisional admission is not granted if an expulsion could not be enforced due to the individual’s lack of cooperation. After five years of provisional admission, the alien is granted the status B, which however is cancelled if the protection is lifted, i.e. the objective impediments cease to exist.

2.6. Conceptual differences in the transition from protection to durable solutions, i.e. permanent residence and integration

Closely related to the question of status differences is the matter of transition from protection to durable solutions. Traditionally, there are three possible ways for durable solutions: integration, resettlement and return. In this regard, a shift in the preference of states can be discerned. While in the first three decades of the existence of the Geneva Refugee Convention the preferred durable solution to refugee situations particularly in Western Europe appeared to be integration, the preference today gradually shifts to return.

In Switzerland, after approximately 4 years of unsuccessful enforcement procedures, repatriation attempts shall be abandoned and the person finally admitted and integrated. The general policy in Switzerland does not favour regularisation (and is reluctant to run large scale regularisation programmes), based on the argument that it does not solve the problems but paves the way for the next one, still a significant number of persons every year receive a status through regularisation. A humanitarian

\[\text{Vorläufige Aufnahme}\]

\[\text{Art. 14a ANAG}\]

\[\text{Art. 17 Abs. 2 Verordnung über den Vollzug der Weg- und Ausweisung von ausländischen Personen – VVWA}\]
residence permit is granted if the person concerned has been provisionally admitted for at least 2 years and has already stayed in Switzerland for 8-10 years.

2.7. Reception, reception facilities, counselling, care-taking

As previously mentioned, there are four FOM reception centres in Switzerland, which are run by a special division. In order to enlarge capacities in reception centres, a flexible system allows the FOM to increase the number of units up to 10,000 places if the circumstances so require. At the start of the procedure, asylum seekers are first placed in collective centres run by the Cantons and are only later allowed into the private housing market, e.g. when they have found work.

Asylum seekers, provisionally admitted persons and refugees are provided assistance through public welfare (social assistance). They receive a minimum living wage and health insurance. Cantonal authorities - specifically municipalities - are, in some cases, competent for providing these, and are in turn reimbursed by the Federal government.

Upon admission to a reception centre, the asylum seeker’s personal details are registered and a first interview is conducted within six weeks. He/she is given a fact sheet, other material and counselling, informing him/her about his/her rights and duties, and about the course of asylum proceedings. Furthermore, for identification purposes, they are photographed and have their fingerprints recorded on a registration form.

2.8. Obligation to leave and time limits

Persons under unappealable expulsion or deportation orders are given a deadline to leave, set by the authorities (the FOM). Failure to comply may result in the expulsion

---

1039 In Chiasso, Vallorbe, Basel and Kreuzlingen,
1040 "Abteilung Empfangsstelle".
enforced by the police of the respective Canton. This deadline is in general variable and flexible, and is adapted to the individual’s situation (i.e. his/her commitments and obligations in Switzerland). If the individual has no commitments, the time limit set for expulsion is shortened. An extension of the deadline can be requested at the FOM (and can for instance be granted in such circumstances where children have to complete a school term)\textsuperscript{1041}. The delay may range from a few days to six months. According to a directive\textsuperscript{1042}, depending on the duration of the procedure the deadline to leave is to be determined in the first instance removal order as follows:

<table>
<thead>
<tr>
<th>Duration of the procedure</th>
<th>Deadline to leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 6 months</td>
<td>56 days</td>
</tr>
<tr>
<td>More than 6 months</td>
<td>30 days</td>
</tr>
</tbody>
</table>

\textsuperscript{1041} Art. 45 Abs. 1 Best. B Asylum Law.

\textsuperscript{1042} FOR directive “Weisung über den Vollzug der Wegweisung während und nach Abschluss des Asylverfahrens” (20 September 1999, partly revised on the 11 May 2000), (hereafter: “Directive on the enforcement of removal”).
If an appeal against the first instance decision is rejected or inadmissible, FOM determines a new deadline to leave on the basis of the duration of the procedure.\textsuperscript{1043}

The following deadlines are determined according to the mentioned directive:

<table>
<thead>
<tr>
<th>Duration of the procedure</th>
<th>Deadline to leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 12 months</td>
<td>2 weeks</td>
</tr>
<tr>
<td>6-12 months</td>
<td>4 weeks</td>
</tr>
<tr>
<td>1-2 years</td>
<td>6-8 weeks</td>
</tr>
<tr>
<td>More than 2 years</td>
<td>Max. 3 months</td>
</tr>
</tbody>
</table>

The determination of shorter deadlines to leave remains reserved for cases of public interest in swift departure (such as in cases of delinquency or considerable welfare dependency).

After the time to leave has elapsed and if the person does not obey the order to leave, detention to secure the physical presence of the person to be removed (i.e. to secure the execution of expulsion)\textsuperscript{1044} can be ordered under certain circumstances as prescribed by law\textsuperscript{1045}. As \textit{ultimo ratio}, the person is forcibly returned by police officers of the responsible Canton to the country of origin.

\textsuperscript{1043} The deadline is also newly determined if the decision of the AAC is delivered only two weeks prior to the expiration of the deadline.

\textsuperscript{1044} "Ausschaffungshaft".

\textsuperscript{1045} Art. 13a-d ANAG.
2.9. Regulations to secure co-operation of the individual in the procedures, responsibility and accountability of the individual

A major obstacle in asylum determination procedures, as well as in return operations is the fact that a number of asylum-seekers, respectively rejected asylum-seekers, are reported to prove uncooperative. Lacking co-operation together with missing identification and travel documents represent the core problems authorities are facing.

According to the authorities, the paradigm of the Swiss asylum policy conceives of an asylum system which shall be humanitarian and based on individual responsibility (“to give the responsibility back to the individual”). The Swiss Constitution does not permit a complete withdrawal of support but guarantees in any case a minimum level of subsistence.

However, within these limits, possibilities do exist to secure the individual’s co-operation during the procedure. The authorities may compulsorily assign an uncooperative asylum seeker to specifically assigned accommodations, detain and reduce benefits down to a minimum level.

To illustrate the level of co-operation, one might take account of the following figure: approximately 60 percent of all rejected asylum-seekers in Switzerland disappear prior to their removal. Upon expiration of the date at which they are allowed on Swiss territory, absconded rejectees are listed in the computerized RIPOL police search system. It is assumed by the Swiss authorities that most of them cross illegally into another country.1046

Generally speaking, to preserve the ability to remigrate, returnees are supported to develop professional prospects in their country of origin and to acquire or extend the

know-how required to realise their plans. According to the Swiss authorities, a downside of this approach is that while attempting to preserve and promote the returnees’ ability to remigrate, such measures could impair self-responsibility, create or increase dependency.


The Convention and the Protocols have been incorporated into the Swiss legal system, but they still have their character of international laws, with major consequences when it comes to interpretation. Conflicting arguments have fuelled many legal controversies over the formal status of the Convention in the Swiss legal system. Formally speaking, according to the procedure by which legal acts are adopted, the European Convention on Human Rights should rank below laws, because it was approved only by a decree of the Federal Assembly and not by a referendum. But materially speaking, given the fundamental nature of the rights, which it enshrines, it ranks above the laws.

The Federal Tribunal initially affirmed that the European Convention on Human Rights was ‘at least of the rank of a law’ or ‘equal to a federal law’. However, it went on to emphasize that the rules which it contained were of ‘constitutional rank’, a legal analogy according to which anyone could claim violation of the Convention in exactly the same way as of their fundamental rights – written and unwritten. This procedural practice has recently been formally established in an amendment to the federal legislation.

The Tribunal also pointed out that the Vienna Convention on the Law of Treaties, which took effect in Switzerland on 6 June 1990, expressly provided for the principle of the predominance of international law, whereby all the implementing authorities in Switzerland had to interpret national law in line with international law.
Lastly, it is worth noting that, faced with two initiatives proposing to restrict the right of asylum, the Federal Council found by reference, *inter alia*, to Articles 3 and 8 of the European Convention on Human Rights, that no state in which law prevails may ignore those rules of public international law. All states in which law prevails are bound by these rules, regardless of any ratification or denunciation of treaties by public international law.

4. Return procedures and processes

4.1. Responsibilities and decision procedures, processes to terminate stay/residence

According to the FOM, decisions on asylum requests are taken in accordance with the principles stated in the 1951 Geneva Convention, and asylum is granted accordingly. Consequently, decisions regarding the rejection of asylum requests or the removal of temporary protection are made in relation to these principles. Beyond the decision on the rejection of asylum applications or the removal of temporary protection is the execution of return, which is submitted to a number of conditions: return to the country of origin must be possible, permissible and reasonably acceptable. As already mentioned before, temporary admission is granted as long as one of these conditions is not met. Return should be based on humanitarian standards, which create certain limits to the enforcement. For various reasons the Swiss policy of return emphasises preference for voluntary return. It is only if voluntary return did not take place that forced removal is carried out, based on the provisions of the Asylum Law, ANAG the respective Cantonal laws, and a number of asylum ordinances.

For statistics of expenditures in the sphere of asylum in Switzerland in 2001 see annex 3, table 4

See article 44, Asylum Law.

„Bundesgesetz über Aufenthalt und Niederlassung der Ausländer“ (Law of Stay and Residence of Aliens)
The respective Cantonal enforcement authority calls the rejected asylum-seeker to an interview, which should in principle take place within 10 days following the final asylum and removal decision. The obligation to leave and the consequences in case of violation are pointed out and the rejected asylum-seeker is requested to procure valid travel documents from the country of origin, if he/she is not in possession of enforcement-sufficient documents.\textsuperscript{1050}

In cases of \textit{Nichteintretensentscheiden} (see above), there is no suspensive effect and immediate enforcement can be ordered.\textsuperscript{1051} In such cases, nevertheless, it is possible to request suspensive effect within 24 hours at the AAC, which has to decide within 48 hours. In such cases, furthermore, legal impediments to deportation have also to be examined (\textit{inter alia} Art. 3 ECHR, CAT). Generally, extraordinary legal remedies do not delay the enforcement, except if FOM or the AAC decide to award suspensive effect.\textsuperscript{1052} A rejectee who goes into hiding in Switzerland is not considered to have left. The order of removal becomes void five years after the establishment of his/her evasion.\textsuperscript{1053}

4.2. Positive incentives: voluntary return assistance programmes, scope and benefits

As Swiss policy favours voluntary return, the priority of the authorities is to promote it by granting individual return and reintegration assistance as well as structural help in the countries of origin (or implementation of specific projects geared to the improvement of living conditions).\textsuperscript{1054}

\textsuperscript{1050}“Directive on the enforcement of removal“.

\textsuperscript{1051} Art. 45 Abs. 2 Asylum Law.

\textsuperscript{1052} Art. 112 Abs. 4 Asylum Law.

\textsuperscript{1053}“Directive on the enforcement of removal”.

\textsuperscript{1054} The FOR return policy.
According to Swiss authorities “return assistance has been an asylum policy instrument in Switzerland since 1993. Promoting voluntary and orderly return as well as facilitating the reintegration in the country of origin are the main goals to be achieved with return assistance. If specific programmes were set up in order to respond to major crisis such as Bosnia or Kosovo, constant efforts were made to seek durable solutions in a more global migration approach.”

The Swiss authorities consider that voluntary return is based on the individual’s free and independent will and he/she can avail himself/herself of this at all times. Return assistance is aimed at promoting voluntary return and facilitating reintegration in the country of origin.

The regulations on return assistance are based on Art. 93 of the Asylum Law, and the practical application and restrictions on Asylum Ordinance (VO2 1999). Various Directives are issued by FOM in order to implement specific aspects of return assistance.

According to Swiss regulations governing return assistance, all persons who benefited from an asylum status, refugees, persons under temporary protection, asylum-seekers at all stages of the asylum process and persons who benefit from a temporary admission are eligible. Art. 64 VO2 however submits eligibility to various restrictions, in regard to “non-entrée en matière” decisions, cases of delinquency, lack of co-operation with the authorities and availability of sufficient means. Moreover, return orders and deadlines laid down for leaving the country must generally be respected.

Country Report Switzerland

Return assistance is available in two forms, as general individual return assistance and as country specific return assistance. The former does not target specific countries but is available to all countries, whereas the latter focuses on specific crisis-areas, and is set up in order to respond to major crises, for example in BiH, Kosovo, Turkey, Northern Iraq, Sri Lanka, Somalia and Ethiopia. In such cases additional humanitarian and development features might be included in return assistance programmes. This was the case, for example, in Kosovo and BiH. The eligibility principles are the same as in general programmes.

The pre-departure benefits of the general return assistance in Switzerland consist of a reintegration grant (max. CHF 2,011,-/family, depending on country of origin, status/duration of procedure), costs coverage for medicines and treatment in Switzerland or in the country of origin (on a case-by-case basis), transport costs and travel documents. Professional capacity building is also provided. Exploratory visits are generally not foreseen.
Examples of pre-departure benefits:

<table>
<thead>
<tr>
<th></th>
<th>Adult</th>
<th>Child</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia</td>
<td>€ 2.450</td>
<td>€ 1.225</td>
</tr>
<tr>
<td>Kosovo (depending on the phase)</td>
<td>€ 1.370/685</td>
<td>€ 685/340</td>
</tr>
<tr>
<td>Turkey &amp; Northern Iraq (per person)</td>
<td>€ 2.050</td>
<td>€ 2.050</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>€ 1.350</td>
<td>€ 675</td>
</tr>
<tr>
<td>FRY</td>
<td>€ 1.370</td>
<td>€ 684</td>
</tr>
</tbody>
</table>

Post-arrival benefits may consist of temporary housing, reconstruction material and assistance and reconstruction programmes. For the Sri Lanka programme, projects aid is available in some cases.

Specific return programmes for Turkey, DR Congo and Angola are currently being planned. A specific return programme for Iran started in 2002, and providing SFR. 2000,-/adult, SFR. 500/child, as well as the financing of individual income generating projects in some cases. Regarding Afghanistan, financial return assistance of the same amount and transport to the destination is provided for.

Regarding other facilitation measures, it is worth to be mentioned that all working persons are by law obliged to give a percentage of their wage to social insurance and to the pension fund. In case of definitive departure from Switzerland, the person can reclaim such funds. In general such benefits may be transferred if a special agreement exists, though this is rarely the case for the majority of countries of origin. The

---

\[1056\] The FOR return policy.
amount accrued is then cancelled if a social insurance convention does not exist between Switzerland and the corresponding country. The amount can, in some cases, reach a few thousand Swiss francs and could be a factor in any deliberations about whether or not to return voluntarily. This fact has been acknowledged by the RCO in assisting to claim these funds gained while working in Switzerland.

