



UNHCR's comments on *Høringsforslag 26. marts 2010 – om gjennomføring av Returdirektivet i norsk rett.*

Introduction

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees¹. As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention") according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention". The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol"). "

The Office therefore appreciates the opportunity to present comments concerning *Høringsforslag 26. marts 16. 2010 – om gjennomføring av Returdirektivet i norsk rett.*

UNHCR understand that the proposed bill will implement parts of the Returns Directive² and UNHCR's comments made to the Directive are relevant³. The Bill applies to persons who are not entitled to remain in Norway. UNHCR takes note of the guarantees in article 18 of the Aliens Act ensuring all persons the right to seek asylum in or at the

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> ("Statute").

² European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, 2008/115/EC, available at: <http://www.unhcr.org/refworld/docid/496c641098.html> [accessed 2 April 2010]

³ UN High Commissioner for Refugees, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 June 2008, available at: <http://www.unhcr.org/refworld/docid/4856322c2.html> [accessed 2 April 2010]

border of Norway, and understands this to mean that the provisions in the proposed Bill will not apply to asylum seekers and refugees.

However, UNHCR also notes that the proposal will include the Return Directives article 2 (2) a and b. Article 2(2)(a) allows Member States to exclude from the scope of this Directive any persons apprehended for **irregular crossing of an external border**, and who have not subsequently obtained authorization to stay, although certain limited guarantees apply to all returns. This could mean that many of the protections contained in the Directive and in the proposed legislation would apply only to third-country nationals who entered Norway legally.

However, in view of visa regulations and other entry restrictions, many persons seeking protection are compelled to enter Norway in an irregular manner. The possibility for individuals effectively to appeal against a return decision is undermined by Article 11(3), which allows Member States to opt not to provide a translation or information on the main elements of removal and entry ban decisions. Also, the wording of Article 12(4) does not oblige Member States to provide legal aid to those in need of it. The result of these provisions is an increased risk of removal of people who have protection needs.

Unaccompanied and Separated Children (UASC)

Proposed new § 90 stipulates that “Retur av enslig mindreårige skal bare skje til en familiemedlem, utnevnt verge eller til et forsvarlig omsorgstilbud”.

UNHCR commented on the provisions in the Return Directive in relation to safeguards for certain vulnerable persons (as defined by Article 3(j) of the Directive) and Article 5 regarding children. Article 5 stipulates that Member States must take “due account” of the best interest of the child. UNHCR pointed out however that this falls short of the requirement under the Convention on the Rights of the Child to ensure that childrens’ best interests are a ‘primary consideration’. The safeguards for **unaccompanied minors** in Article 10 of the Directive are also considered insufficient. These allow return if “adequate reception facilities” are in place, without a definition of what this constitutes, and without requiring the presence of a person or entity legally responsible for the child in the country of return.

Below are UNHCR’s recommendation for best practice in relation to return of unaccompanied or separated children (UASC).

UNHCR would recommend that unaccompanied and separated children are not returned to their country of origin, unless return is determined through a formal procedure which contains all necessary safeguards and following an assessment of all solutions available to a child to be in the child’s best interests. The child shall be fully informed and consulted at all stages of this process and provided with appropriate counselling and support.

UNHCR further recommends that genuine efforts are made to trace family members. If family members are successfully traced, it must be ensured through an individual

assessment that the family is willing and able to receive the child. The outcome of this assessment (where applicable) will inform the decision on return.

Where family tracing is unsuccessful, return to a child-care institution in the country of origin may be considered as a last resort option. In such a case, full documentation of tracing efforts should be handed over to the guardian / caregiver in the country of origin, to facilitate continuation of tracing efforts after return. Specific and adequate reception and care arrangements should be in place prior to return. As a minimum, reception and care arrangements should include:

- a) Receiving the child at the airport followed by immediate access to appropriate accommodation, support for basic needs, access to education and health care;
- b) The appointment of a guardian or caregiver with appropriate qualifications and training, including in child-protection, who has been formally assigned responsibility for the child and is able to exercise legal capacity where necessary;
- c) An individual plan for the child's sustainable reintegration, drawn up in collaboration with the child and his/her guardian/caregiver in the country which is based on an assessment of access upon return to food, housing, health care, education, vocational training and employment opportunities. It must be ensured that this plan is formally shared with the above-mentioned guardian or caregiver in the country of origin.

