VOLUNTARY DEPARTURE AND RETURN: BETWEEN A ROCK AND A HARD PLACE

ECRE'S ANALYSIS OF EUROPEAN PRACTICES IN THE AREA OF RETURN INCLUDING "VOLUNTARY DEPARTURES" AND ASSISTED RETURN, WITH ITS RECOMMENDATIONS TO THE EU.

I. INTRODUCTION

Although the number of people arriving in Europe to seek protection has fallen dramatically since its peak in 2015-2016, European leaders are still struggling to overcome the political crisis on migration. Return of third country nationals living irregularly in Europe is seen as the magic bullet by some, including policy-makers in both the European Commission (the Commission) and EU Member States. This is despite the complexities associated with return, which include a lack of cooperation from third countries, a lack of travel documentation, serious concerns for the safety of individuals returned to countries in conflict, and non-compliance by individuals. Whilst ECRE acknowledges that return is a legitimate part of governments' migration policy, it argues that three pre-requisites must be in place: fair and consistent asylum systems that properly assess whether a person is entitled to international protection; fair and humane return procedures; and fair and transparent relations with third countries based on international human rights law and standards. ECRE also argues that the effectiveness of return should not be measured only by the numbers of those returned but should also take into account their situation on return.

Even with the pressure to increase returns, most stakeholders agree that voluntary return is preferable to forced return. This Policy Note examines expanding practices in the grey area between forced and voluntary return, including "voluntary departure" and "assisted voluntary return" (AVR), which are political priorities for the EU.

II. ANALYSIS

WHAT IS A VOLUNTARY RETURN OR A VOLUNTARY DEPARTURE?

ECRE makes a distinction between three categories of return: voluntary return, mandatory return and forced return. Forced return is the return of persons who are required by law to leave but have not consented to do so and who are subject to coercion in order to effect their removal. Voluntary return is when people make a free choice to return to their country of origin. Mandatory return sits between the two: individuals are required by law to leave the country and issued with a return order but they may be able to choose when and how they return.

The notion that mandatory return is preferable to enforced removal is one of the key principles underpinning the Return Directive in which it is termed "voluntary departure", defined as "compliance with the obligation to return within the time-limit fixed for that purpose in the return decision". Once a return order has been issued, the voluntary part of the return thus rests in the individual being able to leave themselves, without force, in the given time frame, as they are legally obliged to do. The Danish Refugee Council has called this "accepted return".

Although mandatory return is a legal obligation, it is obviously more humane for people to be allowed to return without force and in dignity. The current debate on "voluntary return" at European level often concerns voluntary departure in a situation of mandatory return rather than purely voluntary return. (Although ECRE does not consider this type of return to be voluntary, the term voluntary departure is used for ease of reference).

Within the grey area, there are also increasing numbers of individuals who have consented to leave when induced to do so by means of incentives, threats or sanctions. This leads some commentators to stress the "sliding scale" between voluntary and involuntary return where there is no clear boundary because policies creating harsh conditions or limiting options are coercive and used to force consent.

RESTRICTIONS ON VOLUNTARY DEPARTURE

While the Commission focuses on increasing returns, it is simultaneously promoting restrictions on access to voluntary departure. The Return Directive establishes a period from seven to thirty days for voluntary departure, during which time the return decision will not be enforced, i.e. the person will not be forcibly deported. The thirty-day maximum deadline can be extended taking into account individual circumstances, such as the length of stay, the presence of children attending school and the existence of other family or social links. In its 2017 Recommendation on making returns more effective (the Recommendation on returns) the Commission urges Member States to provide the shortest possible period for voluntary departure. A period longer than seven days should only be granted when the "illegally" [sic] staying third-country national actively cooperates on return. A period shorter than seven days should be used "If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent". Finally, the Commission recommends that Member States only grant voluntary departure following a request by the third-country national concerned, who should be "well informed" of the possibility to do so.