As a special feature, the Sri Lankan programme provides support in recovering and in banking transfer of assets recovered. The Swiss embassy and a local NGO also provide additional support and counselling in this area, as funds can only be recovered upon return.\(^{1057}\)

4.3. Sanctions

As mentioned above, every person has the constitutional right to receive some kind of social welfare for as long as necessary (in other words, as long as the person relies on it and as long as he/she is physically present in Switzerland). The co-operation or lack of co-operation of the individual concerned has no bearing on this right. There is a certain scope for social welfare, but limited by a margin of subsistence (food, bed, hygiene etc.). Reductions in social welfare due to lack of cooperation vary from Canton to Canton. It is possible that provisions are supplied in kind (with no right to cash benefits and no free choice of accommodation/food). In cases, where the question of protection is not examined, because of enumerated reasons (“Nichteintritensentscheide”) since 2003 asylum-seekers are no longer entitled to regular Swiss social welfare support (“Sozialhilfe”). However, according to a decision of the Fed-  

\(^{1057}\) Experiences have shown that there was an exceptionally high rate of employment among Sri Lankan nationals living in Switzerland. As a result of their gainful employment, some of them have substantial private resources, comprising in particular security account reimbursement deductions, AHV (Old Age and Survivors’ Insurance) and pension scheme contributions. Their lack of knowledge about these claims as well as the administrative hurdles connected with payment faced by returnees once they are back in their native country often prevent their assertion of such claims. (FOR Fact Sheet, update February 2002).
eral Court asylum-seekers cannot be deprived from a minimum social support (“Nothilfe”) which varies in the Cantons.

4.4. Implementation of return measures

As mentioned above, the usefulness of LINGUA examinations has also been proven in connection with the removal procedure: the language expertise has been taken into account in approximately 80% of cases for the determination of the country to which the asylum seeker is to be returned to.

The main obstacles to forced departures that Swiss authorities are facing are lacking travel documents and complicated and long-winded determination procedures to establish the identity and nationality of the person concerned, especially when false information is provided. Moreover, some countries of origin demand high and sometimes unreachable thresholds of proof regarding identity and nationality, this partly due to their lack of registration and records of their own nationals. In some cases states do not readmit their own nationals if they do not return voluntarily.

Regarding travel documents from the countries of origin, for some time now an average of less than 30% of asylum applicants have provided these. This ratio moves closer to 0% for the African regions of origin, which accordingly makes the determination of nationality and identity elaborate and long-winded.

Problems in procuring new travel documents are mentioned not only to arise from the attitude of rejected asylum-seekers but also from a lack of cooperation on the part of foreign diplomatic representatives. On such occasions, the Federal Office for Migration or the Coordinator for International Refugee Policy of the Foreign Depart-

---

1058 “Bundesgericht” – the highest judicial instance in Switzerland.

1059 The FOR return policy
ment can intervene on behalf of the Cantons, if requested to do so.\textsuperscript{1060} As mentioned before, an ‘enforcement support’ division within FOM procures travel documents in problematic cases, thus acts as a centralised federal office for the acquisition of papers for inter alia asylum seekers.

As mentioned before, SwissREPAT, as well as dealing with voluntary return assistance, also organises routing and ticketing for rejected asylum seekers. Its services cover three areas:

**The basic service:**

SwissREPAT advises the Cantons on all questions concerning departure by air. Airport police specialists evaluate and determine suitable travel routes in each case. The federal travel centre of the FDA books the flights and issues the tickets. The basic service further operates a database, to which Cantonal enforcement authorities have access. Therein, all necessary documents for enforcement measures (such as information leaflets, checklists and other forms) are made accessible.

**The departure service:**

The staff of SwissREPAT controls check-in and luggage clearance and accompanies persons who are under obligation to leave to passport control. Additionally, the departure service pays out travel money and individual return assistances.

**The special service:**

SwissREPAT co-ordinates the operations of Cantonal police officers and contributes hereby to the professionalisation of escorted returns by air.

\textsuperscript{1060} http://www.asyl.admin.ch/englisch/foru1e.htm, visited on 7 August 2002.
According to FOM, SwissREPAT’s operations provide a cost-effective way to returns and set standards in the implementation of removals. A person’s safe return shall be upheld in this way.\(^{1061}\)

### 4.5. Detention

The legal basis for detention in Switzerland is Art. 13a – d ANAG. Swiss law differentiates between “preparatory detention”\(^{1062}\) (i.e. to secure the removal procedure), and “detention pending removal”\(^{1063}\) (i.e. to secure the execution of the removal order). There are several limitations to the use of detention as described in Art. 13c/3 ANAG, *inter alia*: [...] the order of preparatory detention or detention pending removal is not possible for children and juveniles under 15 years.

According to Article 13d/2 ANAG detention has to take place on suitable premises, such that the placing of aliens detained pending removal with accused/convicted criminals is to be avoided; and detainees should, as far as possible, be provided with suitable work. Though, several cantons have specifically-adapted detention facilities (e.g. the Zurich/Kloten airport-prison or the removal prison in Basel), the majority of Cantons (e.g. Witzwil/Bern) use remand or normal prisons for detention. In this case, alien detainees are separated from the accused or convicted.

These are two separate and distinct regimes for deprivation of liberty, one for removal and the other for criminal matters. The prior is moderated: possibilities of

\(^{1061}\) Those returned are not only from the asylum sector but also from the aliens sector (70% of forced returns): illegal foreigners who were apprehended in the Cantons, which are issuing the orders. FOR only expands the Cantonal orders to the whole of Switzerland. The enforcement is carried out by the Cantons, except if they request support (special flights etc.). In this case, they have to refer to SwissREPAT.

\(^{1062}\) "Vorbereitungshaft".

\(^{1063}\) "Ausschaffungshaft".
work, communication and visiting rights are more generous than in the case of accused/convicted criminals.

4.6. Detention supervision and control body

Detention is administratively reviewed by the detention authorities, within 96 hours, detention has to undergo a judicial review by the Courts. The court’s decision may be appealed at the Federal Court. Lodging an application for release from detention is possible for the first time one month after the first judicial review.

The arrest and the continuation of detention of aliens pending their removal have to be justified by the cantonal alien police in that it is necessary to implement the removal in due time. The authorities have to prove that everything is being done not to keep people in detention longer than absolutely necessary.

Duration

The maximum duration of both “preparatory detention” and “detention pending removal” is 3 months. However, the latter can be extended by 6 months to a period of 9 months. Between 1995-2000, the average duration of “detention pending removal” was 23 days. Persons who could not be removed are released but are generally not granted any legal status and therefore have no legal permission to stay. However, under special circumstances, they can be granted a subsidiary/temporary status – as already mentioned above. If enforcement of the removal is not admissible,

1064 Art. 13c Abs. 2 ANAG.
1065 Art. 13c Abs. 4 ANAG.
1067 Art. 13a ANAG.
1068 Art. 13b/2 ANAG.
reasonable or practical, the Canton can apply for provisional admission\textsuperscript{1069} at the FOM.\textsuperscript{1070} But this status is usually not granted if the expulsion could not be enforced due to a lack of individual cooperation.\textsuperscript{1071}

**Persons detained in Switzerland for “preparatory reasons” or “pending removal”**

<table>
<thead>
<tr>
<th>Persons detained</th>
<th>80 % of the persons detained pending removal are expelled.</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 to 10 %</td>
<td>5 to 10 % are detained during an extension of 3 more months.</td>
</tr>
<tr>
<td>38 persons</td>
<td>38 persons have been detained for up to 6 months.</td>
</tr>
</tbody>
</table>

**4.7. Other control measures to secure presence of individual for return**

Other means, apart from detention, exist to secure the presence of individuals which are less intrusive. Either the person concerned may not be allowed to leave a certain prescribed area, such as cantonal, municipal or town limits,\textsuperscript{1073} or the person concerned may not be allowed to enter a certain area.\textsuperscript{1074} Other measures, such as regular presentation to the authorities, based on Cantonal laws do exist.

---

\textsuperscript{1069}“Vorläufige Aufnahme”.

\textsuperscript{1070}Art. 14a ANAG.

\textsuperscript{1071}Art. 17 Abs. 2 VVWA.

\textsuperscript{1072}ICMPD 2002.

\textsuperscript{1073}“Eingrenzung” (Art. 13e ANAG).

\textsuperscript{1074}“Ausgrenzung” (Art. 13e ANAG).
4.8. Escorting staff, training, rules and regulations

In order to forcefully remove rejected asylum-seekers states regularly employ escorting officers. In the context of forceful removals several tragic incidents became public. The often stressful and tense process of the actual enforcement of removals consequently requires experienced escorting staff which is specifically trained and able to act according to clear regulations. Since 1991 13 people have died during deportation, out of which 10 between September 1998 and May 2001 while being deported from Austria, Belgium, Germany, France and Switzerland. As a consequence, many states have started revision processes in regard to their training programmes, codes of conduct and regulations concerning use of force and permissible means of restraint. However, not all states have specific regimes in place and the existing national standards are far from being uniform.

Cantonal Police authorities differentiate between unescorted forced returns, where a person is escorted to the airport only and his/her departure is monitored ("deportee unaccompanied") and escorted forced returns, where a person is escorted to the country of destination ("deportees accompanied").

The removal is generally carried out on a single and individual basis, though 2-4 deportees can, in certain cases, be deported on special charter flights. The legal competence of the escorting staff is based on Cantonal police law and on Annex 9 of the Chicago Agreement.

1075 It is important to recall, that there are also other reasons why escorting personal accompany returnees, i.e. some airline regulations call for escorts in any case, etc.

1076 Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity; Report of Committee on Migration, Refugees and Demography, Doc. 9196, Council of Europe, 10 September 2001.

1077 Switzerland has concluded specific readmission and transit agreements with France and Italy, which also regulate questions of competence of the escorting staff abroad. Switzerland intends to
As far as training is concerned, the federal government plans to support the Cantons. “Passenger II”, in cooperation with the Cantons under the supervision of the Justice and Police Department, aims to improve and prepare escorting officers to implement return measures. It is foreseen that the officers will still remain under the respective Cantonal regimes, but trained by the Federal government. Training is planned to cover, among other things, communication under aggravated conditions, strategies for conflict resolution, legal training and practical exercises. Common standards, “code of conduct”, within which escorted returns are to be regulated, are currently being discussed.

4.9. Means of restraint, use of force, standards

A reason for regulatory diversification in regard to the use of force during removals lies in the fact that it is governed by Cantonal law; as it is the Cantons that carry out the escort, each is individually responsible according to its own rules and regulations. Nevertheless, the Federal Government together with the Cantons are developing a uniform doctrine to define a common approach so as to make practices more transparent and uniform.

Presently, persons who are forcefully removed may be hand-and feet-cuffed. Medication, however, may only be used if medically indicated, diagnosed and supervised by a physician. Measures, which can block the respiratory system, are prohibited by police regulations. At present, specific training schemes for escorting officers are being elaborated, according to which only those officers that have successfully participated are allowed to escort. The results of Passenger II aim at harmonised guidelines for the use of coercion measures. It makes some recommendations with regard to the treatment of deportees, as well as the means and measures that ought to be conclude more such agreements with other countries. Worth noting, furthermore, are the efforts of elaborating “facilitation guidelines” within the IGC framework regarding escorted return.
Country Report Switzerland

applied should force be used.\textsuperscript{1078} A proposal for a Federal Law regulating the use of force in the context of removal operations is currently under consideration.

4.10. Means of transport

According to information provided by FOM, a major obstacle is the increasing reluctance of airlines to transport deportees, so that more and more removals have to be carried out using charter flights. In view of this reluctance, compounded by security concerns, it is becoming necessary to regularly use special charter flights. According to the authorities, this measure remains exceptional and is used only as a last resort. Special flights are therefore considered only in such cases where an accompanied return on regular flights is not possible. Three reasons underlie this situation: physical resistance, refusal of captain or refusal of airlines.

According to Swiss authorities, special flights pursue two goals: they are used to preserve the integrity of the system\textsuperscript{1079} and act as a means of maintaining public order and security.\textsuperscript{1080}

\textsuperscript{1078} Two lethal incidents occurred during removal operations in 1999 and 2001: In 1999, Khaled Abuzarifeh died at Kloten airport, having been bound and gagged. In 2001, Samson Chukwu died in a Swiss detention centre in the middle of the night, after being abruptly woken to be taken to the airport. (Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity; Report of Committee on Migration, Refugees and Demography, Doc. 9196, Council of Europe, 10 September 2001).

\textsuperscript{1079} According to FOR, special flights should also convey the message that authorities are serious and have the means to enforce decisions.

\textsuperscript{1080} The use of special flights additionally allows for securing that persons, who represent a danger to public order and security, leave Switzerland. FOR points out that many such persons returned in this way were convicted criminals.
As previously mentioned, the Cantonal police are responsible for escorting. Since charter flights are regularly organised for aliens dispersed over several different Cantons, detailed organisation of the operations is essential.

The costs of charter flights vary according to size of aircraft, the number of persons to be transported and the distance. The flights that were carried out in 2001 generated costs of SFR. 25,000 per person, increasing the costs of removals by 25-30% compared to regular flights. According to the Federal Office, however, these costs have to be compared to those that would incur in case of continuing stay of the person in Switzerland.\textsuperscript{1081}

In 2001, 105 persons were repatriated with special flights from Switzerland to 15 different states.\textsuperscript{1082} The ‘enforcement support’ section co-ordinated 22 special flights for 49 persons to 14 destinations. This includes only those flights carrying a small number of passengers (2-4 persons); not included are flights with higher numbers of passengers, which went to Kosovo (one flight in 2001 with 56 persons on board).\textsuperscript{1083} In other words, in 2001 from an overall of 2,275 persons who, after a final dismissive asylum procedure, were returned to the country of origin or a third country, 49 persons were deported by special charter flights.\textsuperscript{1084}

The application of measures elaborated in “Passenger II” and proposed under the new Federal Law will also have an influence on the enforcement of special flights.\textsuperscript{1085} It is further pointed out that transport by special flights take place to the exclusion of the public. According to Swiss authorities, this way the person con-

\textsuperscript{1081} “FOR special flights”.\textsuperscript{1082} “The FOR return policy of the federal government”.\textsuperscript{1083} “FOR special flights”.

\textsuperscript{1084} For further information on Swiss special-flight destinations in 2001 see annex 3, table 7.

\textsuperscript{1085} Ibid.
cerned loses the motivation for recalcitrant behaviour and enables the escort to adapt the means of coercion.

A report published in March 2002 by the European Committee for the Prevention of Torture (CPT) assessed the treatment of persons deprived of their liberty in Switzerland. In its report, the Committee severely criticised the forced removals of foreign nationals by air, as presenting a manifest risk of inhuman and degrading treatment. The Committee formulated guidelines aiming at preventing such risks: prohibition of methods likely to obstruct the respiratory tracts, introduction of procedures to prevent positional asphyxia, proper training of escorting staff. In its response, the Swiss Federal Council stressed that the CPT's recommendations have to a large extent already been implemented and that instructions on such issues are being prepared at national level. According to the Swiss Federal Council, the advantage in using special flights is that, contrary to regular flights, no special measures have to be taken in preserving the security of other passengers, which therefore makes the use of police force superfluous in this regard. The Committee further criticised the fact that the persons concerned were kept completely uninformed about the date of actual enforcement. The Swiss Federal Council stressed that this measure applied only to those who had already resisted repatriation and where earlier repatriation operations failed. In all other cases, the persons are being informed about the time of repatriation.

