Joint Refugee Council and Amnesty International UK submission to the House of Lords Select Committee on the European Union Inquiry into the Draft Directive on common procedures for the return of illegally staying third country nationals

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Please note: This document has been edited in order to comply with the Refugee Council house style.

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1. Introduction

1.1 The Refugee Council is the largest organisation in the United Kingdom working with asylum seekers and refugees. We not only give help and support to asylum seekers and refugees, but also work with them to ensure their needs and concerns are addressed by decision-makers. Our members range from small refugee-run community organisations to international NGOs, such as Christian Aid, Save the Children and Oxfam. We are a member of the European Council on Refugees and Exiles (ECRE), a network of 80 non-governmental refugee-assisting organisations in 33 countries working towards fair and humane policies for the treatment of asylum seekers and refugees.

1.2 Amnesty International is a democratic, self-governing world-wide movement of 1.8 million members and supporters in over 150 countries who campaign for internationally recognised human rights to be respected and protected. Amnesty International UK is the UK section of the organisation and has 257,000 supporters working together to improve human rights world-wide.

2. Overview

2.1 The Refugee Council and Amnesty International UK welcome the opportunity to comment on the Commission's proposal for a directive on common procedures for the return of illegally staying third country nationals – the 'returns directive'. Whilst the draft directive covers all third country nationals who are illegally staying in an EU member state, our comments in this submission are restricted to the implications of the directive for asylum seekers whose applications have been rejected by a member state, as well as individuals who have had refugee or complementary protection status in the past, but whose status has subsequently been withdrawn.

2.2 Our main interest in this draft directive relates to the extent to which it will ensure the safety of individuals who are returned by an EU member state. We make particular reference to the implications of the draft directive for returns from the UK, and the extent to which safeguards in the directive are sufficient to prevent unsafe returns in the future.

2.3 We believe that setting a high standard for safe returns is crucial to the integrity of asylum systems. Recent caselaw, particularly *AA v Secretary of State for the Home Department AA/0457/2005 [2005] UKAIT CG*, has identified serious shortcomings in the UK's practice as regards both assessing the safety of countries of return, and monitoring of returnees.

3. Comments on the draft directive

3.1 General Comments

3.1.1 The Refugee Council and Amnesty International UK are concerned that the standards contained within this Commission proposal may be considerably watered down during the course of member state negotiations. Negotiations on measures in the first stage of the Common European Asylum System, including the qualification, procedures and reception directives, resulted in standards within the adopted directives that were significantly lower than those proposed by the Commission. It is our view that the UK played a leading role in this process of driving standards down.[1] We note, however, that this directive will be adopted by co-decision with the European

[1] One such example is the UK's role in negotiations on the reception directive. Member states reached agreement on the directive in April 2002. Despite this, the UK later pressed for negotiations to be re-opened as it had subsequently introduced a range of restrictive provisions with the Nationality, Immigration and Asylum Act 2002. As a result of the 2002 Act, the UK needed to lower EU minimum standards so that its new national reception policies could continue once the EU reception directive came into force. In particular, the UK wanted to ensure that it would not be prevented from removing support from asylum seekers who did not apply in good time

Parliament and Qualified Majority Voting by the Council, and hope this will prevent any substantial reduction in the minimum standards that are the subject of the Committee's Inquiry.

3.1.2 We recognise that there are wide divergences between member states' policies and practices in relation to the issues covered by the draft directive.[2] We also note that in recent months there have been many examples of unsafe returns, including the UK's return of rejected asylum seekers to Zimbabwe prior to the Asylum and Immigration Tribunal (AIT) decision regarding the risks faced on return, and Italy's returns of irregular migrants to Libya.[3] We thus support measures that will result in improved national practice and guarantees of safe, dignified and durable returns for those at the end of the asylum process, as well as those whose status has been withdrawn.

3.1.3 However, we regret the fact that states are negotiating an EU law on return before they have addressed the serious deficiencies in their asylum procedures. Asylum seekers cannot currently be assured that their protection needs will be provided for in the same way wherever they apply for asylum in the EU. Prima facie evidence of this can be seen in comparative recognition rates across EU member states. The Slovak Republic, for example, recognises 0% of Chechen asylum seekers as being in need of international protection, whilst 84% of Chechens applying for asylum in Austria are granted status.[4] This is a stark reminder that seeking asylum in the EU remains a protection lottery.

