

RETURN: NO SAFETY IN NUMBERS

ECRE'S ANALYSIS OF RECENT DEVELOPMENTS IN EU POLICY ON RETURN OF MIGRANTS

I. INTRODUCTION

The low return rate of return of migrants staying irregularly in the European Union came under the spotlight in 2015 when more people sought international protection in Europe. For policy makers it became an urgent problem that struck at the credibility of asylum systems and a possible, albeit unproven, pull factor for irregular migration. Increasing the number of persons returned to their country of origin was viewed as a key to reducing migration to Europe. The European Commission attributed the low rate of return to factors including obstacles to implementation by Member States, difficulties in cooperation with third countries, a lack of travel documentation, and non-compliance by individuals. The European Union (EU) has sought to tackle these issues through policies that make increasing “effective returns” a primary aim. This policy note looks at the risks of a narrow focus on numbers, and the ethical, legal and political implications of increasing numbers at any cost.

II. ANALYSIS

GETTING THE NUMBERS UP: EXPANDING THE EU’S TOOLBOX FOR RETURNS

The 2008 Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive) regulates the return of irregularly staying third-country nationals. In its first assessment of the Return Directive in March 2014 the Commission had a positive view overall of its transposition and implementation by Member States. It noted that concerns that provisions on protection would undermine the efficiency of return procedures had not materialized. However, in the European Agenda on Migration published a year later those who had unsuccessfully claimed asylum and “migrants living in a permanent state of irregularity” were seen as corroding confidence in the system with “ineffective” return an incentive for irregular migration and smuggling. The argument then developed that increasing the number of returns was key to Europe’s response to the political crisis on migration. The Commission generally refers to “effective” return and increasing the “effectiveness” of return, meaning either increasing the absolute number of returns or the percentage returned of those issued a return order.

The EU Action Plan on Return from September 2015 proposed an ambitious set of measures to increase the number of returns, including: promoting best practice on voluntary returns; making voluntary return packages more alike across the EU; a uniform EU Travel Document to facilitate returns; amending data systems including Eurodac and the Schengen Information System (SIS II); an EU Entry-Exit mechanism; and the Integrated Return Management Application (IRMA) to improve cooperation between Member States. The Partnership Framework of 2016 aims to increase cooperation with third countries on return.

Frontex has stepped up joint actions and has more resources and responsibilities for return operations, including independently organising joint flights and managing pools of technical experts on returns who are at the disposal of Member States. Model status agreements, such as the one being discussed with Serbia, mean Frontex will be able to carry out joint operations, rapid border interventions and return operations on the territory of third countries, with joint teams entitled to perform border control and return operations and carry and use service weapons and equipment. The model agreement requires deployed border guards to fully respect fundamental rights but concerns remain about the effectiveness of rights safeguards, monitoring and effective remedies for individuals, and about Frontex's assistance carrying out return decisions that are not subject to EU law standards and safeguards.

The 2017 Commission Recommendation on making returns more effective when implementing the Return Directive (the 2017 Recommendation on returns) encourages Member States to increase returns and tackle obstacles to the implementation of return decisions that could act as pull factors. It promotes punitive measures to reduce perceived abuse by individuals to avoid return, including urging Member States to increase detention, lower safeguards, and limit the examination of risks of refoulement. It also suggests limiting access to voluntary departure and reintegration support where they hinder return. Detention is not ruled out for children or families. Health problems are seen as a potential abuse of the system. Recommendations are still consistent with the Return Directive, but they will lower standards in some EU Member States, justified by the need to increase numbers.

The recently updated Return Handbook offers guidance to authorities on how the rules of the Return Directive can be better implemented. While it strengthens provisions on non-refoulement, children's rights and statelessness, overall, the additions are more restrictive, including broadening the criteria in assessing risk of absconding and encouraging States not to provide a period for voluntary return in these cases or those judged manifestly unfounded.

THREE PREREQUISITES FOR RETURN: CURRENT SITUATION

ECRE has long argued that states have a legitimate right to return irregularly staying migrants including asylum seekers whose applications for protection have been rejected. However, it is also ECRE's view that certain prerequisites are necessary for return to be used. Without them in place, return policy would not be just and return should not be extensively used. With the push to increase return numbers, are the prerequisites in place?

The first prerequisite is that fair and consistent asylum systems properly examine whether a person will face a well-founded fear of persecution or serious harm if returned. Unfortunately, currently it cannot be assumed that a person whose asylum claim has been rejected does not have a case for protection in Europe. Although recognition rates overall are high, they are sometimes widely divergent across the EU, including for key nationalities from countries in conflict. A failure to protect those in need of protection undermines the credibility of Member States' removal systems. Measures to improve asylum procedures would mean greater confidence in negative decisions on protection claims and could mean more cooperation from returnees and other stakeholders.

Fair return procedures are also a prerequisite. The policies in the 2017 Recommendation on returns are predominately punitive, and likely to undermine fairness towards individuals and change the nature of relations with third countries. There is a risk that individuals will be less likely to comply with return decisions that feel unfair and for which they have not had time to prepare. This is counterproductive and will damage the credibility of the return procedure.

Fair and transparent partnerships with third countries that respect fundamental rights and are open to scrutiny by the European Parliament, are the third prerequisite for returns. Return is now a priority in the EU's external cooperation on migration with third countries, as seen with the Partnership Framework, the Valletta Action Plan, the Joint Way Forward with Afghanistan and the deployment of European Migration Liaison Officers in priority countries. Analysis has highlighted the risks of human rights violations and the design of agreements in ways that avoid scrutiny and render them non-justiciable.