Currently, Switzerland posts migration attachés in certain embassies who contribute to examining problems related to return measures and the use of special charter flights. The potential of these attachés with regard to the return process is specifically being explored, in order to contribute to a more systematic support outside Switzerland.

---

1086 See the above mentioned report “passenger II”.

1087 «FOR special flights».
5. Co-operation with reception and transit countries and countries of origin

Swiss authorities increasingly acknowledge that the success of a return policy and management is more and more linked to and dependent on external factors. The planning and implementation of programmes to promote voluntary return and the return of persons who are obliged to leave is calling for an intensive migration dialogue to be conducted with countries of origin. It is therefore essential to clarify what mutual interests exist so as to develop harmonised approaches.

The conclusion of a formal agreement with countries of origin is not always at the centre of political attention. The conclusion of formal agreements is however only one tool in this approach. Other measures involve intensified co-operation in the consular sector and technical support to assist countries in setting up effective asylum regimes of their own. Despite the progress achieved in the above mentioned areas return-related problems continue to prevail with regard to a number of countries.

According to FOM, it frequently occurs that, in spite of international treaties, states refuse to readmit their own nationals, delay the provision of travel papers or make unreasonable demands (i.e. with regard to financial aid). The FOM has no foreign policy instruments of its own that would enable it to exercise pressure on states. In its point of view, there is all the more need for migration and asylum considerations to be adequately taken into account in the other spheres of Swiss foreign policy and Swiss foreign economic policy. The Swiss Agency for Development Co-operation (SDC) in its messages to the Federal Assembly, explicitly established a connection between the granting of Swiss development aid and the duty of readmission, as an important step in the direction of a coherent, interministerial foreign policy. Nevertheless, it is acknowledged there to be certain conflicting interests and objectives between the policies of asylum and development aid, when it comes to reconciling the justified concerns of the two policy spheres.
6. Readmission Agreements

Countries with which readmission agreements exist

<table>
<thead>
<tr>
<th>SWITZERLAND 1088</th>
</tr>
</thead>
<tbody>
<tr>
<td>Readmission agreements with</td>
</tr>
<tr>
<td>Albania, Austria, Liechtenstein, Bosnia Herzegovina, Bulgaria, Croatia, Estonia, France, Germany, SAR Hong-Kong, Hungary, Italy, Latvia, Lithuania, FYR Macedonia, Serbia and Montenegro, Romania, Czech Republic, Kosovo (Transit), Slovakia, Slovenia, Srí Lanka, Benelux (Initialized), Sweden, Vietnam (Negotiation), Algeria (Preparation), Denmark (Preparation), Egypt (Preparation), Ghana (Preparation), Greece (Negotiation), Lebanon (Signed), Moldova, Nigeria (signed), Russia (Negotiation), Ukraine, Armenia (Signed), Kyrgyzstan, Georgia (Initialized), Namibia, Norway (Negotiation), Philippines, Poland (Initialized) SAR Macau (Initialized), Spain, Portugal (Initialised), UK (Negotiation)</td>
</tr>
</tbody>
</table>

These agreements are bilateral and are based on reciprocity. The Geneva Convention and its ‘67 Protocol is a standard clause in readmission agreements, provided the State in question has ratified it. In addition, references to basic international agreements such as the ECHR are also included. These take into account to afford asylum seekers access to determination procedures, i.e. they include provisions to ensure against refoulement.

The degree of evidence of citizenship, which is provided for in order for the country to readmit: Basic documents to validate the person’s nationality, such as a valid identity card or a valid passport, or substitute passport (e.g. laissez-passer). A presumption of nationality can be established by any document listed above if validity has expired, furthermore by identity cards proving membership in the Army/Navy of the respective country, driving licenses, birth certificates, statements by witnesses, par-

1088 A Comparative Review of the Management of Asylum by Australia - In Comparison to Eight Other Industrialised Countries; Prepared by the International Centre for Migration Policy Development, Vienna for the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), Australia; International Centre for Migration Policy Development • May, 2005
ticulars supplied by the person concerned, the language of the person concerned and comparison of fingerprints that are registered in the other contracting party’s fingerprint files.

**Time limits within which decisions regarding requests and readmissions have to be made:** Following a readmission request by a sending state a reply has to be given within 10 working days (maximum time limit). Readmission has to be carried out within 1 month (maximum time limit). But the time limit can be extended as necessary to deal with legal requirements or practical difficulties.

The agreements provide for financial compensation but not for burden sharing. All transport costs incurred in connection with re-admission and transit as far as the border of the requested state are borne by the requesting state.

Reasons not to enter into readmission negotiations vary from country to country. Frequently cited reasons are other political priorities and lack of technical structures to cope with returnees. The negotiation processes are often very long-winded and Switzerland is frequently confronted with counterclaims, such as requests with visa-facilitation or the enhancement of bilateral economic and legal assistance and some alleviation in regard to legal immigration. 1089

On the occasion of the negotiations for the last revision of the French-Swiss agreement on readmission of persons with unauthorised residence, it was decided to carry out readmission procedures in a future “French-Swiss Centre of police and customs co-operation”. 1090

1089 The FOR return policy.
1090 “Centre franco-suisse de cooperation policière et douanière” (CCPD), located at the Geneva/Cointrin airport.
7. Statistical information

7.1. Persons in the Swiss asylum sector

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>First instance pending apps.</td>
<td>15.137</td>
<td>14.603</td>
</tr>
<tr>
<td>Second instance pending apps.</td>
<td>12.332</td>
<td>11.050</td>
</tr>
<tr>
<td>Regulation/enforcement</td>
<td>13.363</td>
<td>10.398</td>
</tr>
<tr>
<td>pending or blocked(^{1091})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provisionally admitted</td>
<td>32.114</td>
<td>30.734</td>
</tr>
<tr>
<td>Recognized refugees</td>
<td>25.534</td>
<td>26.577</td>
</tr>
<tr>
<td>Total of persons in the</td>
<td>98.480</td>
<td>93.363</td>
</tr>
<tr>
<td>asylum sector</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The figures represent the deviation in percentage.

\(^{1091}\) Residence regulations or enforcement of the expulsion still outstanding or at the moment technically blocked.
<table>
<thead>
<tr>
<th>Category</th>
<th>2000</th>
<th>2001</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum applications</td>
<td>17,611</td>
<td>20,633</td>
<td>+17,2</td>
</tr>
<tr>
<td>Total handled cases</td>
<td>38,307</td>
<td>21,963</td>
<td>- 42,7</td>
</tr>
<tr>
<td>Asylum granted</td>
<td>2,061</td>
<td>2,253</td>
<td></td>
</tr>
<tr>
<td>Negative decisions</td>
<td>24,759</td>
<td>12,470</td>
<td></td>
</tr>
<tr>
<td>“Nichteintreten” (*)</td>
<td>5,292</td>
<td>4,498</td>
<td></td>
</tr>
<tr>
<td>Withdrawals</td>
<td>6,195</td>
<td>2,742</td>
<td></td>
</tr>
<tr>
<td>Otherwise closed</td>
<td>16,966</td>
<td>8,922</td>
<td>- 47,4</td>
</tr>
<tr>
<td>Provisional admissions during/after procedure</td>
<td>16,102</td>
<td>8,626</td>
<td></td>
</tr>
<tr>
<td>Provisional admissions without asylum procedure</td>
<td>864</td>
<td>296</td>
<td></td>
</tr>
<tr>
<td>Humanitarian and other alien police-regulations</td>
<td>5,556</td>
<td>11,012</td>
<td>+98,2</td>
</tr>
<tr>
<td>Humanitarian regulations, Art. 13f BVO</td>
<td>2,148</td>
<td>8,201</td>
<td></td>
</tr>
<tr>
<td>Other cantonal alien police-regulations</td>
<td>3,408</td>
<td>2,811</td>
<td></td>
</tr>
<tr>
<td>Enforcement of expulsions/deportations and departures</td>
<td>49,030</td>
<td>15,823</td>
<td>- 67,7</td>
</tr>
<tr>
<td>Departures within prescribed time limits</td>
<td>25,483</td>
<td>3,415</td>
<td></td>
</tr>
<tr>
<td>Repatriation to country of origin</td>
<td>4,813</td>
<td>1,818</td>
<td></td>
</tr>
<tr>
<td>Repatriation to third country</td>
<td>533</td>
<td>457</td>
<td></td>
</tr>
<tr>
<td>Uncontrolled departures</td>
<td>13,155</td>
<td>8,725</td>
<td></td>
</tr>
<tr>
<td>Competence canton</td>
<td>5,046</td>
<td>1,408</td>
<td></td>
</tr>
</tbody>
</table>
Decisions in Switzerland

The figures represent the deviation in percentage

(*) Decision, where the question of protection is not examined, because of enumerated reasons: another state is competent, cases of deception of identity, refusal of co-operation by individual, safe country of origin – will enter asylum procedure only if especially strong reasons exist (in such cases, the presumption that an alien is not in need of protection is rebuttable); “Nichteintreten”-decisions do not carry suspensive effect (Art. 45 Abs. 2 Asylum Law).
## Asylum applications and settled cases in Switzerland according to nationalities

**01.01. until 31.12.2001**

<table>
<thead>
<tr>
<th></th>
<th>Algeria</th>
<th>FRY</th>
<th>Guinea</th>
<th>Iraq</th>
<th>Sri Lanka</th>
<th>Turkey</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Asylum applications</strong></td>
<td>828</td>
<td>3.425</td>
<td>679</td>
<td>1.201</td>
<td>684</td>
<td>1.960</td>
<td>11.335</td>
<td>20.633</td>
</tr>
<tr>
<td><strong>Total settlement</strong></td>
<td>572</td>
<td>5.574</td>
<td>605</td>
<td>1.487</td>
<td>1.667</td>
<td>1.674</td>
<td>10.249</td>
<td>21.963</td>
</tr>
<tr>
<td><strong>Asylum status granted</strong></td>
<td>30</td>
<td>266</td>
<td>0</td>
<td>351</td>
<td>90</td>
<td>496</td>
<td>1.013</td>
<td>2.253</td>
</tr>
<tr>
<td><strong>Negative decisions</strong></td>
<td>287</td>
<td>3.845</td>
<td>265</td>
<td>773</td>
<td>1.394</td>
<td>820</td>
<td>4.873</td>
<td>12.470</td>
</tr>
<tr>
<td>“Nichteintreten”</td>
<td>137</td>
<td>972</td>
<td>298</td>
<td>100</td>
<td>113</td>
<td>156</td>
<td>2.730</td>
<td>4.498</td>
</tr>
<tr>
<td><strong>Withdrawals</strong></td>
<td>33</td>
<td>285</td>
<td>5</td>
<td>34</td>
<td>37</td>
<td>97</td>
<td>727</td>
<td>1.218</td>
</tr>
<tr>
<td><strong>Otherwise closed</strong></td>
<td>85</td>
<td>206</td>
<td>37</td>
<td>229</td>
<td>33</td>
<td>105</td>
<td>829</td>
<td>1.524</td>
</tr>
<tr>
<td><strong>First instance pending on</strong></td>
<td>427</td>
<td>1.733</td>
<td>243</td>
<td>1.365</td>
<td>511</td>
<td>1.526</td>
<td>8.798</td>
<td>14.603</td>
</tr>
</tbody>
</table>

**Asylum applications and settled cases according to nationalities:**

- **Algeria**: 828 (Asylum applications), 572 (Total settlement), 30 (Asylum status granted), 287 (Negative decisions), 33 (Withdrawals), 85 (Otherwise closed), 427 (First instance pending on 31.07.02)
- **FRY**: 3.425 (Asylum applications), 5.574 (Total settlement), 266 (Asylum status granted), 3.845 (Negative decisions), 285 (Withdrawals), 206 (Otherwise closed), 1.733 (First instance pending on 31.07.02)
- **Guinea**: 679 (Asylum applications), 605 (Total settlement), 0 (Asylum status granted), 265 (Negative decisions), 5 (Withdrawals), 37 (Otherwise closed), 243 (First instance pending on 31.07.02)
- **Iraq**: 1.201 (Asylum applications), 1.487 (Total settlement), 351 (Asylum status granted), 773 (Negative decisions), 34 (Withdrawals), 229 (Otherwise closed), 1.365 (First instance pending on 31.07.02)
- **Sri Lanka**: 684 (Asylum applications), 1.667 (Total settlement), 90 (Asylum status granted), 1.394 (Negative decisions), 37 (Withdrawals), 33 (Otherwise closed), 511 (First instance pending on 31.07.02)
- **Turkey**: 1.960 (Asylum applications), 1.674 (Total settlement), 496 (Asylum status granted), 820 (Negative decisions), 97 (Withdrawals), 105 (Otherwise closed), 1.526 (First instance pending on 31.07.02)
- **Others**: 11.335 (Asylum applications), 10.249 (Total settlement), 1.013 (Asylum status granted), 4.873 (Negative decisions), 727 (Withdrawals), 829 (Otherwise closed), 8.798 (First instance pending on 31.07.02)
- **Total**: 20.633 (Asylum applications), 21.963 (Total settlement), 2.253 (Asylum status granted), 12.470 (Negative decisions), 1.218 (Withdrawals), 1.524 (Otherwise closed), 14.603 (First instance pending on 31.07.02)
Asylum applications and settled cases in Switzerland according to nations

01.01. until 31.07.2002

<table>
<thead>
<tr>
<th></th>
<th>Algeria</th>
<th>FRY</th>
<th>Guinea</th>
<th>Iraq</th>
<th>Sri Lanka</th>
<th>Turkey</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum applications</td>
<td>640</td>
<td>2.093</td>
<td>477</td>
<td>615</td>
<td>294</td>
<td>1.170</td>
<td>8.999</td>
<td>14.288</td>
</tr>
<tr>
<td>Total settlement</td>
<td>616</td>
<td>2.045</td>
<td>414</td>
<td>826</td>
<td>426</td>
<td>1.026</td>
<td>6.678</td>
<td>12.031</td>
</tr>
<tr>
<td>Asylum status granted</td>
<td>14</td>
<td>94</td>
<td>0</td>
<td>194</td>
<td>57</td>
<td>275</td>
<td>377</td>
<td>1.011</td>
</tr>
<tr>
<td>Negative decisions</td>
<td>390</td>
<td>1.206</td>
<td>222</td>
<td>416</td>
<td>298</td>
<td>525</td>
<td>3.536</td>
<td>6.593</td>
</tr>
<tr>
<td>Nichteintreten</td>
<td>121</td>
<td>521</td>
<td>166</td>
<td>67</td>
<td>41</td>
<td>85</td>
<td>1.764</td>
<td>2.765</td>
</tr>
<tr>
<td>Withdrawals</td>
<td>35</td>
<td>147</td>
<td>7</td>
<td>7</td>
<td>17</td>
<td>71</td>
<td>574</td>
<td>858</td>
</tr>
<tr>
<td>Otherwise closed</td>
<td>56</td>
<td>77</td>
<td>19</td>
<td>142</td>
<td>13</td>
<td>70</td>
<td>427</td>
<td>804</td>
</tr>
<tr>
<td>First instance pending on 31.07.02</td>
<td>455</td>
<td>1.803</td>
<td>307</td>
<td>1.207</td>
<td>409</td>
<td>1.727</td>
<td>11.352</td>
<td>17.260</td>
</tr>
</tbody>
</table>

788
7.2. Costs of return

Due to the high number of state actors involved in removal procedures it is impossible to accurately describe the overall costs attached to an effective return policy. This would, without doubt, go way beyond the scope of this report. By way of illustration, however, it might be of interest to have a closer look at the distribution of expenditures of the Federal Office in 2001 in the field of asylum. The chart below does not record any other expenditures incurred by the other actors involved. Generally speaking, the importance of an effective return policy cannot adequately be described in terms of their budgetary implications. Conversely, the financial and social costs of an inadequately functioning return policy may be a multiple of the expenditures arising in the context of return.
Expenditures in the sphere of asylum in Switzerland in 2001

Federal expenditure in the sphere of asylum 2001

- Assistance to Asylum Seekers: 69.9%
- Assistance to Refugees: 8.5%
- Enforcement: 2%
- Return assistance: 5%
- Other FOR expenditure: 14.7%

FOR budget for 2001: Sfr. 946 Mio(*)

- Assistance to asylum seekers: Sfr. 661 Mio
- Assistance to refugees: Sfr. 80 Mio
- Return assistance: Sfr. 47 Mio
- Enforcement: Sfr. 19 Mio
- Other FOR expenditure: Sfr. 139 Mio

The overall budget of the FOR in 2002 amounted to SFR 922 millions.