3.1.4 The Commission asserts that "An effective return policy is a necessary component of a well managed and credible policy on migration".[5] The Refugee Council and Amnesty International UK, however, believe that a more important indicator of a credible migration policy is whether asylum systems can provide protection to those who need it. We have profound concerns about the asylum processes and procedures in place in the UK and other EU countries and we cannot be confident that EU member states only return individuals who do not have protection needs.

3.1.5 We regret the fact that the European Council has recently adopted the procedures directive without addressing the serious concerns raised about its provisions by the United Nations High Commissioner for Refugees (UNHCR), the European Parliament, and a wide range of NGOs.[6] The asylum procedures directive represents a catalogue of member states' worst practices with some standards set so low that breaches of international refugee and human rights law will be permitted.[7] As highlighted by UNHCR, the final text contains 'serious deficiencies', for example in allowing states to designate 'safe third countries' outside the EU to which asylum seekers can be turned back without even having had their claims heard in an EU member state. This absence of meaningful procedural safeguards for asylum seekers means that, whilst we recognise that the returns directive is not concerned with reasons for ending an individual's right to stay, we believe that it cannot be considered in isolation from national asylum procedures.

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without good reason, a policy the government had introduced in section 55 of the new 2002 Act. The UK was successful in persuading other countries that a provision almost identical to section 55 be incorporated into the reception directive. The result is that the reception directive permits EU states to introduce a similarly punitive and inhumane policy into their national law. In the recent case of *R v Secretary of State for the Home Department, ex parte Adam, Limbuela and Tesema [2005] UKHL 66*, the UK House of Lords held that section 55 breached Article 3 of the ECHR when applied to asylum seekers dependent on the state for accommodation and support.

[2] An example is that of states' use of detention: in France, for example, there is a 32-day maximum time limit on detention, whereas in the UK there is no maximum time limit.

[3] For more information about Italy's returns from Lampedusa see paragraph 3.2.3.

[4] ECRE (June 2005*) Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe*.

[5] *Returns directive explanatory memorandum*, p3.

[6] *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*. The 25 EU member states formally adopted the directive on 1st December 2005 at the Justice and Home Affairs Council.

[7] For more information on these breaches see European Council on Refugees and Exiles (2005) Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004.

3.2 Article 2 - Scope

3.2.1 The Refugee Council and Amnesty International UK note that the scope of the directive is extremely broad and is intended to apply to a wide range of individuals who have very different experiences and needs. Those affected will include individuals who have overstayed their visas; asylum seeking adults and children whose applications have been rejected as well as those whose Convention refugee status or complementary protection status has been withdrawn.

3.2.2 We believe it is imperative that the directive allows sufficient flexibility to enable member states to respond to the very different circumstances of those falling within its scope. For example, an asylum seeker whose claim has been fast-tracked and who a member state is seeking to remove after a presence of a few weeks in the country, will have very different needs from an individual who has been through an asylum process, been granted Convention refugee status, and integrated into the host country before their status has been withdrawn.

3.2.3 We are concerned that the draft directive allows member states to selectively apply its provisions to transit zones (Article 2.2).[8] So, for example, Lampedusa, which is classified as an international transit zone under Italian law, would not necessarily fall within the scope of the directive. This is of utmost concern to us in light of the Italian government's actions in Lampedusa and their responses to the arrival of migrants by sea. We believe that Italy's actions in Lampedusa have seriously compromised the fundamental right to seek asylum and the principle of *non-refoulement*, which prohibits the forcible return of anyone to a territory where they would be at risk of serious human rights violations.[9] The returns directive will do nothing to oblige the Italian authorities to change their practices.

3.2.4 There is no justification for allowing states to distinguish between transit zones and other parts of their territory. The distinction is also without justification in international human rights law.[10] The same safeguards and minimum standards must apply to asylum seekers and those whose status has been withdrawn, regardless of whether or not they happen to be present in an area that has been designated a transit zone. Further, the fact that the minimum standards outlined in the EU procedures directive can also be selectively applied to transit zones, makes it all the more important that the full range of safeguards is in place for returns.

3.3 Article 3 - Definitions

3.3.1 The definition of return in the draft directive encompasses enforced return to a country of origin or transit, as well as to another third country. We do not believe that mere transit through a country proves that a person has any meaningful link with that country. Further, we would like to draw the Committee's attention to the fact that there is no obligation under international law for countries to accept persons who are neither nationals nor former habitual residents. In order to ensure the safety of those returned to a transit country we believe that the directive should stipulate that prior to return the receiving state must explicitly agree to accept the individual being returned, and the sending state must establish that the individual's human rights will be fully respected in the country to which they are being transferred.

