

RETURN AS “NON-ESSENTIAL TRAVEL” IN THE TIME OF PANDEMIC

ECRE'S POSITION ON RETURN AND DETENTION DURING COVID-19

I. INTRODUCTION

On 16 March 2020, in view of rapidly growing numbers of infections of Covid-19, the European Commission (“the Commission”) adopted the Communication “Temporary restriction on non-essential travel to the EU,” in which it called for a temporary restriction of non-essential travel from third countries into the EU. Several Member States imposed entry bans and restrictions on human mobility within their borders. These measures aim at limiting social interactions to counter the spread of the virus and respond to the health care emergency. Indeed, no Member State was spared and [over 170.000 people had died](#) in Europe by end May. Given that measures aimed at controlling the virus had an impact on asylum and migration policies, on 16 April the Commission issued [guidance on implementing EU rules on asylum and return procedures and on resettlement](#) (hereafter “the guidance”). This Policy Note addresses the part of the guidance relating to return and expresses ECRE position on how return-related measures as laid down in the [Return Directive](#) should be interpreted and applied in the context of the Covid-19 pandemic. Given the scale of the public health emergency hitting both host and destination countries and the resulting economic fallout worldwide, return of people should not be considered a priority for resource allocation, especially as it risks putting individuals and communities at risk. Although many restrictions in the EU, including on intra-EU travels, are being lifted, in other parts of the worlds the pandemic is still spreading.

II. ANALYSIS

RETURN

Since travel bans were imposed and flight connections disrupted, deportation became impossible in many cases. Even when travel restrictions are lifted, the social distancing rules and other adaptation measures will render return procedures cumbersome. Indeed, several Schengen countries, including Denmark, France, Ireland, Italy, and Switzerland, are [carrying out no or very few returns in practice](#). However, in almost no country did the government adopt a policy to *officially* halt returns for the duration of the health crisis. Governments appear to have difficulties acknowledging that it is not business as usual in this area. In Germany, for instance, the Federal Ministry of Interior in its [Procedural note](#) stressed that if possible removals should be carried out, and the Dutch authorities use the continuation of identification procedures to justify maintaining people in immigration detention. A similar approach emanates from the Commission's guidance. According to the Commission, despite everything, return procedures should continue as far as possible and Member States should be ready to resume returns and deal with the backlog when restrictive measures end.

Instead of tacitly postponing removals and keeping people in limbo, Member States should take a principled stance and place a moratorium on removals. An official policy to halt returns would reflect both the principles underlying EU return policy, namely effectiveness and fundamental rights, and would show solidarity with third countries.

Postponing removals is an inadequate and expensive approach; it requires regular reassessment of the possibility of return, hence administrative and judicial processes, both of which involve costs. In addition, these procedural steps typically require direct contact between the administration and migrants, which increases the risk of transmission. Likewise, carrying out preparatory activities (like identification and dialogue with countries of origin) when removal is unlikely in the near future is not a wise use of financial and human resources, much needed now in other sectors. Ending deportation plans in some cases would give clarity to the person concerned and respect their inherent dignity. In the times of general fear and lack of security, limbo has an additional impact on mental health. People who decide to leave on a voluntary basis should have the possibility to do so, once international traveling is possible, and be offered return counselling and reintegration support, tailored to the current distancing rules.

Return is ultimately trans-border travel and as such undermines national policies of containing the spread of the virus. The consequences of transmission are heightened due to limited capacity of the health systems in receiving countries. This risk is not hypothetical: several people deported from the United States to Mexico and Guatemala turned out to be infected and further transmitted the virus in destination countries. As of June 2020, around [20 percent of infections in Guatemala](#) have been traced to deportees from the US. Beyond a risk of direct transmission of the virus, demanding destination countries to cooperate with Member States' return procedures (like identification or issuing travel documents) and to readmit their nationals appears unfair, given the challenges they are facing. A case in point is Afghanistan where the Ministry of Migration has called on European countries to suspend all returns, as the country is already struggling to care for its nationals repatriated from Covid-19-hit Iran. As of late May, Afghanistan registered almost 12,000 infections and had just [a few ventilators](#) for the whole country. [Returnees from Iran and Pakistan](#) risk discrimination as they are considered to bring the virus with them. Beyond Afghanistan, several of the top countries of return were using their limited resources to contain the spread of the virus. [Iraq](#) and [Nigeria](#) registered respectively over [4,600 and 8,000 cases](#) of Covid-19, while the countries' healthcare systems are chronically under resourced. Finally, with almost 140,000 infections, [Iran](#) became the epicentre of the virus in the region and also suffers from shortage of medical equipment. By suspending returns the EU can show solidarity with those countries because, according to the Commission, ["the global coronavirus pandemic requires a global response."](#) This would also ensure consistency with the EU's financial support to third countries as part of the 'Team Europe' package, which otherwise risks being undermined by the focus on returns.