---

1092 :
- CHAPTER XVIII -

COUNTRY REPORT UNITED KINGDOM

by
Anneliese Baldaccini
with
Prof. Elspeth Guild,
University of Nijmegen/London
Study on return and repatriation – UK report

By Anneliese Baldaccini with Professor Elspeth Guild

### Policy recommendations arising from UK law and practice:

- A credible return and repatriation policy must be underpinned by an efficient asylum procedure

### Introduction

Return and repatriation policy in the UK must be seen in the context of the highly politicised debate on asylum and the huge amount of political capital invested in controlling a phenomenon that has recently made Britain a key destination country in Europe. Ever since the significant increase in applications, asylum has been high on the political agenda and policy responses, driven by the Cabinet Office, have focused largely on measures aimed at reducing numbers of applicants and increasing the capacity for returns. The overall emphasis of recent reforms to the asylum system has been on speeding up procedures and tightly managing and policing the asylum process throughout all stages. In addition, a raft of deterrent measures – from increased use of detention to withdrawal of support – was to discourage further applications and make the UK less ‘attractive’ to asylum seekers. There has been remarkable little debate over the fact that the effect of these measures would ultimately be to displace the ‘asylum problem’ with an ‘irregular immigration problem’, thus blurring the distinction between asylum seekers and economic migrants even further. Irregular migrants have been and continue to be less of an issue.

Policy responses have engaged several actors across government and in the intergovernmental sector (particularly UNHCR and IOM), and provoked high profile judicial challenges and widespread criticism by NGOs. The EU has been virtually non-existent in the asylum debate or present only behind the scenes. The UK has embraced very substantially the asylum acquis which is seen as fitting its concerns over containing numbers of asylum seekers and shifting responsibility for their applica-
tions to EU partners or third countries. However, the government has been at pains to minimise publicly its participation in EU measures and avoid any impression to be advocating for greater EU involvement in member states’ immigration and asylum policies.

The tougher stance on asylum displayed in public discourse and in legislative reforms has placed the UK government at odds with its human rights obligations. There is a tremendous amount of concern in civil society about the impact of recent measures on the refugee protection regime and the right to seek asylum. This is increasingly a field where the legitimacy of government policies is being scrutinised and called into question.

1. Facts and figures

From the mid–1990s onwards, asylum applications in the UK increased considerably reaching a peak of 110,700 (including dependants) in 2002. As a result of measures subsequently introduced, numbers began to decline sharply and were down to 40,200 in 2004. The decline is attributed to raft of new pre–arrival measures which include the agreement with the French over the closure of Sangatte, the deployment of new detection technology, the introduction of new visa regimes, and the expansion of juxtaposed control locations and of the airline liaison officers (ALO) network. In addition, new legislative measures were introduced in 2002 which aimed to secure a radical reduction in asylum numbers by ending appeals in the UK for nationals of safe countries and removing benefits from those claiming in–country.

Having achieved a significant reduction in the number of arrivals, emphasis in public policy has more recently shifted to the issue of removals. It emerged from recent parliamentary debates that fewer than one in four failed asylum seekers is recorded as being removed or departing voluntarily and it is estimated that there are more than
250,000 asylum seekers in the UK with no entitlement to stay.\textsuperscript{1093} The government argues that the failure to remove large numbers of people whose claims have been refused strikes at the credibility of the asylum system. New legislative measures introduced in 2004 further attempt to dispose of barriers to removal and deliver on the government’s commitment to increase the monthly rate of removals so that it exceeds the number of unfounded asylum applications by the end of 2005.\textsuperscript{1094}

The pressure to increase the removal rate of failed asylum seekers had previously been aided by the setting of numerical targets – a policy that generated considerable controversy and one which UNHCR and NGOs criticised as inconsistent with a human approach to removal. In its 2002 annual report, the Home Office listed a Public Service Agreement (PSA) target to increase the number of failed asylum seekers removed from the country to 30,000 by March 2003. However, it soon recognised that the target had been ‘massively overambitious’ and targets have since been defined in terms of removing every year a greater proportion of failed asylum seekers.\textsuperscript{1095} The PSA target refers to the removal from the UK of people who have breached immigration laws, with a particular focus on those who have at some stage applied for asylum but who have been unable to establish an eligibility to remain on that, or any other, basis.

Unlike in respect of failed asylum seekers, there is no official estimate of the number of irregular immigrants and there are no statistics on overstaying. Most entries of visitors are not recorded and as there is no immigration control on embarkation, there is no way of checking whether someone has left the country. The only figures available that are directly relevant are those of illegal entrants and overstayers who are identified or proceeded against. In 2002, the last year for which reliable data are

\textsuperscript{1093} House of Commons Hansard Debates, 7 February 2005: Col.1184.
\textsuperscript{1094} ‘Asylum applications continue to fall’, Home Office Press Notice, 22 February 2005.
\textsuperscript{1095} Details of the target are given in the Spending Review PSA Technical Notes available at www.treasury.gov.uk. Technical Notes published by the Home Office in March 2003 provide that the
available, enforcement action was initiated against 57,735 people, of whom the great majority (nearly 48,050) were illegal entrants – persons who entered the country clandestinely or by deception. Although data was not of sufficient quality for publication in 2003, it is estimated that 22,950 persons had illegal entry action initiated against them in this year. The number undetected is largely a matter of speculation.

A tougher stance on returns has been reflected in the government’s recent position towards refugees from post conflict or transitional situations, such as Iraq and Somalia which account for the most applicants in Britain. In February 2004, the Home Office announced that the UK was to begin enforced returns of unsuccessful Iraqi asylum applicants to Iraq. In March 2004, it quietly started the forced return of failed Somali asylum seekers to Mogadishu. The government believes that removals will deter new applications and induce the voluntary return of those already in the country.

Reactions to both these developments have been strong. UNHCR called the announcement on returns to Iraq premature in light of the continuing security problems and poor infrastructure. In its response to forced returns to Somalia, UNHCR reiterated its stance against the involuntary return of rejected asylum seekers to southern Somalia, including Mogadishu, or to an area of the country from which they do not originate. Six people were removed to Somalia and 13 Somalis returned voluntarily through IOM in 2004. There have so far been no removals to Iraq. In 2004, 352 Iraqis returned on a voluntary basis with assistance from IOM. Applicants must sign a waiver releasing IOM from responsibility once they are on Iraqi territory because IOM cannot guarantee their personal safety once they cross the border into Iraq.

---

removal target will be met if the proportion of refused asylum seekers (including dependants) removed in the target year (2003-04) is greater than those removed in the baseline year (2002-03).

Asylum seekers have also been returned to Zimbabwe, against the advice of UNHCR. In 2002, as a result of protests from all parties, the government temporarily suspended the forcible removal of asylum seekers from Zimbabwe. However, a visa regime was introduced for new arrivals and return was considered safe in individual cases. Hence, failed Zimbabwean asylum seekers were required to apply for voluntary repatriation. Meanwhile accommodation and a basic allowance were withdrawn and they were forbidden to work. In effect, there were left in a state of limbo with no legal status. Threat of destitution induced some 60 Zimbabweans to return ‘voluntarily’ in 2004. On 10 November 2004 the government decided to end the temporary suspension of enforced return of failed Zimbabwean asylum seekers.

A record of 13,005 principal asylum applicants were removed from the UK in 2003. Of these, 2,980 were refused entry at port and subsequently removed; 8,270 were in-country enforcement removals; 1,755 left under the assisted voluntary return programmes run by IOM. Provisional data for 2004 show that removals fell slightly to 12,430 principal applicants, due to a large extent to fewer removals of principal applicants recorded as nationals of the then ten countries which joined the EU on 1 May 2004. The largest nationalities of principal applicants removed or departing voluntarily in 2004 were Serbia and Montenegro, Afghanistan, Iraq and Albania.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications received</td>
<td>2000</td>
<td>2001</td>
<td>2002</td>
<td>2003</td>
<td>2004</td>
</tr>
<tr>
<td>of which: Applied at port</td>
<td>25,935</td>
<td>24,865</td>
<td>26,560</td>
<td>13,720</td>
<td>7,590</td>
</tr>
<tr>
<td>Applied in–country</td>
<td>54,380</td>
<td>46,160</td>
<td>57,570</td>
<td>35,685</td>
<td>26,340</td>
</tr>
<tr>
<td>Initial decisions</td>
<td>109,205</td>
<td>120,950</td>
<td>83,540</td>
<td>64,940</td>
<td>46,035</td>
</tr>
<tr>
<td>Granted asylum</td>
<td>10,605</td>
<td>13,495</td>
<td>10,240</td>
<td>4,265</td>
<td>1,515</td>
</tr>
</tbody>
</table>

1097 Hansard Written Statements, 14 March 2005: Col. 2WS.
<table>
<thead>
<tr>
<th>Granted exceptional leave to remain</th>
<th>11,475</th>
<th>21,615</th>
<th>21,020</th>
<th>7,535</th>
<th>3,995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refused asylum and ELR, HP and DL</td>
<td>64,975</td>
<td>90,410</td>
<td>55,200</td>
<td>56,445</td>
<td>40,525</td>
</tr>
<tr>
<td>Granted asylum %</td>
<td>12</td>
<td>11</td>
<td>12</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Granted ELR, HP and DL %</td>
<td>13</td>
<td>17</td>
<td>24</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>Refused asylum and ELR, HP and DL %</td>
<td>75</td>
<td>72</td>
<td>64</td>
<td>83</td>
<td>88</td>
</tr>
</tbody>
</table>

**Appeals**

| Appeals received by the Home Office | 46,190 | 74,365 | 51,695 | 46,130 | 35,000 |
| Appeals determined by adjudicators | 19,395 | 43,415 | 64,405 | 81,725 | 55,975 |
| of which allowed                    | 3,340  | 8,155  | 13,875 | 16,070 | 10,845 |
| Appeals allowed %                   | 17     | 19     | 22     | 20    | 19     |

**Removals and voluntary departures**

<table>
<thead>
<tr>
<th>8,980</th>
<th>9,285</th>
<th>10,740</th>
<th>13,005</th>
<th>12,430</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,440</td>
<td>4,175</td>
<td>3,730</td>
<td>2,980</td>
<td>n/a</td>
</tr>
<tr>
<td>2,990</td>
<td>4,130</td>
<td>6,115</td>
<td>8,270</td>
<td>n/a</td>
</tr>
<tr>
<td>550</td>
<td>980</td>
<td>895</td>
<td>1,755</td>
<td>n/a</td>
</tr>
</tbody>
</table>

(data for 2004 are taken from the quarterly bulletins and are provisional).

### 2. Regularisation of irregular immigrants

The process of applying for leave to enter and remain in the UK is laid out in the Immigration Rules, originally provided for by the Immigration Act 1971. The Rules set out categories of people who can be granted leave and lay down periods of leave to be granted for different categories. Leave can be limited to a particular period, or be indefinite. Limited leave may be subject to certain conditions, whereas indefinite leave cannot be made subject to any conditions. Those accepted as refugees are usually given indefinite leave to remain (ILR), although the government has recently announced plans to make their status temporary and reviewable. There is no provision in the Rules for asylum seekers to obtain a visa or leave to enter on the basis that they wish to claim asylum. Instead they must somehow get themselves to the UK...
and, once here, submit their claim. If they claim asylum at their port of entry they may be detained or, as an alternative, be given temporary admission to the UK. Temporary admission allows a person to be physically, but not legally, present in the country. For immigration purposes, they are considered as if still waiting in the port – a circumstance that subjects them to a very restricted benefits regime.

While limited or indefinite leave to remain in the UK may be granted according to the Immigration Rules, the immigration authorities have discretion to grant leave outside the Rules. As this is leave granted outside the criteria laid down, this has been known as exceptional leave to enter or to remain (ELR). Exceptional leave to remain has also been used as a term to refer to the granting of leave to persons whose claims for asylum fail, but who are recognised as requiring protection. Furthermore, exceptional leave to remain has been granted to people who have successfully shown that their human rights would be endangered by removal.