3.3.2 The Refugee Council and Amnesty International UK strongly oppose the transfer to third countries of those whose asylum claims have been rejected, or whose status has been withdrawn,

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[8] Member states will only have to ensure that treatment of individuals in transit zones complies with articles 8 (postponement), 10 (removal),13 (safeguards pending return), and 15 (conditions of temporary custody).

[9] On 10 May 2005, The European Court of Human Rights asked the Italian government not to further proceed with expulsion measures regarding a group of eleven "irregular" migrants who were arrested in Lampedusa in March 2005. However Italy continued to operate large-scale expulsions of "irregular" migrants to Libya. *ANSA News, 16 May 2005*.

[10] The European Court of Human Rights in the Amuur case ruled clearly that the European Convention on Human Rights and Fundamental Freedoms fully applies in transit zones and that the latter should be considered as an integral part of their territory. *Ammur v France 10 June 1996, 22 EHRR 533*.

unless the individual has given informed and express consent to voluntarily return to the third country concerned. Forced removal to a third country raises concerns as it involves a serious risk of chain removal and may violate the principle of *non-refoulement*.[11] However, we acknowledge that states are intent on removing people to third countries, and we support ECRE's position that if they do so, stringent safeguards must be in place to ensure that states do not breach their obligations under international law and that the individual will benefit from a dignified and sustainable standard of living in that country.[12]

3.4 Article 4 - More favourable provisions

3.4.1 We welcome the proposal that member states will be able to adopt or maintain more favourable provisions than the minimum standards outlined in the directive. However, during the transposition of instruments from the first stage of the Common European Asylum System we have seen that where minimum standards are set, some states reduce their national standards accordingly. Harmonisation of asylum and immigration laws and policies must not become an opportunity for convergence of practices at the lowest common denominator. We believe that a 'standstill clause' is required to ensure that member states with national standards higher than those in the directive do not lower them.

3.4.2 We are concerned that the directive as currently drafted does not permit states to maintain more favourable provisions in all situations, namely where they are not compatible with the directive.[13] For example, the tripartite Memorandum of Understanding between the United Nations High Commissioner for Refugees, the UK and Afghanistan allows for a period of up to two months for rejected Afghani asylum seekers to opt for voluntary repatriation.[14] Article 6.2 of the draft directive, however, provides that a return decision "shall provide for an appropriate period for voluntary departure of up to four weeks". We are concerned that states such as the UK that currently allow for a longer period would not be able to continue to do so were the draft text to become law.

3.5 Article 5 - Family relationships and best interest of the child

3.5.1 We welcome the proposed obligation on member states to take due account of family relationships, duration of stay in the member states and the existence of family, cultural and social ties with country of origin. This is a positive acknowledgement of the fact that return procedures

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[11] "Chain removal" describes the process whereby an asylum seeker or rejected asylum seeker is returned from one country to the next and ultimately back to his or her country of origin without a substantive examination (or re-examination) or his or her claim.

[12] ECRE sets out these essential safeguards:
- under no circumstances should the transfer entail the individual being sent (either directly or indirectly) to a country where their human rights might not be respected;
- the voluntary and informed consent of the individual must be obtained and access to information and advice from independent organisations, such as NGOs, must be provided before a decision to consent is taken;
- the individual must have a meaningful connection with the third country, such as for example family ties, a previous legal status or cultural background;
- there must the possibility for an individual to have a dignified standard of living in the third country and a legal residence status must be guaranteed;
- the particular potential risks faced by mixed couples must be carefully examined be-fore any transfer;
- an agreement with the receiving country should be in place, but governments should not give inducements to third countries, whether in the form of development aid or otherwise, to take asylum seekers whose asylum applications have been rejected in Europe.

From ECRE (2005) *The Way Forward: Europe's role in the global protection system. The return of asylum seekers whose applications have been rejected in Europe.* P36.

[13] Article 4.3: "This Directive shall be without prejudice to the right of the Member States to adopt of maintain provisions that are more favourable to persons to whom it applies **provided that such provisions are compatible with this Directive**" (emphasis added).

[14] Tripartite Memorandum of Understanding (the MoU) between the Government of the United Kingdom of Great Britain and Northern Ireland (the UK Government), the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR), October 2002. Paragraph 3.IV:
"Afghans without protection needs or compelling humanitarian reasons who applied for asylum after 1 October 2002 or who were in the asylum procedure pending a decision on their claim on 1 October 2002, can opt for voluntary repatriation until two months after a final negative decision on their asylum claim or on their leave to remain."

are not executed in a social vacuum and that there are essential considerations that must be taken into account before deciding whether or not to remove someone from the EU.