Three concerns arise. First, it is hard for individuals to show they are actively cooperating in their return and this criterion may deter them from openly discussing legitimate concerns for fear of being classed as non-cooperative. Second, Member States have extended the range of criteria under which asylum claims can be designated as "manifestly unfounded", even in circumstances that are clearly not related to its merits, e.g. when the application has not been lodged immediately after arrival. The Recommendation on returns has also suggested extended criteria for judging when there is a risk of absconding. Third, it is difficult to monitor compliance of national authorities with the obligation to keep individuals well-informed.

Reducing the period for voluntary departure means that many asylum seekers are deprived of the possibility of complying with a return decision before it is enforced. It also undermines individual's preparations for return or access to counselling and support services. The shorter period of seven days can even be difficult for Member States, particularly where a country has fewer embassies and fewer direct flights. (In Greece, those in AVR programmes can wait for months in detention until the numbers of returnees are high enough to charter a flight.) These various restrictions on voluntary departure undermine the stated aim of increasing its uptake.

ASSISTED RETURN SCHEMES

For those judged able to return, the Return Directive requires Member States to provide enhanced return assistance and counselling to promote voluntary departure and voluntary return. The Recommendation on returns asked all Member States to have operational AVR programmes in line with the common standards on Assisted Voluntary Return and Reintegration Programmes, i.e. to actively AVR promote voluntary return as early as possible, information campaigns, wide access to assisted return schemes, and cooperation among Member States. There is also a push by the Commission for Member States to harmonize assisted return programmes, notably through the E(R)RIN network, but also through shared IT solutions. Harmonization aims to make it simpler for returnees, the country of return and the programmes to know what assistance is available for whom, as well as to deter "return shopping" or misuse (although there is no research to show that return assistance shopping is a significant phenomenon).

ECRE welcomes the broadest possible access to assisted return schemes, including for those forcibly returned, and the dissemination of information to help individuals make an informed choices (while noting that some AVR schemes are less than voluntary, particularly in countries where asylum seekers face detention and difficult conditions.) Counselling and support is essential and more readily accepted from trusted organisations, qualified to provide the service and independent from agencies enforcing return decisions. While harmonisation of return assistance packages would avoid confusion, their aim must be to ensure people can return in dignity and build a life so there is no future need for forced migration. They also need to be able to meet the complex and diverse needs of returnees including vulnerable people.

CARROTS BUT MAINLY STICKS

The Commission is urging Member States to introduce new policies to induce individuals to consent to return. There are some positive incentives, such as financial assistance, however the trend is for sticks rather than carrots. These include the threat of (continued) detention and withdrawal of rights such as employment and housing and other support in the host country.

For ECRE the denial of human rights and the withdrawal of support as a means of forcing individuals to cooperate with return procedures or compel them to leave of their own accord is unacceptable. Individuals facing return should be adequately supported by the government of the host country until it is possible for them to leave. Otherwise, states risk violating their obligations under the ECHR and forcing people into destitution.

In addition, the evidence that punitive measures have the intended effect is limited. A 2004 UK government study on voluntary return showed that peace and security in home countries were the key factors influencing the decision to return, followed by family factors. Restricting the employment of asylum seekers did not increase the likelihood of return. A European Migration Network (EMN) study, The Return of Rejected Asylum Seekers: Challenges and Good Practices from 2016 stated it is difficult to draw conclusions on the effectiveness of different approaches without sufficient evidence, however, the practice of drastically removing rights following a return decision may increase the likelihood of absconding or mean that individuals fall out of contact with the authorities. Evidence from an EMN Ad-Hoc Query on the correlation between forced and voluntary return from January 2017 was inconclusive. A 2014 study concluded that the more voluntary the decision to return, the higher the "return motivation"; both the possibility of post-return mobility and more positive experiences in the host country before return meant greater "embeddedness" in the return country.