Government perception that the widespread use of exceptional leave was acting as a pull factor and increasing the number of unfounded applications in the UK led to a change in its subsidiary protection policy. From 1 April 2003, exceptional leave to remain was replaced by humanitarian protection (HP) and discretionary leave (DL). Humanitarian protection is granted to those who, though not refugees, would, if removed, face in the country of return a serious risk to life or person arising from the death penalty, unlawful killing or torture, inhuman or degrading treatment or punishment. Discretionary leave is granted to some people who do not qualify for humanitarian protection or leave under the Immigration Rules. The difference between the two categories lies in the provision that those who qualify for humanitarian protection will be granted three years of leave and then, if still in need of protection, will be eligible to apply for settlement in the UK. Under discretionary leave, periods of three years or less can be granted, after which a person will only be able to apply for a further period of leave, rather than for settlement.\(^{1098}\)

\(^{1098}\) APU Notice 1/2003, 1\(^{st}\) April 2003.
Country Report United Kingdom

Non–UK nationals who have no entitlement to enter or stay under the above categories of leave are liable to removal or deportation. They are or become irregular immigrants, and hence are potential targets of regularisation. Other than failed asylum seekers, individuals in this situation can be those who have fallen into irregularity after their leave to remain in the UK expired (overstayers); people who have permission to be in the country but are in breach of their conditions of stay (such as visitors working illegally); and clandestine entrants or those who obtained leave to enter by deception.\textsuperscript{1099}

Regularisations in the UK take the form of decisions made by the Secretary of State for the Home Department under the Immigration Rules. Internal guidance instructions of the Immigration Directorate provide that indefinite leave should normally be granted to a person who has completed a continuous period of residence of 14 years or more, regardless of its legality.\textsuperscript{1100} Leave should only be refused if there are serious countervailing factors. A concession was added in 1999 to permit any family with young children and who had lived in the UK for seven years or more to gain indefinite leave to remain. These concessions are collectively called the long residence rule which in effect is a rolling regularisation programme. In 2003 the numbers of persons who were granted indefinite leave to remain on a discretionary basis, which include grants after a long period of continuous residence in the UK, were 11,235.\textsuperscript{1101}

The long residence rule operates on a case–by–case basis and by no means represents a blanket approach. Group regularisations (or amnesties) are believed to act as a powerful pull factor and are therefore resisted. There have been three or four such

\textsuperscript{1099} Statement of changes to the Immigration Rules, HC 395, as amended.
\textsuperscript{1100} Immigration Rules, para.276B.
\textsuperscript{1101} Control of Immigration: Statistics United Kingdom 2003.
amnesties in the past following changes to the law either by Parliament or important decisions by the courts but they have never involved substantial numbers.\textsuperscript{1102}

Far greater numbers were involved by a regularisation exercise, announced in 1998, aimed at reducing the pre–1996 asylum application backlog.\textsuperscript{1103} Backlog clearance criteria involved the granting of ILR for people whose asylum claims had been outstanding from 1 July 1993, and ELR for people with claims outstanding from between 1 July 1993 and 31 December 1995. Between 1999 and 2000, 11,140 individuals were granted asylum and 10,325 were granted exceptional leave under these criteria.\textsuperscript{1104}

Recently, two more regularisations were directed at solving long–standing asylum cases. One took place in December 2002 and involved the grant of status to a group of \textit{would–be} asylum claimants in an attempt to stem the flow of irregular traffic from the Red Cross Centre at Sangatte near Calais to the UK. As part of an agreement between the British and the French governments to close the Sangatte Centre, the UK admitted about 1,000 people from Sangatte, comprising about 900 Iraqis and 100 Afghans. Iraqis were given four years leave to enter with permission to work. Afghans were admitted to join relatives in the UK and given status in line with those relatives. These arrangements were subject to the individuals concerned signing an undertaking that they would not raise an asylum claim in the UK.

On 24 October 2003, the Home Office announced a one–off exercise to allow families with dependent children who applied for asylum in the UK before 2 October


Country Report United Kingdom

2000 to receive permission to stay indefinitely. The exercise initially applied to those cases where the final appeals process had not been exhausted and to those where final decisions were made but removal was not effected. In August 2004 the policy was broadened, to include people who already have limited leave to remain and people who came on the Kosovan humanitarian evacuation programme (HEP) before October 2000 and did not apply for asylum. It also includes those who have had a child, or were joined by a dependent child, between 2 October 2000 and 24 October 2003, provided any dependent was under 18 on either date. The exercise, which is still running, was meant to clear an estimated 15,000 asylum seeking family cases. To date a total of 10,349 grants has been issued.

3. Legislative and administrative measures to speed up the return process

The capacity to remove individuals from the UK has in recent years been streamlined by way of enactment of rules which seek to restrict or remove the courts’ jurisdiction against negative asylum decisions made by the Home Office, and by making greater use of detention of asylum seekers and restricting their ability to work and access support.

The Nationality, Immigration and Asylum Act 2002 introduced non–suspensive appeals provisions for claims which the Secretary of State certifies as clearly unfounded.\textsuperscript{1105} It allows for asylum seekers’ swift removal without an in–country appeal right against a refusal of their asylum or human rights claim. The process was initially restricted to the then ten EU accession countries which were presumed ‘safe’ under the Act. The Act empowers the Home Secretary to add to the list of countries presumed ‘safe’ for the purpose of disallowing an in–country right to appeal and a total number of 15 countries have subsequently been added to the list.\textsuperscript{1106} Designa-

\textsuperscript{1105} 2002 Act, ss94 and 115.
\textsuperscript{1106} The Asylum (Designated States) Order 2003 added Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania and Serbia and Montenegro (including Kosovo) to the list. The Asylum (Desig-
tion of one such country, Bangladesh, as ‘safe country of origin’ under the 2002 Act was recently successfully challenged in the courts (see further below at legal barriers to removal). All cases from countries labelled as ‘safe’ are fast–track at designated detention facilities and dealt with in a matter of seven to ten days. New legislation introduced in 2004 has extended the Secretary of State’s power to certify claims as ‘clearly unfounded’ and so deny in–country rights of appeal. In addition to the power under s94 of the 2002 Act to designate countries or parts of countries that are generally free from persecution and relevant human rights abuses, s27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 provides a power to designate countries or parts thereof as safe for particular categories of claimants even though they are accepted to be unsafe for other categories.

Greater emphasis on removal has resulted in an increasingly assertive detention policy as a way to support removal. The 2002 Act formally changed the name of detention centres to removal centres, a change that, according to ministerial statements, was intended to send a message to people that they will be removed if they are unsuccessful in their asylum claim. There are currently ten such removal centres with a total capacity of 3,000 places. Most are run by private companies contracted to the Immigration and Nationality Directorate (IND), some are run by the Prison Service. Six of the centres detain men only and the other four are mixed centres which also detain children in families (Tinsley House, Oakington, Yarl's Wood and Dungavel House). Oakington 'Reception' Centre, which opened in March 2000, is used to detain people whose claims the government assesses to be straightforward and capable of being decided quickly. Detention at Oakington is supposed to last around 7 to 10 days, however it can be for longer periods. People are granted temporary admission or are transferred to other detention centres while they pursue their appeals. There is careful case–tracking of applicants who have passed through the detention

nated States) (No.2) Order 2003 added Bangladesh, Bolivia, Brazil, Ecuador, South Africa, Sri Lanka and Ukraine. Lastly, the Asylum (Designated States) Order 2005 added India.

1107 Campsfield House (Oxfordshire), Colnbrook (near Heathrow), Dover (Kent), Dungavel House (in Scotland), Harmondsworth (near Heathrow), Haslar (Gosport), Lindholme (near Doncaster), Tinsley
centre, so that if the appeal is dismissed, prompt action can be taken to remove the individual. Since April 2003, a super fast-track process operates at Harmondsworth where asylum seekers are detained from arrival throughout the asylum process. Nationality is the main criterion for expedited decision-making.

An increasing number of asylum claimants are detained on arrival and held in detention during part or all of the process of dealing with their application. Although there are no data available on how many asylum seekers are detained each year and for how long, or at what stage of the asylum process, quarterly statistics are issued which detail a snapshot of the detention estate on a particular day. They suggest that detention of asylum seekers is implemented only to a fraction of the full capacity of the detention estate. The latest figures show that at 25 December 2004, 1,950 people were detained in the UK under Immigration Act powers of which 1,515 (78 per cent) were asylum seekers. 25 were recorded as being under 18 years old. The law does not provide for a maximum duration of detention. According to the statistics, the majority (76 per cent) had been in detention for less than two months, 85 detainees for one year or more. Asylum seekers from China, Turkey, India, and Nigeria figure as having the highest detention rate in normal as well as fast-track detention facilities.

Another significant deterrent measure introduced under the 2002 Act is section 55, which restricts access to social support by asylum seekers. The provision, which came into force on 8 January 2003, prevents the Home Secretary from providing an asylum seeker with support (including emergency accommodation) if he is not satisfied that the person made his or her claim as soon as reasonably practicable after arrival in the UK. This harsh measure was meant to deter asylum applications by overstayers or other irregular migrants, enforcement action against whom is frequently frustrated by their lodging an asylum claim on detection. However it was applied in such a draconian way as to leave destitute thousands of individuals who had claimed

House (near Gatwick airport), Yarl's Wood (Bedfordshire) and Oakington 'Reception' Centre (near
asylum within hours of arrival. The policy was slightly mitigated to comply with judicial decisions in various test cases and finally disapplied when the Court of Appeal found that it violated the right to be free from torture, inhuman and degrading treatment in a substantial number of people.\textsuperscript{1108}

The impact of section 55 was compounded by a change of policy in respect of asylum seekers’ right to work. In July 2002, the government announced the withdrawal of a policy concession which had allowed asylum seekers whose applications had not been decided after six months to take up employment.\textsuperscript{1109} The government justified this new policy on the basis of its own view that employment opportunities act as a pull factor. In order to comply with the EU Directive 2003/9 on reception conditions for asylum seekers the entitlement to work was then reinstated for applicants whose case had not been the subject of an initial determination within 12 months.

New provisions were enacted in 2004 which are meant to cater for returns. Section 9 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 aims to encourage more families to return voluntarily by ending their unlimited right to support when the legal process has been exhausted and when they are able to take up a voluntary, paid route home. This policy is currently being piloted by the Home Office’s Immigration and Nationality Directorate (IND) at three of its local enforcement offices across the UK (Manchester, Leeds and Becket House), covering 120 families. Section 2 introduces a new offence of deliberately destroying or discarding travel documents in an attempt to frustrate removal (more details below at section dealing with practical barriers to removal). In addition, airlines are asked to copy travel documents on certain routes.

\textsuperscript{1108} The Secretary of State for the Home Department v Limbuela and Others [2004] EWCA Civ 540, 21 May 2004.

The 2004 Act also radically changes the system for immigration and asylum appeals by replacing the two–tier appellate authority (consisting of adjudicators and the Immigration Appeal Tribunal) with a single–tier body called the Asylum and Immigration Tribunal (AIT) and placing restrictions upon access to the courts.\footnote{2004 Act, s26.} This has been accompanied by cuts to legal aid for immigration and asylum work and the introduction of a new conditional fee regime in applications for High Court review and actual reconsideration by the AIT. The effect of changes in the legal aid system has been to create increasing shortage of specialist legal advice and representation. The problem is acute throughout the country and is affecting people at all stages of the asylum process, not least because of the increasing speed at which applications and appeals are being processed. Legal practitioners and the non–governmental sector have consistently raised concerns that the failure to make specialist legal support available is restricting access to justice and undermining the credibility of the whole system.

Finally, increasing removals is a key part of the government’s new five year immigration and asylum strategy announced in February 2005.\footnote{2004 Act, s26.} The strategy includes plans to expand detention and fast–tracking of asylum claims; secure more effective returns arrangements with the countries from which most failed asylum seekers come; grant refugees temporary leave to begin with, and keep the situation in their home countries under review, so that if appropriate they will be expected to return home.

4. **Legal and administrative procedures concerning return and repatriation**

There are a number of different procedures for removing a failed asylum seeker from the UK. These include port removal, removal of illegal entrants, administrative removal and deportation. The formal procedures for removal are triggered by the un-
derlying immigration decision against the individual (for example, that he is an ‘illegal entrant’ or an ‘overstayer’) rather than the refusal of the asylum claim. In effect, the asylum claim is a ground for appealing against removal in circumstances where the applicant is not otherwise entitled to remain in the UK. This is because an asylum claim is, in legal terms, a claim that removal would be contrary to the protection laid down in the 1951 Convention.

The first ground for removal concerns people who arrive at a sea port or airport in the UK and apply for leave to enter the country. If, after consideration, their application is refused, they will then be liable to removal under a procedure known as ‘port removal’, against which they have limited rights of appeal. It is a simple process as the only decision which needs to be made by the immigration officer is that the individual does not qualify for leave to enter the country. The term ‘port removal’ is not a technical term, but is generally used to describe this group of removals. It applies both to those removed directly from the port at which they arrive, and to those who are granted temporary admission to the UK for a period of time while their claim for asylum is considered, before being removed when the claim is unsuccessful.

Other asylum seekers enter the UK irregularly, and subsequently lodge a claim for asylum. If this claim is unsuccessful, they will be liable to removal as illegal entrants. Appeals may be made both against removal on human rights and asylum grounds, and also disputing the decision that the individual is an illegal entrant. Categories of illegal entrants include those who enter by deception of an immigration officer, by virtue of using false documents, or failing to supply all the relevant information to an immigration officer.

Those who have been granted leave but have breached the conditions attached to that leave, overstayed the period allowed or obtained leave to remain by deception, are

---

subject to administrative removal, a process introduced in October 2000. Before this date, these groups would have been subject to deportation. Those subject to administrative removal are given a notice of the decision to remove them, and may appeal only on asylum or human rights grounds. The effect of replacing deportation by administrative removal for these groups has been to reduce the available rights of appeal and speed up the process. The right to appeal on compassionate grounds, which was available under the deportation processes to overstayers who had been in the country for at least seven years, no longer applies to this group. Those subject to administrative removal may return to the UK provided that they qualify for admission under the Immigration Rules.

Finally, a small number of people are subject to deportation. Since the introduction of the Immigration and Asylum Act 1999, which amended section 3(5)(a) of the Immigration Act 1971, deportation has been applicable only to those whose departure from the country is judged ‘conducive to the public good’ or who have been convicted of a criminal offence and recommended for deportation by the court, or who are family members of a deportee. The Immigration Rules specify that in considering whether deportation is the right course of action on the merits, the public interest will be balanced against any compassionate circumstances of the case.

The factors to be taken into account before reaching a deportation decision are

a) age;
b) length of residence in the UK;
c) strength of connections with the UK;
d) personal history, including character, conduct and employment record;
e) domestic circumstances;
f) previous criminal record and the nature of any offence of which the person has been convicted;
g) any representations received on the person’s behalf.\textsuperscript{1112}

Deportation will generally not be considered appropriate where there are minor dependent children in a family which has been living continuously in the UK for seven

\textsuperscript{1112} Immigration Rules, para.364.
years or more, unless there are strong countervailing factors, such as a conviction for a serious offence.

Deportation is a lengthier process than other removals, carrying greater rights of appeal. In most cases a ‘decision to deport’ (against which various grounds for appeal may be raised) must be issued before a deportation order can be made. Once all appeal rights have been exhausted, a deportation order is signed, paving the way for an immigration officer to set removal directions. The person concerned is prohibited from re–entering the country for as long as the deportation order is in force. A person subject to enforcement action may choose to leave the UK voluntarily at any time before the deportation order has been signed, thus bringing enforcement action to a halt. However, once a deportation order has been signed, voluntary departure still carries the implications associated with actual deportation.

