

## Persons in return procedures who have not been removed: fundamental rights challenges

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### Introduction

This brief paper deals with migrants in an irregular situation who are known to immigration law enforcement bodies but who have not or not yet been removed. Such persons are often in a situation in between regularity and irregularity. Although return is not implemented by the authorities, their status in the host country remains often irregular, typically resulting in difficulties in enjoying basic human rights.

Leaving aside the criteria for granting international protection under the Qualification Directive and the 1951 Convention relating to the Status of Refugees, a number of obstacles may prevent removal of migrants in an irregular situation. These may be of a legal nature, such as obstacles relating to the protection of family and private life or to Article 3 of the European Convention on Human Rights. They may be of a humanitarian nature. Often, however, it is practical or technical obstacles that prevent the implementation of the removal.

Obstacles can be of a short-term nature, for instance in situations of pregnancy or temporary sickness, but they can also last over time. As an illustration, at the end of October 2009, in Germany 58,800 persons who could not be removed, had been formally tolerated in the country for more than six years.<sup>2</sup>

Persons in return procedures who have not been removed are a heterogeneous group. They include rejected asylum seekers, visa over-stayers and other persons who are in the territory of a state without a residence permit. Their common feature is that their presence in the host country is acknowledged by the police or immigration authorities, who often also know where they are staying.

### European Union law

The presence of persons who are in return procedures but are not removed is a Europe-wide phenomenon. European Union law highlights the need to address the situation of irregularly staying third-country nationals who cannot yet be removed in Recital 12 and calls for defining basic conditions of subsistence according to national legislation.

In practice, limited guidance can, however, be found at the European Union level. The Returns Directive prohibits detention where prospects for removal no longer exist (Article 15.4). In its Article 9, the directive recognises that legal, humanitarian or practical obstacles may hinder a

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<sup>1</sup> This paper is extracted from a forthcoming publication by the FRA, Fundamental rights of migrants in an irregular situation in the European Union: Comparative report which will be published in late 2011.

<sup>2</sup> *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Jan Korte, Sevim Dağdelen weiterer Abgeordneter und der Fraktion Die Linke, Bundestagsdrucksache 17/764 vom 22. Februar 2010 m.w.N., Stand 31. Dezember 2009.*

removal. However, it provides only few guarantees to ensure that such persons are treated in accordance with basic fundamental rights standards.

Article 6 (4) of the directive foresees the possibility for Member States to grant a residence permit for “compassionate, humanitarian, or other reasons”. The directive also allows Member States to formally suspend removal in a number of circumstances (Article 9); however, apart from the specific situations listed in Article 9 (1), there is no duty on Member States to do so, even when it proves not possible to remove the person.

At the same time, the minimum safeguards foreseen for persons who are not removed in Article 14 (1) of the directive do not apply as long as the removal is not suspended. In those cases where the removal has been suspended according to Article 9, the directive provides four minimum safeguards:

- family unity with family members present in their territory;
- emergency healthcare and essential treatment of illness;
- access to the basic education system for minors (subject to the length of their stay);
- considerations to the special needs of vulnerable persons.

These safeguards are not comprehensive as they do not reflect all human rights to which migrants in an irregular situation are entitled to under international law. For example, it does not mention access to justice or the right to be registered at birth.

According to Article 14 (2) if removal is suspended a written confirmation has to be provided:

“Member States shall provide the persons [to whom a period for voluntary departure has been granted or the return decision temporarily suspended] with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7 (2) or that the return decision will temporarily not be enforced.”

The directive does not provide for any mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability. Suggestions to tackle this issue have so far remained unsuccessful.<sup>3</sup>

### **National responses to non-removability**

National policies dealing with situations of non-removability vary considerably across the European Union. They differ by country as well as within states, according to the grounds for suspension as well as on other factors, such as the profile of the individual or other interests at stake. Responses may range from a pure *de facto* toleration of the individual on the state territory to the granting of a residence permit.