3.5.2 However, we are concerned that the meaning of 'due account' is not clear and believe that it requires clarification if the directive is to result in safe, durable, dignified returns and harmonisation of state practices. The Refugee Council and Amnesty International UK note that individuals whose status has been withdrawn, as well as asylum seekers whose claims have taken many years to determine, may have established themselves in the country of asylum and have stronger ties to the EU state than to their country of origin.

3.5.3 We note that the draft directive does not set out a definition of family. Where children are concerned, it is essential that the primary carer/s (which might be an aunt, uncle or grandparent) be considered family and, where appropriate, that the child remain united with their carer. Further, we believe that the directive should contain an explicit provision that families must not be separated because of return, for example in situations of mixed nationality marriage.

3.5.4 We believe that the directive should oblige states to ensure that best interests determinations are carried out by child care specialists, with particular regard to Article 12 of the Convention on the Rights of the Child.[15] Best interests determinations require an in depth understanding of child welfare and child development, and given the additional complexity involved in assessing a child's best interests across two national contexts, it is essential that this task is undertaken by competent officials. The impact of return on children is likely to be particularly acute, given the fact that they are more likely to be fully integrated in their country of refuge; consequently there is a clear need to ensure that their views are properly reflected in the decision making process.

3.5.5 We note that it is particularly problematic to determine a child's best interests in situations where states, such as the UK, withdraw refugee and complementary protection status from those who have been living in the host state for several years. It is difficult to see how return could be in a child's best interests where they have closer links to the host country than to the country of their parents' origin. This would be the case for children who arrive in the EU when very young, or who are born in the EU and remain there for several years before their parents' status is withdrawn.

3.5.6 With regard to determining the best interests of unaccompanied children, we support the principles and arguments set out in the Save the Children and the Separated Children in Europe Programme paper on returns of separated children.[16] In order to assess whether or not voluntary return is in the best interests of an unaccompanied child, the following interrelated factors should be fully considered: safety; family reunification; the child's view; voluntary return; legal guardian and carer's views; socio-economic conditions in the country of origin; the child's level of integration in the host country; and the age and maturity of the child. The UK is one of the few EU countries not to appoint independent legal guardians to represent the best interests of separated children. We are of the view that without such a guardian, separated children should never be forcibly returned.

3.5.7 We remind the Committee that the UK has a standing reservation to the UN Convention on the Rights of the Child as it relates to immigration control. The UK is thus is not currently compliant with the provisions as set out in Article 5 of the draft returns directive.

[15] Convention on the Rights of the Child. Article 12:
"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[16] Save the Children and The Separated Children in Europe Programme (September 2004) *Position Paper on Returns and Separated Children*.

3.6 Article 6 – Return decision

3.6.1 Whilst we agree with the general principle that individuals should have an opportunity to leave the territory of their own accord as an alternative to forced removal, we have the following concerns:

- The use of the term 'voluntary' to describe all departures that are undertaken as an alternative to forced removal has led to confusion and misunderstanding. For example, in the UK many rejected asylum seekers, such as those from Iraq, have only been able to obtain the means to avoid destitution by agreeing to participate in 'voluntary return' even when the UK was unable to facilitate forced removals to their country of origin. We support ECRE's suggestion that the term 'mandatory return' be used to describe situations whereby a person consents to return to his/her country of origin instead of staying illegally or being forcibly removed.[17]

- The draft directive provides that member states may deny individuals the opportunity to return 'voluntarily' where '*there are reasons to believe that the person concerned might abscond during such a period*.' We believe that the text as currently drafted may result in states utilising a very broad range of grounds for believing an individual may abscond. In order for 'voluntary return' opportunities to be meaningful, a clear obligation must be placed upon the state to demonstrate sound reasons for believing that there is a risk of absconding, through transparent and fair procedures. Unless this is the case, states will be free to deny the opportunity to return voluntarily to all those receiving a return decision.

  We note that in the UK there is a lack of official data on the risk of absconding, despite the Home Affairs Committee's 2003 recommendation that:

  "in the absence of adequate statistics, it is difficult to know the extent of the problems caused by absconding. The current situation, in which the Home Office simply does not know – even in broad outline – what proportion of failed asylum seekers abscond is unacceptable. It ought to be possible to obtain at least a snapshot of the scale of the problem and we recommend that steps are taken to do this without delay."[18]

- We are concerned that a period of 'up to four weeks' (Article 6.2) may prove insufficient for many individuals who would otherwise choose to depart voluntarily. We suggest that four weeks is designated as a minimum period to allow for departure. Maximum time limits are inappropriate in this context as they fetter states' capacity to respond flexibly to individual needs.