All those subject to these processes should be issued with removal directions. Generally, removal directions are issued in writing to the person concerned, specifying the date, time, carrier and destination to which the individual is being removed. The cost of removal is usually borne by the Home Office, unless a carrier has been identified as liable for the removal under the Immigration (Carriers’ Liability) Act 1987.

Certain restrictions may be placed on an individual, with regard to employment or residence, or an obligation to report regularly to a police station, following issuance of a removal notice. An immigration officer may also order the detention of an individual where it is believed that a person will not comply with removal orders (because, for instance, he or she might abscond). Detention may also be ordered for persons who have been refused entry to the UK or where the person is to be deported.
Country Report United Kingdom

*Operational procedures for enforced return*

The Immigration Service, part of the Home Office’s Immigration and Nationality Directorate (IND), carries out enforced removals, with the assistance of the police and the escorting services provided by private contractors. Individuals or families are visited at their home without notice, arrested and conducted to holding facilities. A provision in the Nationality, Immigration and Asylum Act 2002 allows detainee custody officers of private firms to attend a residence with the Immigration Service or police so that an individual may be removed directly rather than via holding facilities.1113 In this case, the rejected asylum seeker is taken directly to the airport and put on a flight, or taken into detention for a brief period prior to departure.

Various private security firms have been contracted to provide safe and secure escorting and removal services to the IND. Contractors provide escorting services to transfer immigration detainees (both failed asylum seekers and other offenders) to and from a variety of locations, including airports, seaports, international rail terminals, immigration detention centres, prisons, police stations, courts or appeals hearing centres. They are also required to ensure that detainees ‘board’ a ship, aircraft or train in accordance with removal directions. Overseas escorting services are also carried out by private contractors. They assist the government’s programme for the removal of immigration detainees (both failed asylum seekers and other offenders) from the UK to destination overseas in cases where the government assesses that individual detainees need to be escorted to their destinations for reasons such as security, medical care or flight safety. Most deportations are effected singly or in family groups on scheduled flights. Charter flights are organised occasionally to remove groups of detainees.

1113 2002 Act, s64.
Security firm personnel carrying out escort or custodial functions for IND are employed as detainee custody officers and, under the terms of the Immigration and Asylum Act 1999, are required to be certified by the Secretary of State for the Home Department as being fit and proper persons to be such officers and as having received training to a standard set by the Secretary of State. The contractor may use reasonable force only where necessary to keep a detainee in custody, to prevent violence and the destruction of property. Reasonable force may include the application of mechanical restraints where such restraint is proportionate and is the minimum necessary to ensure continued detention and safe removal. Only control and restraint (C&R) techniques and procedures approved by the government are to be used. All occurrences of use of force have to be reported in writing to the government contract monitor. Notification is given to the airline, the airport authorities, immigration and police at any transit points.

Concern has been raised by human rights and refugee NGOs, immigration detainee visitors groups and legal practitioners about harm occurring to asylum seekers in detention, during transfer and on attempted removal. They also express disquiet about the way in which the Immigration Service enforces removal from homes.

One frequently expressed complaint is that insufficient time is given to people to collect their belongings and settle their affairs before removal from the country. There are frequent reports of cases where individuals are fully complying with conditions of temporary admission and are suddenly arrested at reporting centres, at places of work or at home without time to prepare for removal. Persons, who have been living in the country for many years, are taken into detention without any prior warning and removed the following day without them being able to collect their possessions or settle their personal and financial affairs. Following her inspection of five immigration detention facilities (Tinsley House, Haslar, Campsfield House and Lindholme Removal Centres, and Oakington Reception Centre), the HM Chief Inspector of Prisons recommended that a post of welfare officer be created within re-

1114 1999 Act, s154.
moval centres to assist with problems and advise and support detainees on release, transfer and removal. The government has not acted upon this recommendation.

A recent parliamentary inquiry into asylum removals also highlighted instances of abuse and serious misconduct by the Immigration Service and escorting staff. The report following the inquiry recommended the creation of an external monitoring body to carry out checks on escorts and the instalment of CCTV in the vans, where assaults were reported to occur. Mounting pressure from detainee visitor groups and a report from the Medical Foundation for the Care of Victims of Torture recording a dozen assaults in removal vans in a period of three months eventually persuaded the Home Office to install CCTV in the vans.

Allegations of violence and abuse against immigration detainees by Home Office contractors have recently been substantiated by an undercover report by the BBC into immigration detention. The conduct of staff and management at Global Solutions, one of the government's largest contractors, responsible for the detention and transport of asylum seekers, is being investigated by the prisons and probation ombudsman.

5. **The impact of EU instruments and European co-operation**

*Dublin II and EURODAC*

In recent years, removals of asylum seekers have increasingly been effected without substantive consideration of their claim on so-called third country grounds. The Third Country Unit (TCU), which is part of the Immigration Service, is responsible

---


1116 Lords Hansard Debates, 23 February 2005: Col.1247.
for all decisions to refuse an applicant on third country grounds. These occur within
the context of the Dublin Regulation to other European countries or to other third
countries under criteria specified in the statute. Returns to non–EU states on safe
third country grounds are only attempted in port cases. This is because it is essential
to return such cases quickly after their arrival in the UK.

In all third country cases the TCU must be satisfied that:

- the applicant is not a national or citizen of the country of destination;
- the applicant's life and liberty would not be threatened in that country by reason
  of race, religion, nationality, membership of a particular social group or political
  opinion; and
- the government of that country would not send the applicant to another country
  other than in accordance with the 1951 Convention (the concept of 'non–
  refoulement').

Under section 11 of the Immigration and Asylum Act 1999, member states of the EU
are to be regarded as countries which fulfil the second and third of these require-
ments as a matter of law. In addition, for non–EU countries removals, the TCU must
be satisfied in each such case that an applicant:

- had an opportunity at the border or within the territory of a safe third country to
  make contact with that country's authorities in order to seek protection; or
- that there is other clear evidence of the applicant's admissibility to a safe third
country.

Latest data show that, in 2004, 2,590 asylum applications were refused on third
country grounds. The numbers were 1,720 and 1,305 in 2003 and 2002, respec-
tively. The UK’s third country policy has relied greatly on EURODAC, enabling the
identification of a significant number of applications as ones falling for considera-

\[1118\] Home Office Asylum Statistics: 4th Quarter 2004 United Kingdom.
Country Report United Kingdom

by other member states. In 2003, there were 2,734 EURODAC hits, i.e. fingerprints sent by the UK to the Central Unit matching those of asylum seekers who had applied elsewhere in Europe. The UK attempts to transfer responsibility in the majority of such cases which in the main involve returns to countries such as Austria, Germany and Italy.\(^{1119}\) In the rush to send people back it is not uncommon for mistakes to occur as recently highlighted by a judicial review of a third country removal. A Sudanese national had been wrongly removed to Italy and despite it being immediately obvious that he was not the person the Italian authorities had agreed to take back, the Home Office unreasonably refused to acknowledge the mistake and have him returned to the UK for his asylum claim to be processed.\(^{1120}\)

\textit{Framework agreements with countries of origin or transit}

Within the framework of the EU, the UK has also made efforts to co-operate with relevant countries of origin and transit in the areas of return and readmission. The UK fully supports the negotiation of Community level agreements and has accordingly opted into all negotiating mandates for readmission agreements. It also maintains that member states should retain flexibility to negotiate bilateral arrangements with key source and transit countries according to their own priorities.

The UK has only recently begun to negotiate its own readmission agreements. In past years, the preferred option was to negotiate removals through bilateral contacts.\(^{1121}\) However, informal procedures came to be seen as less effective when a higher proportion of individuals with problematic immigration statuses came from countries which did not have Commonwealth links with Britain, such as North African and Central European countries. Bilateral contacts to negotiate returns are still being pur-


\(^{1120}\) Home Office ‘Sent Wrong Asylum Seeker to Italy’, \textit{"PA" News}, 17 March 2005.

\(^{1121}\) Home Office, \textit{Fairer, Firmer, Faster}, para.11.19.
sued in the framework of its ‘migration partnership’ arrangements, which currently involve the countries of Tanzania and South Africa.

In 2003, the UK concluded readmission agreements with Romania, Bulgaria and Albania. These agreements are not yet in force. They provide that identity and citizenship or right of abode of a person is to be proved, or may be reasonably presumed through a number of valid documents specified in the agreements, or any other evidence acceptable to both parties. The agreements set out how the request and response for readmission should be made, together with the timescale for the procedure.\footnote{Hansard Written Answers, 28 April 2004: Col.1099W.} Negotiations have also been held with a number of countries including Algeria, Afghanistan, China, India, Jamaica, Pakistan, Somalia and Turkey on the removal of third–country nationals through or to their territory, to facilitate the issuance of travel documentation or on the use of charter services for removal.

6. **Legal and administrative schemes for voluntary return**

If a claim is refused, and any subsequent appeal lost, it is open to failed asylum seekers to return voluntarily to their source countries, rather than being subject to forcible return by the Immigration Service. Since 1999, the Home Office has funded the voluntary assisted returns programme (VARP) run by the IOM. According to the Home Office, voluntary returns are inherently preferable to enforced returns and a vital component of the government's returns policy. Provisions to expand assisted voluntary return programmes were made under the Nationality, Immigration and Asylum Act 2002, which provides that the Home Secretary may make arrangements to assist people to return voluntarily or help them decide about returning.\footnote{Hansard Written Answers, 28 April 2004: Col.1099W.} This could include financial and practical support on and after arrival to help successful reintegration, and to explore and prepare visits for those considering returning.
Country Report United Kingdom

The voluntary return programme is open to those with pending or failed asylum claims, and those granted exceptional leave to remain (humanitarian or discretionary leave). Until March 2002, the programme provided basic assistance only, in the form of advice and information, pre-departure, transit and post-arrival assistance. Since that date, the package has also included reintegration assistance, in the form of activity that benefits the returnees, but also, where viable, supports activities that benefit the overall community where returnees settle. The voluntary assisted returns and reintegration programme (VARRP) is funded by the Home Office and the European Commission’s Refugee Fund. The programme is implemented by IOM in partnership with domestic non-governmental organisations which act as advice and referral points. VARRP applications are assessed by the Home Office for approval. Returning asylum seekers are requested to sign an asylum disclaimer prior to departure, relinquishing any outstanding application for asylum in the UK.

An independent evaluation of the returns programme, commissioned by the Home Office, found that it provided significant cost savings for IND in comparison with enforced removals and enabled people to return to a greater number of countries.\textsuperscript{1124} The programme was commended for providing asylum seekers with a dignified, timely departure. However, the study also evidenced shortcomings in the referral system, which affected the level of demand for the programme. To increase the demand for voluntary returns, the programme is in the process of being made available to detainees in removal centres.

Since the introduction of the programme, the number of individuals applying for return has increased steadily. During 2003, VARRP assisted the return of a total of 2,634 individuals to 87 countries around the world. From March 2004 to February 2005, 2,599 people left the UK under assisted voluntary return schemes run by IOM.

\textsuperscript{1123} 2002 Act, s58.

\textsuperscript{1124} Home Office, \textit{The Voluntary Assisted Returns Programme – An evaluation}, Research Development
Specific inter-agency programmes have also been set up to assist particular nationalities who wish to return to their home country. The Voluntary Returns to Afghanistan Programme (VRAP) is a programme for Afghans in the UK who have decided to return to Afghanistan on either a temporary or a permanent basis. UNHCR monitors returns to ensure they are voluntary, and works with the other partners in the VRAP to this end. The UK government offers resettlement grants under the scheme, amounting to £600 per individual and up to £2,500 per family. Those who are not eligible for the resettlement grant may benefit from reintegration assistance under the VARRP. In addition, an ‘explore and prepare’ programme has been set up which allows some Afghans to return to Afghanistan to assess the situation and prepare for the return of their family. It is available to Afghans who have exceptional or indefinite leave to remain. Those who take up the programme will be able to re-enter the UK within the period of their leave to remain in the UK. According to IOM, 14 Afghans have taken advantage of the explore and prepare programme and this has led in two cases to permanent return to Afghanistan.

Despite these significant incentives, the uptake on voluntary returns to Afghanistan has been slow. The number of Afghans who have returned since the commercial travel routes opened in April 2002 is 426. In April 2003, despite being advised to the contrary by UNHCR, the government started forced removals to Afghanistan.

There is increased pressure for return to be undertaken on a compulsory rather than voluntary basis, which raises questions as to how ‘voluntary’ the return programme funded by the Home Office is. The availability of a return route through IOM has been accompanied by a tougher stance on the granting of humanitarian status or extensions to exceptional leave. For instance, the rate of grants of humanitarian status (ELR, HP and DL) to Afghans which was as high as 78 per cent in the second quarter of 2002, dropped to 29 per cent in the third quarter of the same year and has been

________________________________________________________________________________________

Statistics, Findings 175, July 2002.
an average of 14 per cent since. Nationals from Iraq had a humanitarian grants rate of 71 per cent in the first quarter of 2003, after which it has been an average of 2 per cent. It is questionable whether a choice between returning voluntarily or remaining to face destitution and forcible return is consistent with the principles of voluntary return as promoted by UNHCR.

IOM London is expanding its activities in the UK to include irregular migrants in one of its new programmes, the Assisted Voluntary Return for Irregular Migrants Programme (AVRIM). The AVRIM project will complement the existing voluntary return programmes implemented by IOM as it is open to irregular migrants who are in the UK without legal documentation. This includes people who might have been smuggled or trafficked into the UK or who have overstayed their visas. In these cases IOM can now help to get travel documentation, pay for flights home and assist each returnee at the airport upon arrival and departure as well as assist with onward transportation to a returnee’s home town if necessary. Since the programme started in November 2004, IOM has assisted 53 irregular migrants to return home. IOM purports to guarantee confidentiality to applicants to this programme. It is difficult to see how this is to be reconciled with the fact that the process requires applicants to agree to the retention of personal details and fingerprints by the Home Office which ultimately approves applications under this programme. Irregular migrants who reconsider their application thus risk that their files are passed to the Home Office special unit responsible for enforcing removal.

7. Legal and administrative or other barriers to enforced removal

In many cases where enforcement action has been initiated, the person is not removable because of an outstanding asylum application or appeal. Other reasons include judicial review, lack of administrative capacity, documentation problems, and absconding.
Legal barriers

The general scheme of immigration control, establishing who can come into the UK and in what circumstances is set out in the Immigration Act 1971 (as amended) and the Immigration Rules made under it, as well as a large body of statutory instruments.