Different solutions with varying degrees of ‘security of residence’ are possible. The choice is not necessarily one between irregularity and full regular status. Different forms of intermediate

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<sup>3</sup> See the European Commission, Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, COM(2001) 743 final, Brussels, 05 December 2001; European Commission, Communication on an Area of Freedom, Security and Justice Serving the Citizen: Wider Freedom in a Safer Environment, COM(2009) 262, Brussels, 10 June 2009.

solutions exist. Some have only a *de facto* toleration with minimal or no security of residence, as is the case when the persons concerned do not receive a written confirmation of the suspension of their removal. In other cases, the suspension is more official and leads to a formal authorisation to stay.

In general terms, the degree of recognition of presence of a person who is in between regularity and irregularity and the way in which this is certified has an impact on the protection of fundamental rights and, first and foremost, on protection from arbitrary detention. In many cases increased residence security also means increased access to basic rights. This is, however, not necessarily always the case. In Spain, for example, the level of residence security is minimal, but migrants in an irregular situation can access a variety of social rights, if they register with the local municipality.

Where domestic law provides for the possibility of granting temporary stay or residence for certain grounds, in practice not everybody can benefit from it. Often, their issuance is discretionary and/or limited to individuals who fulfil certain conditions, such as length of stay, good conduct, degree of *de facto* integration, etc.

There are in essence three possible policy responses to migrants in an irregular situation who are not removed for legal, practical or policy considerations: they can be tolerated only *de facto*, they can be provided with a formal toleration or they can be granted a residence permit.

a) De facto toleration

A number of EU Member States do not provide in their national law or administrative practices for any status or mechanism to deal at least with certain categories of non-removed persons. They are not provided with any documentation (except possibly a copy of the decision on their release from detention) and remain under obligation to leave the country.

In some EU Member States these persons are not protected from being arbitrarily re-arrested and detained. For example, in Italy, the law provides that when, for practical reasons, the order of accompaniment to the border cannot be executed, the individual is kept in a detention centre for a maximum of six months. After that period, the person is released with an order to leave the country within five days. If the order is not executed the person can be re-arrested. In Belgium, the impossibility of removal can in some cases lead to a permit based on exceptional circumstances, but more often, the individual is released from detention and no documentation preventing new arrests is issued.<sup>4</sup> In the Netherlands, moratoria of removals to certain countries can be announced, but affected persons would normally not be granted a right to stay.<sup>5</sup>

In other EU Member States, repeated arrest and detention is not possible. In Portugal and Spain, if a person has been kept in immigration detention for 60 days, he/she must be released.<sup>6</sup> After release, the person's status remains irregular and he/she is under the obligation to leave the country and can

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<sup>4</sup> An authorisation to reside can be requested by the individual according to Article 9bis of the Aliens Law. However, in the majority of cases this does not occur (information provided by the Fralex focal point in May 2009 in the context of the FRA project on the rights irregular immigrants in voluntary and involuntary return procedures).

<sup>5</sup> European Migration Network (EMN) (2010), *The Practises in The Netherlands concerning the granting of non-EU harmonised protection Statuses*.

<sup>6</sup> Portugal, Law 23/07, Article 146 (3); in Spain the upper limit of 40 days was extended to 60 days in 2009, Law 4/2000 (as amended), Article 62 (2).

be removed at any time.<sup>7</sup> Normally no authorisation to stay is given. However, in both countries all persons, including migrants in an irregular situation, are entitled to enjoy a set of fundamental rights. In Spain, according to the jurisprudence of the Constitutional Tribunal, fundamental rights are recognised to migrants in an irregular situation because they are fundamental rights recognised to all as human beings.<sup>8</sup>

Where the law does not foresee any specific authorisation to stay for those persons whose removal is delayed or cannot be enforced for practical or humanitarian reasons, this leads to a *de facto* toleration. Non-removed persons tolerated only *de facto* remain in a state of limbo with no legal right to stay but no factual possibility to be expelled. In those countries where the legal protection of migrants in an irregular situation is weak, this can lead to violations of fundamental rights of non-removed persons.

#### b) Formal toleration

There are a number of EU Member States where the national law provides for a formal authorisation to stay (toleration) specifically for persons whose removal has been suspended. In a majority of cases suspension of removal is certified with a document proving that the removal is postponed which is given to the individual concerned, although this is not always the case.<sup>9</sup> Such a document normally protects the individual from arrest and detention for the purpose of removal. If a toleration or similar authorisation to stay is issued, this accords a certain level of 'security of residence'. It recognises the person's presence in the country, but remains inferior to recognition provided by a residence permit, which normally entitles the holder to a broader range of rights.