DETENTION

In light of both legal and public health considerations, immigration detention should cease. States should adopt an official policy releasing people from immigration detention and suspending issuing new detention decisions.

With removals suspended, pre-removal detention loses its legal basis and *raison d'être*. Under article 15(4) of the Return Directive, when a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned should be released immediately. This provision should be read alongside article 15(1) of the Directive according to which, detention may only be maintained as long as removal arrangements are in progress and executed with due diligence. Both notions stem from Strasbourg jurisprudence. According to the European Court of Human Rights, pre-removal detention under article 5(1)(f) of the [European Convention on Human Rights](#) is justified as long as return proceedings are carried out and return remains reasonably possible. If these conditions are not fulfilled, detention, irrespective of its length, ceases to be lawful.

According to the Commission's guidance, the temporary restrictions introduced by Member States and third countries to contain the spread of Covid-19 should not automatically lead to the conclusion that a reasonable prospect of removal no longer exists in all cases. Rather, according to the Commission, release should be based on a case by case assessment. Indeed, such a policy was adopted by countries including [France](#), [Italy](#), [Sweden](#), [Spain](#), and [the UK](#), where many immigration detainees were released. Yet, regular re-assessments of the viability of removal and progress in identification procedures are time and resource consuming, so an official policy to release all immigration detainees would save valuable resources.

In addition, considering public health considerations, detention would hardly stand the necessity and proportionality test. Given the well-known consequences of Covid-19, the high infection rate, and modes of transmission, immigration detention does not seem a necessary measure of a last resort. States have a duty of care towards people under their control, including detainees. It is difficult to ensure preventive self-distancing or swift access to medical advice in custodial settings. Infection may spread rapidly in detention centres, posing a risk to health and life of immigration detainees but also staff and community at large.

Upon release, people should be tested and if positive be subject to relevant public health protocols. They should be provided with a written confirmation of their situation in the event of administrative controls, in line with recital 12 of the Return Directive and as interpreted by the Court of Justice of the European Union (CJEU) in [Mahdi](#). Further, migrants released from detention should be offered accommodation and, at least basic, immediate assistance. States could cooperate with civil society organisations which run shelters to ensure places for released people, while also providing adequate funds.

If detainees are released because their detention is considered unlawful due to lack of a realistic prospect of removal, they should not be subject to any limitation of their freedom of movement in the form of alternatives to detention. If, however, their detention was unnecessary in light of risks of infection inside detention centres but return is realistically possible in the specific case, Member States may impose non-custodial measures to avoid the person absconding but under strict conditions based on a risk assessment. In the context of Covid-19, alternatives to detention, such as reporting or residence restrictions, should comply with the overall measures to contain the spread of the virus and protect the individuals. For instance, physical reporting to authorities, whereby the person would often need to take public transport, could be removed, suspended or replaced by phone or video check-in arrangements.

Finally, if Member States decide not to release all detainees and instead continue running detention centres but with a limited capacity, safeguards need to be observed, including those in the [WHO guidance on Preparedness, prevention and control of COVID-19 in prisons and other places of detention](#). The rules relate to social distancing, provision of sanitary equipment, disinfection of the facilities, access to medical advice and measures mitigating restricting out-of-cell time. Contact with the outside world (in particular with organisations visiting detention centres) should be facilitated using remote contact tools. Following these rules is cumbersome and it begs the question whether keeping migrants in detention is justifiable in the context of containing the spread of the virus where financial and human resources are needed in other sectors.