- In some cases, four weeks may be insufficient time to obtain a travel document and finalise practical travel arrangements, including obtaining any transit visas that are required. Many rejected asylum applicants have difficulty in obtaining travel documents from their Embassy or High Commission. Often the delays in such procedures are beyond the control of the individual seeking to leave or that of any organisation assisting departure. We understand that other member states in the EU experience similar difficulties to the UK when arranging forced removals.

- The appropriate period of time will also depend on factors such as the length of time an individual has been present in the country: asylum seekers who have been fast-tracked through an asylum system are likely to require less time to make practical arrangements than those who have been living in an EU member state for a number of years. The latter group is likely to require more than four weeks to sort out their affairs including, for example, ending a

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[17] See *ECRE Position on Return*, October 2003, para 9.

[18] House of Commons Home Affairs Committee. Fourth report of session 2002-2003. *Asylum Removals.* HC 654

mortgage, closing bank accounts, or selling property. Allowing time to resolve such matters may help to ensure any return is dignified and durable.

- Many individuals and families would benefit from the opportunity to make considered and well-informed decisions about their return. Access to information, advice and counselling services, independent of governments and of intergovernmental organisations, can assist returns. Coming to terms with the return decision and obtaining accurate and confidence building information about return prospects may take time.

- People who have been recognised as refugees but have subsequently had their status withdrawn may need time to prepare mentally for return to the country from which they were forced to flee. Others who have been absent from the country of origin for prolonged periods of time may benefit from time to explore the conditions in the country to which they will return.

- We regret the fact that the draft directive is silent as to measures that states should introduce to assist return. We advocate the inclusion of a provision in the directive obliging states to introduce packages to assist the return of those they have issued with a return decision, as well as measures to make return more viable.

- The draft directive is silent as to the minimum social and economic support that individuals should have while they decide whether or not to return voluntarily. It is essential that individuals are not left destitute during this time. Situations where individuals are driven into destitution while making such an important decision are simply unacceptable and may lead to violations of states' obligations under ECHR. We strongly believe that the provision of socio-economic benefits should continue until an individual's actual departure. Forcing individuals and families into destitution or a desperate scramble to find any means to survive is likely to undermine their capacity to prepare properly for return.

3.6.2 We welcome the recognition in Article 6.4 of member states' obligations derived from fundamental rights, including those resulting from the European Convention on Human Rights. However, we would urge that the directive make reference to other relevant international human rights instruments. Further, it is essential that where states have these obligations towards individuals, they should not only refrain from issuing a return decision, but also ensure that individuals are provided with legal status for remaining in the EU. Unless this is the case, the directive will result in large numbers of individuals left in limbo with no prospect of integrating or exercising the full range of rights to which otherwise they would be entitled.

3.6.3 Whilst we welcome the proposal in Article 6.5 that member states have scope to grant the right to stay for compassionate, humanitarian or other reasons, we are concerned that unless framed as an obligation, this discretion will not be used in practise.[19]

3.7 Article 7 – Removal order

3.7.1 As outlined in paragraph 3.6.1 in relation to the removal decision, we believe it is essential that the directive proscribe more tightly the grounds on which states may conclude that there is a 'risk of absconding'.

3.7.2 Our concerns in paragraph 3.6.1 about support also apply to Article 7: individuals must be provided with support where it is needed until their return has been effected.

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[19] We note that most of the obligatory provisions of this draft returns directive relate to enforcement measures, whilst member states are given discretion in relation to measures that provide safeguards for those being returned, or safeguards against indefinite limbo situations.

3.7.3 The Refugee Council and Amnesty International UK believe that there is a real risk that if Article 7.3 is retained in the directive, then the option of issuing a removal order at the same time as the return decision may become the norm in many states, with a consequent lack of opportunity for individuals to choose to leave before their return is enforced.

3.8 Article 8 – Postponement

3.8.1 The Refugee Council and Amnesty International UK welcome the provision in Article 8.1 for member states to postpone the enforcement of a return decision as a result of the specific circumstances of the individual case. We further welcome recognition that the removal order should be postponed if an individual cannot travel because of their physical or mental health, or for technical reasons, which might include natural disasters in the country of origin.

3.8.2 However, we urge states to recognise that there are additional factors that provide sound grounds for postponing a return decision but which are not referred to by the draft directive. For example, we believe that it is essential to specify an obligation on states to ensure that returns do not destabilise fragile countries. The directive should oblige states to consider conditions in countries of return as well as the impact of return on the receiving country before enforcing any returns. We further recommend that states consult with UNHCR about the conditions for enforcing removals to countries of origin which have experienced large scale forced migration, conflict situations, or are facing signification reconstruction, relief or development challenges.