In some EU Member States (Austria, Bulgaria, Germany, Greece, Lithuania, Romania), holders of a toleration status remain under the obligation to leave the country.<sup>10</sup> The toleration basically only suspends return as long as it is impossible in fact or in law.

In other EU Member States a right to stay in the country for a certain period of time – which does not amount to a residence permit under national law – is accorded with the suspension of removal. In the Czech Republic a person whose deportation has been suspended will be granted a 'toleration visa' which may be valid for a period of one year.<sup>11</sup> In Hungary, non-removed persons are given a document which indicates that their immigration procedure is pending.<sup>12</sup> Similarly in Malta, although the law does not provide for a suspension of removal, if rejected asylum seekers (or other migrants in an irregular situation) are released from detention and their removal is still pending,

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<sup>7</sup> Law 23/07, Article 160; Spain, Article 62.2 of Law 4/2000.

<sup>8</sup> See SSTC 236/2007 and 259/2007.

<sup>9</sup> Bulgarian Law, for example, establishes a formal suspension of removal but the right to stay in the country is not granted, and in practice only a copy of the administrative decision suspending removal is given to the person. (National Authority Survey, Bulgarian Ministry of the Interior). See also Greece, Law 3907/2011, Article 24 (4).

<sup>10</sup> Austria, Settlement and Residence Act, Section 69a(1); Germany, Residence Act, Section 60a; Greece, Law 3907/2011, Article 24 (4); Lithuania, Law on the legal status of aliens, Article 128 (3); Romania, Emergency Ordinance No. 194 (2002 as amended) at 104 (2). Bulgarian Law establishes 'prohibition to leave' as a formal suspension of removal but the right to stay in the country is not granted and the person is issued only a copy of the administrative decision suspending removal (National Authority Survey, Bulgarian Ministry of the Interior).

<sup>11</sup> Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic (§120a, §33 + §179, §43+§179).

<sup>12</sup> Third-Country National Act, Section 48 (3).

they can be issued by administrative practice with a short-term visa.<sup>13</sup> In Slovenia, permission to stay is issued for a period of six months and may be extended for as long as the meriting conditions exist. The police issue persons granted a permission to remain a personal identity card certifying their right to stay in the Republic of Slovenia and a copy of the administrative decision to suspend removal.<sup>14</sup> In Slovakia a tolerated stay is granted.<sup>15</sup>

#### c) Temporary residence permits

Although national provisions are rather diverse, all Member States have the possibility to grant temporary residence to at least certain categories of persons who are not removed for humanitarian, practical or policy considerations. Once an individual is issued a residence permit, even of a temporary nature, his/her situation is no longer irregular. Legislation in Cyprus, Finland and Poland are an illustration of policies to grant temporary residence permits. In Cyprus, for example, migrants who are not removed can obtain a temporary residence permit (called a pink card).<sup>16</sup> In Finland, aliens are issued a temporary residence permit if they cannot be returned for temporary reasons of health or if they cannot actually be removed from the country.<sup>17</sup> In Poland, a person who receives a tolerated stay permit has a right to obtain a residence card, which is valid for one year.<sup>18</sup>

In some EU Member States, granting a residence permit can depend on a number of conditions, such as time,<sup>19</sup> absence of fault on the migrant's side for preventing the removal or absence of a threat to public order and public policy.<sup>20</sup>

#### Ways to end situations of legal limbo

In those cases where persons who are not removed are not issued a temporary residence permit, but only formally or *de facto* tolerated, this may lead to a protracted situation of legal limbo. Legally unclear situations are undesirable for both the individual concerned as well as the state.

As the likelihood of return becomes increasingly remote over time, the host country needs to find solutions to end situations of legal limbo. There are essentially two options to achieve this. The first is to resort to exceptional and time-limited regularisation programmes, which have been widely used in the past.<sup>21</sup> The second option is to foresee the possibility in individual cases to grant a residence permit to persons whose removal has been suspended as part of regular migration policies.