RISKS OF WRONGFUL RETURN

In its Communication on the Delivery of the European Agenda on Migration from September 2017 the Commission estimated that one million third-country nationals were irregularly present in the EU in 2016; approximately half received orders to leave the EU and less than half of those (226,000) were effectively (actually) returned. The rate of return in 2015 was 36.4%. According to the European Migration Network (EMN) return decisions are issued at different points in the asylum procedure in different Member States, and multiple decisions can be issued in some countries but not others. This means not all the return decisions were enforceable because individuals had not exhausted legal remedies. The Commission and some Member States have also placed increasing importance on the return of asylum seekers whose application for international protection has been rejected. There can be more complex issues involved in the return of people who have applied for asylum. Return is often to a country experiencing conflict, where the authorities may have less capacity or interest in cooperating, and where individuals could be at risk of human rights violations including refoulement upon return. The push to increase numbers mean that people falling into these categories are more likely to be returned.

THE FALSE ECONOMY OF RETURN

The high numbers of arrivals in 2015 and 2016 created challenges, but migration is not a purely negative phenomenon. Indeed, the International Monetary Fund has assessed that immigration increases GDP per capita in advanced economies, and that the gains are broadly shared across the population. In addition, it is important not to lose sight of the fact that whilst around 500,000 return orders were issued in 2016 for all categories, the EU-wide average recognition rate for asylum claims was a record 61% and over 700,000 people were awarded a protection status. In this context, the focus and resources used for returns seems disproportionate when the bigger challenge is inclusion. The focus on increasing returns also ignores the plight of those who cannot be returned for various reasons, and whose status differs widely across the EU. This group is particularly at risk of destitution and detention.

LIMITING VOLUNTARY DEPARTURE

Although the European Commission is aiming to increase those who return the current recommendations restrict the space for voluntary departure and encourage states to give the least time possible for individuals to make up their mind and prepare for return. This is neither realistic nor useful as it will lead to more (enforced) removals and detention, which is more harmful for individuals and families, more difficult for Member States to carry out, and more costly in all senses. Voluntary departure and assisted voluntary return programmes should be the default, open up to the moment of return, and for as wide a group as possible to encourage more take-up. There is no evidence that limiting voluntary return will increase overall return numbers – the opposite may well be true.

SUSTAINABILITY: STAYING RETURNED

Although ECRE's concerns are primarily with the fairness of return, effectiveness is also important and should not be measured solely according to the numbers of people returned. A better measure would include assessment of rates of re-migration. Evidence is emerging, particularly from Afghanistan, of the lack of reintegration prospects, as well as the negative impact on individuals and communities of return. These factors lead returnees to head back to Europe, rendering the whole exercise ineffective. Recent discussions on reintegration support for returnees have looked at harmonisation across Member States, including in the Non-binding common standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by Member States. Harmonisation is seen as a way to counter "return assistance shopping and misuse". However, there needs to be equal attention paid to how programmes work and if they answer the needs of returnees and host communities, enable reintegration and thus increase the sustainability of returns.

OVERALL LACK OF EVIDENCE

Much of the evidence base for recent recommendations to "enhance" returns comes from Schengen evaluation missions – a peer review tool with classified reports – and research from the European Migration network (EMN), which is often more nuanced than the recommendations that follow. This means the evidence base behind policy assumptions for increasing return is not always clear, including the assumptions on the

practice and extent of shopping for return packages. For some recommendations such as increasing detention to increase returns there is conflicting evidence, with several studies showing that there is a reduced return rate with longer detention periods. Data on returns is generally weak, including in Eurostat, something that the Commission will try to address with proposals including the entry-exit system, extending SIS II to cover returns, and the updated Return Handbook.

INADEQUATE MONITORING

Monitoring of return processes is not adequate, meaning that the potential negative impact of increasing numbers, including harm to individuals, will often not be identified. In the Return Directive Member States are obliged to establish a system for monitoring forced return, although not on every flight, and reports are not public. There is no specific monitoring framework to report on fundamental rights compliance by Member States that covers pre-return, the return process as well as follow-up in the country of return. Once a person has been returned there is little possibility for them to re-engage with Member States in case of difficulties and Member States generally do not monitor what happens. Frontex's expanded mandate on return requires increased investment in monitoring fundamental rights compliance during its activities, including joint return operations and this should be put in place as a matter of priority. As returns are being encouraged to countries where there is ongoing conflict, post-return monitoring becomes even more important to ensure States have complied with human rights obligations, and that people are safe. Monitoring in the country of return should include a wide range of stakeholders including NGOs. It should not in any way replace procedural safeguards, scrutiny or the suspensive effect of appeal procedures in Europe.

III. RECOMMENDATIONS

- » The Commission should reassess its approach to the effectiveness of returns and move from a narrow numbers-based approach to a broader approach looking at safeguards and conditions in host countries, during return procedures, in the country of return, and at the overall sustainability of return.
- » The Commission should ensure that there is an accessible reporting procedure on fundamental rights observance by Member States in return procedures, presented annually to the European Parliament. Expertise from the Fundamental Rights Agency, ombudsmen and civil society should be used along with Member State reports.
- » Member States should ensure that options for voluntary departure and access to assisted voluntary return programmes are open throughout the return process, and are available to as wide a group as possible.
- » Member States should only issue return decisions when all appeal options and other procedures have been exhausted by individuals, so return orders can be enforced.
- » Monitoring should be carried out pre-, during and post-removal and feed into impact assessments of reintegration programmes to ensure they work for individuals and communities. A wide range of stakeholders should take part.
- » More emphasis should be given by the Commission and Member States to assistance for those who cannot be returned. A status, even temporary, should be granted that enables people and families to work, train, study, access health services, avoid destitution and provide a strong foundation for reintegration upon return.
- » The impact on relations with third countries of a focus on returns should be examined.

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