Adequate post-return monitoring arrangements should be in place. .

Period for voluntary return

Proposed new § 90 stipulates that "Dersom det anses for nødvendig, kan det settes en lengre frist".

UNHCR notes that Art. 7 (2) of the Return Directive stipulates that "*Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.*

UNHCR acknowledge that Norway is not bound by the Return Directive, however UNHCR recommends that Norway does not goes below the Return Directive and change the wording in § 90 to "*Dersom det anses for nødvendig, skal det settes en lengre frist".*

Pre-removal detention

Proposed new § 106 stipulates that “ samlet fængslingstid kan ikke overstige 12 uker, med mindre der foreligger særlige grunner. Fængsling kan uanset ikke overstige 18 måneder, med mindre utlendingen er utvist som følge av ilagt straff eller særreaksjon, eller oppholder seg lovlig i riket og utgjør en trussel mot grunnleggende nasjonale interesser. Kongen kan i forskrift gi regler om hva som skal anses å være særlige grunner etter tredje ledd”.

The grounds on which detention could be extended to 18 months maximum duration – delays in obtaining documentation – potentially cover a wide range of cases. UNHCR recommends that pre-removal detention is used as a last resort.

UNHCR also recommends that vulnerable groups as defined in art 3 (9) of the Return Directive should be exempted from pre-removal detention.

Entry ban

Proposed § 66 stipulates that ” En utlending uten oppholdstillatelse skal utvises” (b) “når utlendingen ikke er gitt en frist for frivillig retur I medhold av § 90 sjette led fordi der er fare for unndragelse, jf. § 106a, eller fordi en søknader avslått som åbenbart grunnløs, eller fordi utlendingen utgjør en fare for offentlig orden eller grunnleggende nasjonale interesser”.

*Proposed § 71 stipulates that ”Utvisning er til hinder for senere innreise i riket. Innreiseforbudet kan gjøres **varig** eller tidsbegrenset. Innreiseforbud gitt I medhold av § 66 første led og annet led bokstav a og d kan ikke gis for mer end fem år, med mindre utlendingen utgjør en alvorlig trussel mot offentlig orden eller grunnleggende nasjonale interesser. Innreiseforbudet kan etter søknad oppheves dersom nye omstendigheter tilsier det. Dersom særskilte omstændigheter foreligger, kan den som er utvist, etter søknad få adgang til riket for kortvarig besøk selv om innreiseforbudet ikke opheves, men som regel ikke før to år er gått fra utreisen.*

This proposal transposes Art. 7 (4) of the Return Directive which allows states to withhold the possibility of voluntary departure for a wide number of reasons, including a risk of absconding, or if an application for legal stay was dismissed as manifestly unfounded, encompassing a large range of cases under EC legislation. Thus, an entry ban may be imposed on many people.

Article 14 of the Universal Declaration of Human Rights affirms the right of every individual to seek and enjoy asylum from persecution. The importance of this right is also reflected in Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum in the EU.

UNHCR reiterates that if the circumstances change in the individual's country of origin, or in the individual's profile or activities, resulting in a need for international protection,

s/he must realistically be able to seek entry in Norway or an EU country. A (re-entry ban should, furthermore, not be issued for persons whose application for protection has been rejected on purely formal grounds. At the very least, a process for withdrawal of an entry ban would need to be available at border posts as well as at consular posts abroad. The possibility to seek withdrawal in cases related to family circumstances, or other situations of humanitarian need, should be provided.

In this regard, UNHCR takes note that the proposed text includes a reference that "*Innreiseforbudet kan etter søknad oppheves dersom nye omstendigheter tilsier det*". UNHCR recommends that a person returned who may at a later stage risk persecution or serious harm can in practice make representation at the border or at a consular post abroad and that this would be sufficient to consider that there are special circumstances.

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