3.8.3 We are concerned that the draft directive sets no time limit on the period of postponement. Thus, it is possible that individuals who cannot be returned to their country of origin will be left in limbo, with no status, no means of support,[20] and facing the constant and unsettling prospect of imminent return. The Refugee Council and Amnesty International UK believe that if return is postponed for more than a short period*,* the removal order should be withdrawn and the individual issued with temporary, renewable status with associated entitlements to work and receive state support. This period could usefully be viewed by states as an opportunity for individuals who cannot be returned to use their time profitably so that their long-term prospects for sustainable return or successful integration are enhanced.

3.8.4 We welcome the provisions of Article 8.2 (c) in relation to the return of unaccompanied children. However, we are concerned about references to "a competent official of the country of return' and the 'equivalent representative". We believe that unaccompanied children should only be returned where they are handed over to the person who will be their primary carer, whether that is a family member or a legal guardian. They may be handed over to a competent official, but only if that official becomes the child's legal guardian. The child and his/her legal guardian in the EU member state must be informed of the name of the person to whom the child will be handed over, as well as that person's future relationship to the child. We further believe that an additional provision is required to ensure that any postponement of a separated child's return is communicated to that child and to their legal guardian.

3.9 Article 9 – Re-entry ban

3.9.1 The Refugee Council and Amnesty International UK are opposed to the draft directive's requirement that states impose a re-entry ban of up to five years in removal orders. We do not believe that there is a need for such a drastic measure. The draft directive proposes that the re-

[20] Under Article 13 of the draft returns directive, the conditions of stay for those who are not returned must only be as favourable as the following articles of the EU reception directive: residence and freedom of movement (article 7); families (article 8); medical screening (article 9); schooling and education of minors (article 10); health care (article 15); provisions for persons with special needs (articles 17-20).

entry ban may also be imposed on people departing 'voluntarily', thus clearly reducing any advantage for individuals who depart before their removal is enforced. In all situations, it is proposed that the ban may be extended indefinitely for people constituting *a* "serious threat to public policy or public security". However, we are concerned that there is no clear definition of what amounts to such a 'serious threat'. We are particularly concerned about the lack of access to legal remedies in the face of such a ban. We note that withdrawal and suspension of the re-entry ban are permitted, albeit under stringent conditions.

3.9.2 Whilst the draft directive states that the ban is "without prejudice to the right to seek asylum in one of the Member states" (Article 9.5), it is difficult to foresee in practise how this right could be realised. If a person is denied entry to the EU for any purpose, s/he will have little chance in practice of ever getting access to an EU asylum procedure for the purpose of making a claim. There is a clear need for the directive to be amended to safeguard the right to seek asylum in the EU. If the re-entry ban is retained in the directive, changes are needed to ensure that the withdrawal of a re-entry ban would have cross-territorial effect and would be automatically effected in cases where there is a change in the situation in the country of origin, creating the need for an individual to flee to access safety in the EU. Further, it is essential that any ban be withdrawn if an individual is subsequently deemed in need of resettlement to an EU country.

3.9.3 Re-entry bans are a blunt instrument that are entirely inappropriate in light of the fact that future changes in a country of origin, and thus an individual's need for international protection, cannot be predicted. As currently drafted, the re-entry ban could apply to Convention refugees where states have accepted that they have been at risk of persecution in the past and granted them status, but where it has been decided that due to changes in the country of origin, the risk of persecution is no longer present. If this article is retained we believe that asylum seekers' lives, including those who have previously been recognised as refugees, will be put at risk since they are likely to be denied entry to the EU without any consideration of their asylum claim.

3.10 Article 10 – Removal

3.10.1 The Refugee Council and Amnesty International UK welcome the requirement that coercive measures shall be proportional and not exceed reasonable force, but believe that states need more guidance than is currently provided. We recommend that the directive specify that coercive measures must only ever be used as a last resort, and that physical force must never be used where vulnerable persons are concerned, including children and the elderly.

3.10.2 We regret that the draft directive does not provide any clarity as to what 'coercive' measures are envisaged by the Commission and urge states and the European Parliament to set clear limits to the measures that are permitted. Amnesty International has documented cases of people who have been hurt and traumatized at the point of being removed from the UK.[21] We cannot see how the directive, as currently drafted, would safeguard against this.