The 1971 Act did not deal with asylum, and rules made under it simply indicated that full account was to be taken of the UK's obligations under the 1951 Refugee Convention (as amended by the 1967 Protocol) when a person seeking to enter, or being removed, claimed asylum or indicated a fear of persecution. However, a statutory scheme for asylum determination and appeals was set up for the first time by the Asylum and Immigration Appeals Act 1993. This Act made the 1951 Refugee Convention part of UK law. According to this Act, the Immigration Rules must not be implemented in any way which contravenes the UK's obligation to provide protection to those in danger of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in their source country. The enforcement of immigration law against persons who enter the country is therefore suspended if they claim asylum, while that claim is considered. Immigration law has also been affected by the European Convention on Human Rights (ECHR), as introduced into UK law by the Human Rights Act 1998. Most importantly, Article 3 of the ECHR, and its interpretation by the courts, prohibits torture or inhuman and degrading treatment or punishment, and prevents the removal of people to a country where they might be exposed to such harm. As a matter of policy, the UK would also not seek to remove a person to a state where there is a real risk that they would face unlawful killing contrary to Article 2 of the ECHR or would face a real risk of the death penalty being imposed (contrary to Protocol 6 or even where the exception in Article 2 of Protocol 6 applies).

In certain circumstances, an asylum seeker at the end of the legal process still has the right, on human rights grounds, to make an appeal against removal from the country. Since October 2000 when the Human Rights Act 1998 came into force, appellants
have been required to state reasons why their human rights have breached by the refusal of their asylum claim, as part of the appeal process.\textsuperscript{1125} However, for those who applied for asylum before this date, the appeal process can proceed without human rights grounds being raised until the removal stage. In effect, lengthy delays between refusal of an asylum application and removal have resulted in asylum seekers becoming increasingly integrated into British society, forming ties and relationships, and challenging removal on the grounds that it would amount to an unjustifiable interference with their private life under Article 8 ECHR. In addition, if the situation of the individual has changed between the appeal decision and removal, such that new grounds for claiming breach of human rights have come into being, a further appeal may be brought.

Article 3 ECHR is relevant to the consideration of most applications for asylum. Where there are substantial grounds for believing that, if removed, the applicant would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment, humanitarian protection is normally granted. Applicants may also claim that their removal from the UK would constitute a breach of Article 3 on account of their medical condition. Recent case law, both at domestic and Strasbourg level, has established that the circumstances in which such a breach could be found will be exceptional. In those exceptional cases consideration may be given to the grant of discretionary leave on medical grounds. The initial period of discretionary leave granted is normally three years unless there are clear reasons for granting a shorter period. Examples may include where the applicant is undergoing a course of treatment of a finite duration or is awaiting surgery, after which Article 3 barriers may no longer apply.\textsuperscript{1126}

The extent to which non–Article 3 provisions of the ECHR are engaged by the removal or deportation of asylum seekers has recently been considered by the courts in

\textsuperscript{1125} The Immigration and Asylum Appeals (One-Stop Procedure) Regulations 2000.

a case involving fear of persecution by reason of religious belief (Article 9 ECHR) in the country of return. In a judgement handed down in July 2004, the House of Lords found that there was no reason in principle why articles other than Article 3 could not be engaged where a right under that article would be breached in the country of return. It stressed, however, that in order for any article other than Article 3 to engage the UK’s responsibilities when seeking to remove someone, a very high threshold test would have to be satisfied. To meet this high threshold, it would be necessary to establish a least a real risk of a flagrant violation of the very essence of the right.1127

It has recently emerged that the UK government is trying to overcome barriers to removal on Article 3 grounds, in cases where the presence of the person in the UK is believed not to be conducive to the public good, by seeking diplomatic assurances from the countries of origin. The UK is satisfied that the person concerned will not be at risk of ill-treatment if returned if it obtains assurances from the government of the country to which he/she is to be removed regarding the future treatment of that person. Case law has highlighted instances of unlawful detention of individuals for whose removal assurances were being sought from third–country authorities, despite it being clear that such assurances were unlikely to be forthcoming.1128 While no one has been removed from the UK under Immigration Act powers following the receipt of diplomatic assurances, this development in the UK’s removal policy has been singled out by the UN Committee Against Torture as a matter of particular concern.1129

Judicial review of unfounded claims certificates

1129 Committee Against Torture, Conclusions and recommendations, CAT/C/CR/33/3, 10 December 2004.
The extensive powers of certification, under the 2002 and 2004 Asylum and Immigration Acts, denying in-country appeal rights against refusal of asylum claims has also meant an increase in judicial review as the only means of preventing removal. Recent judicial reviews of certificates enacted under statutory provisions have challenged the Secretary of State’s assessment that a country is safe in the individual cases concerned and highlighted the significance of the manner in which the Home Office collates and presents relevant country information upon which the Secretary of State relies to exercise this power. In one recent case, involving an asylum seeker from Bangladesh, the High Court found that the Secretary of State’s inclusion of Bangladesh in the list of safe countries under s94 of the 2002 Act was unlawful as there were a number of objective materials available that should have precluded any determination that there was in general no serious risk of persecution in Bangladesh. This judgment is not likely to be overturned as it follows sound judicial precedent in respect of the unlawful inclusion of other countries, such as Pakistan and India, in safe country lists.

The Home Office bases its decisions about the countries to which people may be safely returned on information collated from various sources. However, many organisations find that this information is often riddled with inaccuracies and out-of-date material. The Home Secretary was obliged to suspend removals to Zimbabwe in January 2002 when challenges to its asylum decisions established that the information upon which those decisions were based was seriously flawed. A recently published report by the Immigration Advisory Service (IAS) reveals highly selective use of source material. The researchers concluded that, by excluding information that might support the asylum seekers’ cases, a positive ‘spin’ is often put on reports

---

1130 R (on the application of Zakir Husan) v Secretary of State for the Home Department [2005] EWHC 189 (Admin).
from NGOs such as Amnesty International and Human Rights Watch that are, in reality, very critical of the countries concerned. The Advisory Panel on Country Information (APCI), established under section 142 of the 2002 Act to provide independent scrutiny and oversight of the quality and content of the Home Office’s country assessments, recently produced its first report on Sri Lanka, a country which is also designated as a safe country of origin. It found selective quoting, use of outdated source material, lack of analytical substance, misrepresentation of events and other errors that vitiated the Home Office assessment and provided insufficient basis for designation of Sri Lanka as a safe country.\textsuperscript{1133}

\section*{Administrative barriers}

\textit{Lack of capacity and poor administrative decision–making}

In an attempt to reduce the delay between decision–making and removals and so reduce the scope for legal barriers, the Home Office has dramatically increased the processing of asylum applications, including putting a tenth of cases through fast–track procedures. In 2004, immigration authorities were dealing with eight out of ten applicants in less than two months. However, the quality of decision–making by IND case workers remains poor and many cases go unnecessarily to an appeal. Overall, one in five Home Office refusals is overturned on appeal. In the case of some countries with well known records of persecution, up to 40 per cent of initial refusals of asylum are found to have been wrong. A recent report by the National Audit Office, which scrutinises public spending on behalf of Parliament, suggests that more resources should be invested into achieving high quality administrative decision–

\textsuperscript{1133} APCI.2.3 (www.apci.org.uk/PDF.APCI_2_3.pdf)
making in asylum cases, which could make it easier to return failed applicants more quickly.\textsuperscript{1134}

\textit{Lack of documentation}

One of the major barriers to return is the difficulty of providing appropriate travel documents. In evidence to the House of Commons Home Affairs Committee, the Home Office indicated that over 80 per cent of port asylum applicants and 90 per cent of in-country applicants do not present travel documents or other identity documentation, without which removal is not possible. Some countries will issue their nationals with travel documents only after lengthy verification processes. Particular delays appear to arise when awaiting documents from Indian, Pakistani, Chinese and Algerian authorities. To tackle this problem, the Immigration and Nationality Directorate has created a Documentation Unit tasked with liaising with immigration authorities abroad and departments across government are involved in negotiating practicable agreements with the receiving countries. However, the provision of adequate documentation is still a source of major difficulty, as exemplified by attempts made to return Iranians, the top applicant nationality in 2004. In the second half of 2004, IND made 24 applications to the Iranian government for travel documents to facilitate return. None has as yet been issued by the Iranian authorities.\textsuperscript{1135}

While IND attempts to identify and pre–empt documentation problems earlier in the process, new legislation has been introduced in order to deter asylum seekers from destroying or disposing of their documentation between embarkation and claiming asylum. Section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 creates a new offence of entering the UK without a valid passport or document establishing satisfactorily an individual’s identity and nationality. The section also


\textsuperscript{1135} Hansard Written Answers, 15 March 2005: Col.192W.
criminalises travelling with a dependent child without the requisite immigration
document. The defence to these offences is that the person or the child is an EEA
national or has a reasonable excuse for not being in possession of the document. The
fact that the document was deliberately destroyed is not a reasonable excuse for not
being in possession of the document unless the destruction was for a reasonable
cause beyond the control of the person charged with the offence. A reasonable cause
does not include delaying the handling or resolution of a claim or application; or tak-
ing a decision that increases the chances of success of a claim; or complying with
instructions or advice given by those who have facilitated immigration into the UK.
A constable or immigration officer who reasonably suspects that a person has com-
mitted an offence under this section may arrest the person without a warrant. To date
208 people have been charged, with 107 convicted so far. The majority of those
charged have been Chinese, followed by Iranians. Those convicted of documentation
offences risk up to two years in jail. Immigration lawyers claim the legislation is
leading to growing numbers of vulnerable asylum seekers being criminalised at the
whim of immigration officers and they are particularly worried because the proce-
dures being used to prosecute such asylum seekers are shortly to be introduced across
the country following pilots in the Greater London area.

The 2004 Act also introduces a new offence for failing to co–operate with the obtain-
ing of a travel document for deportation or removal. The offence – which may be
committed by failing to make an appointment or to provide full details on an applica-
tion for a travel document – carries draconian penalties, and comes with a wider
power of arrest, search and entry. This provision adds to the already wide powers to
get information to facilitate the obtaining of travel documents available under earlier
legislation. One particularly alarming aspect in regard to asylum cases is the power
to provide identification data to the government of the person concerned. The

1138 2004 Act, s35.
1139 1999 Act, s13.
Country Report United Kingdom

Secretary of State cannot reveal that the person has made a claim for asylum but in practice the fact of applying for a special travel document will often alert the home government that the returnee is a failed asylum seeker. This data is deemed to be ‘a transfer of personal data which is necessary for reasons of substantial public interest’ and therefore falls outside the general prohibition of the Data Protection Act 1998 on transferring personal data to countries outside the EEA unless there are adequate safeguards on data processing.\footnote{Data Protection Act 1998, Sch 1 and Sch 4, para.4(1).}

In cases where removal is complicated by the lack of a travel route or instability in the country of origin, the person’s presence will be tolerated as long as they comply and co–operate with efforts being made for their removal. They may qualify for ‘hard case’ support under section 4 of the 2002 Act which consists of full board and accommodation. The individuals concerned are not granted any form of leave, which leaves the failed claimants without any status or rights in the UK, although there is no foreseeable prospect of returning to their home country. Some groups of claimants—Iraqi Kurds and Zimbabwean nationals in particular—have been left in this limbo status for years and have recently had the continuance of hard case support made conditional on them applying to return under the IOM assisted programmes.

\textbf{Other barriers}

\textit{Absconding}

The Home Office maintains that one reason for delay in removals is that the asylum seeker to be removed frequently absconds. However, there is no statistical analysis of absconing rates and the Home Office does not know what proportion of those who
are not detained abscond or fail to co–operate with the removal directions. Independent research into absconding rates for people who are granted bail suggests, instead, that such rates are very low.\textsuperscript{1141}

The Immigration Service has, in recent years, improved its contact management of asylum seekers, to reduce the likelihood of disappearance by tracking the location of claimants while claims are decided. From January 2002, all new claimants are issued with the Application Registration Card which contains detailed biographical information and fingerprint data. An increasing number of asylum seekers are detained or subjected to various restrictions or reporting requirements.

New legislation permits the electronic monitoring of persons granted temporary admission or bail and those liable to be detained pending deportation.\textsuperscript{1142} This may take the form of an electronic tag to be worn on the wrist or ankle, or as technology develops, the wearing a satellite tracking devise which can monitor a person’s whereabouts on a continuous basis. Ministers have indicated their intention to use the provision for those at the lower end of the absconding risk spectrum, who would otherwise have to be detained or would have to report on an onerous basis.\textsuperscript{1143} However, there is a significant risk that that electronic monitoring will be used for persons who would otherwise have been admitted or released without any conditions, or with less onerous conditions. As such it may affect potentially large numbers of individuals whose liberty will be restricted without being charged with a criminal offence and whose wearing of an electronic device is likely to carry a social stigma.

\textbf{Conclusions}

\begin{footnotesize}
\textsuperscript{1141} Irene Bruegel and Eva Natamba, \textit{Maintaining Contact – What happens after detained asylum seekers get bail?}, Social Science Research Papers, South Bank University, June 2002.

\textsuperscript{1142} 2004 Act, s36.

\textsuperscript{1143} House of Commons Hansard Debates, 22 January 2004: Col.364.
\end{footnotesize}
Country Report United Kingdom

UK asylum law and policy has been in turmoil for the better part of 20 years. In the late 1980s and early 1990s a series of legal challenges lead to the introduction of the Refugee Convention into national law together with an appeal right generally available to all refused asylum applicants. The consequences of these two events led to a judicialisation of the right to protection which coincided with the increase in numbers of asylum applicants across Europe in the early to mid 1990s. One of the consequences was a substantial increase in the work load of the administration and the tribunals regarding asylum. The policy response was to seek to limit access to appeals through a series of measures, such as safe third country and safe country of origin provisions, reducing access to free legal assistance etc. Through a series of acts adopted towards the second half of the 1990s these policies were put into place. Paradoxically, the incorporation of the European Convention on Human Rights into UK national law in 1998, coming into force in 2000, provided a new series of avenues of judicial redress for protection seekers. This in turn was followed by a series of measures to seek to block or limit that access.

Doubtless, recent reforms have been geared towards increasing removability of failed asylum seekers on the assumption that tens of thousands of cases could be processed quickly through the system, and after asylum issues and any rare human rights points were dealt with, departures would be enforced by removal, with the use of detention immediately prior to removal. However, procedural speed without sufficient safeguards and at the expense of due process has resulted ultimately in the judiciary being called upon once again to uphold standards of fairness and justice.

In the UK, the transformation of asylum law and numbers between 1993 and 2000 resulted in an unavoidable regularisation programme which took place in three main phases from 1999 to 2004 to deal with the outstanding applications. The political consequences of this have been to encourage the main UK political parties to invest increasing political capital in criticising and promising to 'solve' the asylum crisis. As numbers of applications have dropped, the focus of attention has been increasingly directed at return and repatriation. The argument has come to revolve around the idea
that the essential element of an asylum policy is a coherent returns policy. In this context, the return of failed asylum seekers has been moving up the political agenda.