Hostile conditions for those with a return decision undermine individuals' agency and dignified return. Punitive measures may be counterproductive, making it more difficult to stay in touch and support individuals in planning for return. The final challenge is that not all people will be able to return – either voluntarily or forcibly – due to protection needs, statelessness, return country opposition, etc. Harsh conditions damage integration prospects for those who cannot be returned.

THE ASYLUM-RETURN NEXUS

Although not all those who receive a return decision have previously applied for asylum, the group of those who have had asylum requests rejected has been a focus of the Commission's recent policy recommendations, according to which it is desirable to create "synergies" between asylum and return processing to increase returns. This often translates into recommendations to increase detention, including plans to expand the

hotspots approach and to detain people in "controlled", "return" "Anker" and other types of euphemistically termed "centres". There is also a link with legal proposals to reduce the fairness of asylum procedures, such as reducing access to the procedure and accelerating procedures through removal of important safeguards, ensuring that people are more quickly identified for return.

The Commission warns that a "failure" to return will lessen the credibility of asylum systems. ECRE believes that a failure to protect those in need of protection, combined with lack of harmonization, Member States' lack of compliance with EU asylum law, and flagrant inefficiencies are the real causes of a lack of credibility of both asylum and removal systems. Consequently, measures to improve Member States' asylum procedures are essential so that negative decisions on protection claims can inspire greater confidence.

HOW EFFECTIVE ARE POLICIES TO INCREASE "EFFECTIVE RETURNS"?

The current definition of "more effective return" from DG Home is an increased number of people leaving the EU to a third country after receiving a return order. Returns overall fell between 2016 and 2017, so recently announced targets to double the effective rate of returns to 70% by 2020 from 36.6% in 2017 seem unrealistic. It is difficult to judge the rate of voluntary departure specifically as not all Member States distinguish between voluntary departure and enforced removal in Eurostat. According to the IOM, take up of their AVR programmes went down in 2017 to more usual levels after an "exceptional" 2016, although participation from "transit" countries such as Greece continued to rise. Little is known of those who leave completely autonomously. Statistics need to improve in terms of frequency, recording types of return, and age and sex of returnees and whether children are accompanied.

For ECRE, the test of an "effective" voluntary departure should be the extent to which it enables individuals to lead a dignified and safe life in the country of return. Unfortunately, there seems to be little appetite to use a broader definition of effectiveness. This is short sighted as it means missing important information about what motivates people to return, why someone would choose voluntary departure, what would help them prepare, the effects on their communities, and whether they will be able to stay safely and in dignity without being forced to migrate again. Post-return monitoring is vital so that Member States learn more for future programmes as well as ensuring the safety of returnees. Different parts of the European Commission such as DG International Cooperation and Development can assist in supporting return communities. Longer-term development approaches have more chance of ensuring that returnees choose to remain in the country of return.

III. RECOMMENDATIONS

» Voluntary departure and supporting assisted return programmes should be the default, open up to the moment of return, and for as wide a group as possible.

» ECRE encourages Member States to make use of the possibility to extend the thirty-day period of voluntary departure, not reduce it. This is particularly relevant for individuals who have spent long periods in the host country, who have vulnerabilities, and to allow children to complete the current school period.

» ECRE urges Member States to refrain from setting additional legal requirements which may prevent third country nationals from choosing a more humane form of return.

» Independent information, counselling and support should be provided to potential returnees and their families, examining all options including other means of regularization in the host-country as well as helping them to prepare for return.

» Voluntary departure, indeed, return, is not possible for everyone. Member States need to provide dignified alternative solutions in the form of a status that provides basic socio-economic rights for those who cannot return.

» Voluntary departure and AVR programmes lose credibility if people are forced into them out of desperation, coercion or destitution. Member States must ensure voluntary departure is an option at the end of a fair asylum procedure.

» There needs to be an open, debate on return involving all stakeholders including the European Commission (DG Home, DG DEVCO, DG ECHO), EEAS, Member States, civil society, NGOs, migrant and refugee communities and host communities on what are effective returns and how to put individuals at the centre of return policy.