3.10.3 The Council of Europe's Guidelines on Forced Return were drawn up to provide guidance for states on how to carry out return in a way which is effective whilst fully respecting human rights.[22] The Guidelines stipulate particularly dangerous coercive measures that shall not be used, and outline the training that members of any escort team should undergo. We believe that the European Council and the European Parliament should draw on

[21] Amnesty International UK (June 2005). *Seeking Asylum is not a Crime - detention of people who have sought asylum.*
[22] *Forced return: 20 guidelines adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 and commentaries.*

these guidelines and ensure that the returns directive includes stringent safeguards on states' use of coercive measures.

3.11 Article 11 – Form

3.11.1 We welcome member states' obligation to issue return decisions and removal orders in writing. However, the importance of the information contained in these documents makes it imperative that these documents are automatically translated into a community language that the individual can understand. The current requirement that the translation be provided in a language the individual '*may reasonably supposed to understand* is inadequate: it is essential that all individuals fully understand the implications of the return decision and removal order.

3.11.2 A further essential safeguard that is missing from the draft directive, is a requirement that states issue the removal order in a manner that allows sufficient time before removal for the individual to obtain expert, publicly funded legal advice and representation and, wherever appropriate, seek a judicial remedy.

3.12 Article 12 – Judicial remedies

3.12.1 The Refugee Council and Amnesty International UK believe that all those subject to a removal order should have an in-country right of appeal against the removal decision before an independent judicial body and be able to raise fears of *refoulement* or ill-treatment on return contrary to Article 3 and 8 of the ECHR and other international human rights treaties.

3.12.2 We would like to draw the Committee's attention to our particular concern that there is no guarantee under the draft directive that the judicial remedy will have suspensive effect. It is of the utmost importance that appeal against removal is robust, given that EU minimum standards on asylum procedures do not guarantee effective protection from *refoulement*. We would also like to reiterate our position that in order for a judicial remedy to be effective, it is essential that publicly funded legal advice and representation is available for all those who require it.

3.13 Article 13 – Safeguards pending return

3.13.1 According to the draft directive, those who cannot be removed, or for whom the return decision has been postponed, should be provided with written confirmation of their situation. They will also be provided with conditions of stay in line with a limited number of provisions of the reception directive.[23]

3.13.2 Whilst we recognise that this will be an improvement in many member states, we strongly believe that people who cannot be returned should be provided with temporary, renewable status and the right to work and access state benefits. Where there is no prospect of return, it is inappropriate for states to detain individuals, and the returns directive should contain a provision to this end.

3.13.3 We believe it is unacceptable that the draft returns directive makes no reference to the reception directive's provisions on employment, social assistance or housing, or to provisions on appeal if any benefits are refused, reduced or withdrawn. The reception directive outlines the minimum standards that will normally suffice to ensure asylum seekers a dignified standard of

[23] Under Article 13 of the draft returns directive, the conditions of stay for those who are not returned must only be as favourable as the following articles of the EU reception directive: residence and freedom of movement (article 7); families (article 8); medical screening (article 9); schooling and education of minors (article 10); health care (article 15); provisions for persons with special needs (articles 17-20).

living.[24] By allowing states to disregard a large number of these minimum standards in relation to those who are in their territory but who cannot be returned, the draft directive is countenancing a situation where large numbers of people will be vulnerable to destitution and homelessness, surviving at the fringes of society for an indefinite period of time.

3.13.4 An example of the risk posed by this failure to ensure minimum standards of support is the situation of Zimbabweans whose claims for protection in the UK have failed. For these people the choice is stark: either they must sign up to return voluntarily to a country the AIT has found to be unsafe for returned asylum seekers, or they must survive without any support whatsoever.

3.14 Articles 14 and 15 – Temporary custody

3.14.1 The Refugee Council and Amnesty International UK are opposed to the detention of people who have claimed asylum and whose claims have been dismissed by the authorities, unless the detaining authorities can demonstrate an objective risk that the individual concerned would otherwise abscond and that other measures short of detention, such as reporting requirements, would not be sufficient to meet the requirements of immigration control. The right to liberty is a fundamental human right set out in international human rights instruments. This should be reiterated on the face of the directive.

3.14.2 We welcome the reference to the primacy of alternatives to detention, but are concerned that this draft directive makes reference to member states detaining individuals who 'will be' subject of a removal order or a return decision. This is inappropriate. Article 14 should only be concerned with detention immediately prior to return and for the sole purpose of effecting return.

3.14.3 The Refugee Council and Amnesty International UK believe that authorities should be required to demonstrate in each individual case that detention is necessary, and should only detain people for the shortest possible time. The directive should further require states to give clear reasons as to why there are *serious* grounds to believe that there is a risk of absconding. As currently drafted, states will have wide discretion to interpret the meaning of having 'serious' grounds for such a belief.