STAY

Since return is currently mostly impossible and in the near future will be disproportionately difficult to carry out, people in an irregular situation should be offered residence permits. The underlying approach of the Return Directive is clear: Member States should either return a person or grant the person a regular status. In normal circumstances, grey zones in states' practice whereby migrants who cannot be returned are tacitly tolerated and left in a semi-legal limbo situation are devastating for the people concerned and unhelpful for states. Leaving people in an undocumented situation in the current pandemic would be even more questionable as it may prevent them from accessing health care and adequate services, essential for the prevention of the spread of the virus. In addition, as labour shortages in various sectors, not least in healthcare, are acute, it is wasteful not to allow migrants to contribute their knowledge and skills to society. Hence, states should rely on article 6(4) of the Directive and grant a residence permit for compassionate, humanitarian, or other reasons. In such a situation, the return decision should not be issued and if it already has been issued, it should be withdrawn or suspended for the duration of the validity of the residence permit. In its guidance, the Commission indeed reminds states that they enjoy broad discretion under article 6(4) to grant residence permits. Promising measures were adopted in [Portugal](#) where non-nationals were granted regular status for three months to be able to access to health care services and social benefits. [Italy](#) will issue temporary work permits for some 500,000 migrant workers, which would benefit both the workers and sectors relying on migrant labour.

Beyond a regular status, migrants need to have access to adequate health care, material support and housing. The Return Directive provides for such safeguards for people whose removal has been postponed. Under article 14(1), states should provide health care and essential treatment of illness, ensure access to basic education of children and take into account special needs of vulnerable persons. The preamble (§12) addresses, albeit in vague terms, the basic conditions of subsistence of people who cannot be removed. Beyond the terms of the Directive, provision of basic social services to migrants is not a matter of charity but of compliance with international human rights obligations. Under the [International Covenant on Economic, Social and Cultural Rights](#), to which all Member States are party, states should ensure to everyone under their jurisdiction at least a basic level of rights enshrined therein, including health care (article 12(1)), education (article 13(1)) and adequate standard of living, including food and housing (article 11(1)). Beyond individual entitlements, given public health considerations and risk of destitution resulting from measures aimed to contain the spread of the virus, migrants should be entirely included in the public measures to prevent and contain the spread of the virus and compensatory schemes.

POST-PANDEMIC

Like in other policy areas, such as health, budget, penal system, and social welfare, the current health emergency may help shift the migration control paradigm. Halting returns, releasing detainees and offering them a regular status in several Member States did not undermine states' legitimacy or public order. To the contrary, by taking these measures states protected the public health of individuals and communities alike and acted in line with EU and international law obligations. An emergency not seen in Europe for a century offers a chance to re-think migration enforcement measures. Does deportation deserve to be such a priority among government actions? Is allocating vast resources to detention and forced returns justified amidst a looming economic crisis? The current crisis should lead to a more measured assessment of the real security and economic threats that Europe faces and a turn to inclusive, fact-based and balanced migration policies. Migration is part of Europe's history and present and people should be allowed to contribute to the societies in which they live in and be recognised for it.

III. RECOMMENDATIONS

In light of the scale of worldwide public health emergency and economic consequences of the lock down measures, ECRE calls for adapting return and detention practices to the new circumstances. Return and detention should be deprioritised, and instead human and financial resources be shifted to other sectors. Migrants should be included in health care measures and long-term recovery policies. More precisely, ECRE recommends that:

European Commission (DG Home):

- Cease pressuring Member States to prioritise return while other policy areas require priority and resources.
- Encourage exchange between the Member States on their measures related to return, detention, and regularisation.

European Parliament:

- Monitor return and detention practices in the Member States.
- Facilitate exchange of approaches on inclusion of migrants in recovery measures and access to labour markets (including acceleration of training, skills and diploma recognition).

Member States: Interior Ministries

- Introduce a moratorium on removals and a suspension of immigration detention.
- Release all detainees and provide for accommodation for those who need it.
- Offer people concerned a regular status, including the right to work.
- Ensure access to healthcare, housing, and material support.

Member States: Health Ministries

- Include migrants in national preventive health programmes.
- Advocate for releasing people from immigration detention.

Domestic courts

- Seek interpretation from the CJEU of the notion of "reasonable prospect of return" in the context of Covid-19 related travel restriction.
- Order release of people whose return is not realistic.