Like a number of other EU Member States, the UK began its engagement with stricter returns policies by setting a quota which was ineffective. This was replaced by a focus on targets on increasing returns. In tandem with this policy has been one of detention – including the creation of increasing numbers of spaces in detention centres. One of the key difficulties of return, however, is effecting it. The figures for 2003/2004 indicate that the administration of returns with targets, which staff are to achieve, tends to result in concentrating resources on nationalities which are perceived as easy to return. Thus the drop in removals between 2003 and 2004 is the result of IND no longer being entitled to return A8 nationals after 1 May 2004 as before. That A8 nationals should have accounted for such a substantial proportion of returns just before the accession of their states to the EU in respect of a member state which was committed to permitting free movement of workers from those same states raises serious questions about the coherence of the returns policy as a whole. The targeting of nationalities is also a determining criterion in the fast-tracking process and may result in discrimination against certain nationalities in comparison with others.

The use of targets appears also to be coinciding with increasing concerns about the use of violence against persons being returned or repatriated from the UK. Official monitors such prison inspectors, the press and non-governmental organisations have all expressed deep concerns about what appears to be a rise in violence by detention and removal staff against persons being removed. The failure of the UK system to make provision for people being returned to collect their belongings and notify employers, family and friends of their departure may well be a factor in the increasing use of violence where individuals are seen as likely to resist.

Further, the UK returns policy appears to be increasingly incoherent in respect of contested or impractical removals of certain nationals. The policies in respect of Afghans, Iraqis and Zimbabweans in particular have come under scrutiny. Rather than
increase the use of humanitarian or discretionary leave in cases not presently covered by the Immigration Rules, where those concerned have genuine links with the United Kingdom or where removal is not practical because transport or other obstacles prevent it, hundreds have been put through a lengthy process of appeals, and left in limbo for years, without any status, right to work or social support, awaiting the day when conditions on the ground drastically change. With no prospect of enforcing their removal, they are now expected to return ‘voluntarily’ with the assistance of IOM.

The emphasis on return and detention has resulted in a new series of legal challenges. These challenges have moved away from the individual grounds of protection to the assessment of countries of origin and third country destinations. As return has become the focus, so return to which country and under what circumstances and according to whose assessment has emerged as a central issue. The successful challenges to the safe country of origin list and strong criticism of the country of origin information used by the authorities are indicative of this change of emphasis in legal challenges, though both have strong judicial antecedents.

For the future, it appears likely that UK returns policy will continue to be a matter of political interest. The legal challenges on country policies are likely to take on greater importance eventually leading to challenged beyond the UK judicial bodies themselves. In addition, legal challenges are likely to take place as regards the manner of assessment of countries of origin and safe third countries. As regards violence against returnees, it must be hoped that the review currently underway will result in strong recommendations which the Government will implement. In addition, it is likely that claims before the courts of damages in respect of violence and detention will become more common.

Among the more positive developments in this field is the increasing emphasis on voluntary returns. The UK authorities appear to be investing greater resources in this field as one which is more fruitful and cost effective. Among the issues which will
need to be kept under scrutiny is the degree to which voluntary returns are in fact voluntary and the protections provided to the returnees regarding their identity and information provided to their national authorities.
PART 4:
SUPPLEMENTARY MATERIALS
- ANNEX I -

LIST OF CONTRIBUTORS
1. Country Report Austria:
   Dr. Ulrike Brandl
   University of Salzburg,
   Department of International Law and International Organisations,
   Churfürststrasse 1
   5020 Salzburg

2. Country Report Belgium:
   Prof. Jean-Yves Carlier/Sylvie Saroléa
   Université catholique de Louvain
   Département de droit international
   Place Montesquieu 2
   1348 Louvain-la-Neuve

3. Country Report Finland:
   Eeva Nykänen
   University of Turku
   Faculty of Law
   20014 Calonia

4. Country Report France:
   Prof. François Julien-Laferrière/Dr. Emmanuelle Neraudau
   Université Paris-Sud
   54 Boulevard Desgranges
   92331 Sceaux cedex

5. Country Report Germany:
   Prof. Kay Hailbronner
   University of Constance
   Fachbereich Rechtswissenschaft
   Universitätsstrasse 10
   78457 Konstanz

6. Country Report Hungary:
   Prof. Boldizsár Nagy
   Eötvös Loránd University and Central European University
   1364 Budapest
Annex I

7. Country Report Ireland

   John Handoll

   William Fry Solicitors
   Fitzwilton House
   Dublin 2

8. Country Report Italy:

   Prof. Bruno Nascimbene

   Università degli Studi di Milano
   Via V. Bellini 12
   20122 Milano

9. Country Report Luxembourg:

   François Moyse

   AS-Avocats
   Rue Jean-Pierre Brasseur 1
   1258 Luxembourg

11. Country Report Malta:

   Dr. Eugène Buttigieg

   252, Liedna Street
   Fgura PLA 15
   Malta

12. Country Report The Netherlands:

   Prof. Kees Groenendijk

   Radboud Universiteit Nijmegen
   6500 KK Nijmegen

13. Country Report Poland:

   Michal Kowalski

   Jagiellonian University
   ul. Golebia 9
   31-007 Krakow
14. Country Report Portugal:

Prof. Maria Constança Dias Urbano de Sousa
Universidade Autonoma de Lisboa
Rua de Santa Marta 47
1150 293 Lisboa

15. Country Report Slovenia:

Neza Kogovsek
Mirovni Institut/Peace Institute
Metelkova 6
Sl-1000 Ljubljana

16. Country Report Spain:

Prof. Christina Gortazar/Emiliano Garcia Coso
Universidad Pontificia Comillas
Alberto Aguilera 23
28015 Madrid

17. Country Report Switzerland:

Lukas Gehrke
ICMPD
Gonzagassee 1
1010 Wien

18. Country Report United Kingdom:

Prof. Elspeth Guild Anneliese Baldaccini
Kingsley Napley Justice
St John’s Lane 59 Carter Lane
London EC 1 M 4 AJ London EC4V 5AQ
- ANNEX II -

BIBLIOGRAPHY (SELECTION)
1. Documents

- Dublin Convention, 1990: Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, O.J. 1997 C 254/1, Dublin, 15 June 1990,
- Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union O.J. C 142 , 14/06/2002, p. 23
Annex II


- **EUROPEAN COMMISSION (ED.), COMMUNICATION to Present an Action Plan for the Collection and Analysis of Community Statistics in the Field of Migration, COM (2003) 179 final of 15 April 2003,


- **EUROPEAN COMMISSION (ED.), COMMUNICATION on Integrating Migration Issues in the European Union’s Relations with Third Countries, COM (2003) 703 final of 18 November 2003,


- **EUROPEAN COMMISSION (ED.), COMMUNICATION from the Commission for a Stronger Partnership for the Outermost Regions, COM (2004) 343 final of 26 May 2004,

- **EUROPEAN COMMISSION (ED.), COMMUNICATION from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Study on the links between legal and illegal migration, COM (2004) 412 final of 4 June 2004,

- EUROPEAN COMMISSION (ed.), Paper on Return Procedures, MIGRAPOL 34 of 10 February 2003,
- EUROPEAN COMMISSION (ed.), FIRST ANNUAL REPORT on Immigration and Integration, Brussels, 16 July 2004,
- COUNCIL DECISION 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 authorisation, O.J. 2003, L 17/23,
- COUNCIL DECISION of 21 April 2004 Concerning the Conclusion of the Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, O.J. 2004, L 143/97,
- COUNCIL DECISION on the Organisation of Joint Flights and Removals, from the Territory of Two or More Member States of Third Country Nationals who are Subject of Individual Removal Orders, DOC 6379/04, Brussels, April 2004,
- COUNCIL CONCLUSIONS on Elements for Establishing Preparatory Actions for a Financial Instrument for Return Management in the Area of Migration, Doc. 10375/04, MIGR 51, 9 June 2004,
- DRAFT COUNCIL CONCLUSIONS on the Priorities for the Successful Development of a Common Readmission Policy, DOC 13758/04 of 27 October 2004,
- AGREEMENT between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, O.J. 2004, L 143/99,
- REGULATION (EC) No. 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), O.J. 2004, L 80/1,
Annex II

- IOM, Return Migration, Managing Migration, 2005,
- UN PROTOCOL Against the Smuggling of Migrants by Land, Sea and Air, 2000,

2. Books, Articles and Other Studies

- Alegre, den Boor et al., The Hague Programme, Strengthening Freedom, Security and Justice in the EU, EPC Working Paper No. 15, February 2005,
- Aleinikoff/Chetail, Migration and International Legal Norms, The Hague, 2003,
- Blake/Husain, Immigration, Asylum and Human Right, Oxford, 2003,
- Boswell, C., The External Dimension of EU Immigration and Asylum Policy, International Affairs 2003, 619-638,
- Bouteillet-Pâquet, D., Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention, Brussels, 2002 (Odysseus Network Study),
- de Bruijcker, P. (ed.), The Emergence of a European Immigration Policy, Brussels, 2003,
- de Bruycker, P., Regularisations of Illegal Immigrants in the European Union, Brussels, 2000 (Odysseus Network Study),
- Frelick, B., North America Considers Agreement to Deflect Asylum Seekers, 7 Bender’s Immigration Bulletin 2002, 1404,
- Friis, L. & Murphy, A., The European Union and Central and Eastern Europe: Governance and Boundaries, Journal of Common Market Studies 37, 1999, 211-232,
- Grahl-Madsen, A., The Status of Refugees in International Law 1966,
- Guild, E., The regularisation of illegal immigrants in the United Kingdom, in: Regularisations of Illegal Immigrants in the European Union, Collection de la Faculté de Droit de L’Université Libre de Bruxelles, 2000
- Hailbronner, K., Möglichkeiten und Grenzen einer europäischen Koordinierung des Einreise- und Asylrechts, Baden-Baden 1989,
- Hailbronner, K., Die Rückübernahme eigener und fremder Staatsangehöriger, völkerrechtliche Verpflichtungen der Staaten, Heidelberg 1996,
- Hailbronner, K., Readmission Agreements and the Obligations of States under Public International Law to Readmit their Own and Foreign Nationals, Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht, vol. 57, 1997, 1-50,
Annex II

- **Hailbronner, K.**, Immigration and Asylum Law and Policy of the European Union, The Hague, 2000,
- **Hathaway, J.C.**, The Law of Refugee Status, Toronto 1991,
- **Hathaway, J.C.**, The International Refugee Rights Regime, Collected Courses of the European Academy 2000, 91,
- **Hathaway, J.C.**, The Right of State to Repatriate Former Refugees, Ohio State Journal on Dispute Resolution, p. 175 f.,
- **Hyndman, P.**, The 1951 Convention and Its Implications for Procedural Questions, 6 International Journal of Refugee Law 2994, 245,
- IOM, Assisted Voluntary Return Programmes in Europe, January 2005,
- **Jacobs/White** (ed.), European Convention on Human Rights, 3rd,
- **Jesuit Refugee Service**, Detention in Europe, Administrative Detention of Asylum Seekers and Irregular Movements, October 2004,
- **Kruse, I.**, The EU’s Policy on Readmission of Illegal Migrants, Cologne, 2004,
- **Labayle, J.-L./Edström**, The European Immigration and Asylum Policy: Critical Assessment 5 Years After the Amsterdam Treaty, Brussels, 2005,


- **Lehnguth, G./Maassen, G./Schieffer. M.**, Rückführung und Rückübernahme – Die Rückübernahmeabkommen der Bundesrepublik Deutschland, Starnberg 1998,


- **Meyer, J.** (ed.), Kommentar zur Charta der Grundrechte der Europäischen Union, Baden-Baden, 2003,

- **Meyer/Ladewig, EMRK**, Handkommentar, Baden-Baden, 2003,

- **Müller-Graff (ed.),** Der Raum der Freiheit, der Sicherheit und des Rechts, Baden-Baden, 2005,

- **Nascimbene, B.** (ed.), Expulsion and Detention of Aliens in the European Union Countries, Milano, 2001,


- **Peers, S.**, Vetoes, Opt-outs, and EU Immigration and Asylum Law, University of Essex, November 2004,


Annex II

- Walker/Neil (ed.), Europe’s Area of Freedom, Security and Justice, Oxford 2004,
- Yakoob, N., UNHCR, Extremely Vulnerable Individuals: The Need for Continuing International Support in Light of the Difficulties to Reintegration Upon Return, Sarajevo, 1999,

3. Links:

- ANNEX III -

AD HOC COMMITTEE OF EXPERTS ON THE LEGAL ASPECTS OF TERRITORIAL ASYLUM, REFUGEES AND STATELESS PERSONS (CAHAR)
Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)

Twenty guidelines on forced return (1)

The Committee of Ministers,

Recalling that, in accordance with Article 1 of the European Convention on Human Rights, member states shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention;

Recalling that everyone shall have the right to freedom of movement in accordance with Article 2 of Protocol No. 4 to the Convention;

Recalling that member states have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens on their territory;

Considering that, in exercising this right, member states may find it necessary to forcibly return illegal residents within their territory;

Concerned about the risk of violations of fundamental rights and freedoms which may arise in the context of forced return;

Believing that guidelines not only bringing together the Council of Europe's standards and guiding principles applicable in this context, but also identifying best possible practices, could serve as a practical tool for use by both governments in the drafting of national laws and regulations on the subject and all those directly or indirectly involved in forced return operations;

Recalling that every person seeking international protection has the right for his or her application to be treated in a fair procedure in line with international law, which includes access to an effective remedy before a decision on the removal order is issued or is executed,
Annex III

1. Adopts the attached guidelines and invites member states to ensure that they are widely disseminated amongst the national authorities responsible for the return of aliens.

2. Considers that in applying or referring to those guidelines the following elements must receive due consideration:

   a. none of the guidelines imply any new obligations for Council of Europe member states. When the guidelines make use of the verb “shall” this indicates only that the obligatory character of the norms corresponds to already existing obligations of member states. In certain cases however, the guidelines go beyond the simple reiteration of existing binding norms. This is indicated by the use of the verb “should” to indicate where the guidelines constitute recommendations addressed to the member states. The guidelines also identify certain good practices, which appear to represent innovative and promising ways to reconcile a return policy with full respect for human rights. States are then “encouraged” to seek inspiration from these practices, which have been considered by the Committee of Ministers to be desirable;

   b. nothing in the guidelines shall affect any provisions in national or international law which are more conducive to the protection of human rights. In particular, in so far as these guidelines refer to rights which are contained in the European Convention on Human Rights, their interpretation must comply with the case-law of the European Court of Human Rights;

   c. the guidelines are without prejudice to member states' reservations to international instruments.

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,
Annex III

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 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.
Annex III

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 Organiza-
tion 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.
Annex III

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
Annex III

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.
Annex III

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;
Annex III

- 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;

Note (1): 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.