3.14.4 The draft directive obliges member states to detain individuals: this is highly problematic. As a minimum, reference must be made to an obligation not to detain unaccompanied asylum seeking children, families with children, pregnant women and particularly vulnerable groups, including those with serious mental health problems and survivors of torture. We are additionally opposed to any detention in prison of those who have claimed asylum or whose refugee status has been withdrawn. Seeking asylum is not a crime. Allowing for detention in prisons serves only to further criminalise and stigmatise asylum seekers, those with status, and the institution of asylum.

3.14.5 In all cases, detention should not last longer than is strictly necessary. We consider the draft directive maximum time limit of six months to be an unacceptably long time for individuals to be kept in detention where no crime has been committed and where detention is solely to effect removal. We believe there is a particular need for a standstill clause to ensure that states don't view the minimum standard on detention as grounds for increasing their national time-limits. Indeed, we would like to see states sharing best practise in relation to detention, and learning from countries such as France where there is a 32 day limit on detention.

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[24] This is stated in the preamble to *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.*

3.14.6 We agree that any decision to detain should be taken by a judicial authority and note that this would necessitate a change to current UK practise, whereby the decision to detain is taken administratively. We further welcome the obligation for review by judicial authorities at least once a month, but consider that there is an additional need for an explicit reference to the possibility for review at other times, whenever circumstances change or new elements emerge to support an individual's release.

3.14.7 We believe that there is need for a provision to guarantee systematic granting of access to effective legal assistance, to the services of competent, qualified and impartial interpreters and access to qualified medical personnel.

4. Outstanding issues not addressed by the draft directive

4.1 The Refugee Council and Amnesty International UK do not believe that, as currently drafted, the returns directive will sufficiently safeguard the rights of those being returned, or of those who cannot or should not be removed. We believe that the following additional elements must be incorporated into the directive in order to ensure that returns from the EU are only ever carried out in a safe, dignified and durable manner:

4.2 Reporting

4.2.1 We believe that states should be required to report on measures they have taken to make voluntary return more viable. Further, they should be required to demonstrate that returns are safe, dignified and durable, and to report on the steps they have taken to ensure that returns have not led to conflict, or undermined relief or development efforts in poor countries.

4.3 Independent monitoring and country information

4.3.1 We deplore the fact that the draft EU return directive does not include any adequate provision for monitoring the safety of returns. In order to ensure that returns are safe and that international obligations, including those of *non-refoulement*, are not breached, EU member states must as a matter of urgency develop mechanisms to monitor what happens to people once they have returned. Monitoring should be comprehensive, undertaken by an independent body and include voluntary, mandatory and forced return.

4.3.2 We are further disappointed that the draft directive does nothing to end the current situation where member states separately assess the safety of countries for the purpose of return and arrive at radically different conclusions. For example, whilst the UK has decided that parts of Iraq are safe for those forcibly removed there, Switzerland has recently concluded that return to Iraq is not a reasonable course of action.

4.3.3 The danger posed to returnees by biased and misleading country information was exposed in the UK when asylum seekers were returned to ill-treatment in Zimbabwe on the basis of country information produced by the Home Office that conflicted with the assessment of the situation in that country by the Foreign and Commonwealth Office (FCO).[25] As noted by the Asylum Rights Campaign, of which we are members, This caused considerable embarrassment and a belated decision that removals should be suspended until the CIPU [Country Information Policy Unit]

[25] Asylum Rights Campaign (2004) *Providing Protection in the 21st Century: refugee rights at the heard of UK asylum policy.* Chapter two.

assessment could be revised".[26] Although we note that the UK CIPU has been separated from the County of Origin Information Service, we believe that country information should be collated by a body that is independent of any party involved in the asylum process. This would enhance the prospects for impartial and authoritative country of origin information and in this way may better assure the safety of returnees.

4.4 We draw the Committee's attention to recent case law in the UK demonstrating that the manner of return can itself give rise to protection needs. In *AA v Secretary of State for the Home Department AA/0457/2005 [2005] UKAIT CG*, the AIT was highly critical of the process used to return people to Zimbabwe, a finding which was influential in their granting Convention refugee status to the applicant, AA.

In conclusion, the Refugee Council and Amnesty International UK believe that substantial changes must be made to the draft returns directive if it is to safeguard the rights of those who fall within its scope.

Refugee Council and Amnesty International UK
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[26] *Ibid,*