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<sup>13</sup> The visa is valid three months and generally renewable. Chapter 217 of the Laws of Malta, Immigration Act, Article 6.

<sup>14</sup> Aliens Act 71/08, Articles 52 and following.

<sup>15</sup> Aliens Act, Article 43 (1)c.

<sup>16</sup> Article 15 (1)(B), 1972 Aliens and Migration Regulations.

<sup>17</sup> Section 51 of the Aliens Act.

<sup>18</sup> 2003 Act on granting aliens protection on the territory of Poland, Article 99.

<sup>19</sup> Denmark, Aliens Act, Section 9(c)2 requires the suspension to last for 18 months before a permit is considered.

<sup>20</sup> See, for example, Austrian Residence Act at 69a(1).

<sup>21</sup> Regularisation programmes have been enacted in several countries including among others in Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, and the UK. See Baldwin-Edwards, M. and Kraler, A. (2009), *REGINE-Regularisations in Europe*, Amsterdam: Amsterdam University Press.

Among EU Member States where the FRA could identify some form of formal toleration (falling short of a residence permit) for persons with suspended removal, at least four have designed mechanisms to end situations of protracted legal limbo.

In Germany, persons who have held a toleration status (*Duldung*) can, after a certain period of time and provided they fulfil a number of conditions, obtain a residence permit on the basis of Sections 104(a) and (b) of the Residence Act. Conditions to qualify for a permit build on the right of residence ruling (*Bleiberecht*) passed by the Standing Conference of Ministers and Senators of the Interior of the Federal German *Länder* on 17 November 2006.<sup>22</sup> Employment conditions, at least six-to-eight years of suspended removal, a clean criminal record, no threat to national security and public order as well as a minimum level of *de facto* integration are required. Since the end of 2006, some 35,000 persons have been regularised, although the majority of them only on a trial basis, as they did not fulfil employment conditions. In late 2009, permits issued on a trial basis were extended for a further two years.<sup>23</sup>

Similar to Germany, in other EU Member States the issuing of a residence permit that is linked to the suspension of removal status depends on the protraction of the conditions impeding return. For example, in the Czech Republic and Lithuania, the tolerated person will receive a residence permit if the conditions upon which a 'toleration visa' (for the Czech Republic) or a temporary residence permit (for Lithuania) were granted, remain after one year.<sup>24</sup> A one-year deadline is also foreseen in Austria.<sup>25</sup>

## Conclusions

The situation of third-country nationals who are in return procedures is regulated by the Returns Directive. It provides, however, only limited guarantees to ensure that persons in return procedures who are not removed are treated in accordance with basic fundamental rights standards. Moreover, neither the directive, nor other EU policy documents provide for a mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability.

Impediments for removal may be based on several grounds linked to legal or humanitarian considerations, practical obstacles or policy choice. EU Member States have adopted different policies to deal with this phenomenon. In some cases, (temporary) residence permits are issued, in others, stay is authorised on the basis of a formal toleration and, in a third group of cases, the presence of persons who are not removed is simply tolerated *de facto*. The level of security of residence usually determines the degree to which non-removed persons have access to fundamental rights, with Spain being an exception, as it grants the same level of rights to all those registered with the municipality.

The FRA is therefore of the opinion that EU institutions and Member States should pay more attention to the situation of migrants in an irregular situation who have been given a return decision

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<sup>22</sup> European Migration Network (EMN) (2010), *German focal point: The granting of non-harmonised protection statuses in Germany*, p. 37. See also: [www.bundesregierung.de/Content/DE/Archiv16/Artikel/2006/11/2006-11-17-einigung-beim-bleiberecht.htm](http://www.bundesregierung.de/Content/DE/Archiv16/Artikel/2006/11/2006-11-17-einigung-beim-bleiberecht.htm).

<sup>23</sup> Ibid at 72-73. On 4 December 2009, the Standing Conference of Ministers and Senators of the Interior agreed on a follow-up regulation, prolonging the regulation governing old cases by two years.

<sup>24</sup> Czech Republic, Act on the Residence of Foreign Nationals in the Territory of the Czech Republic, Section 43; Lithuania, Law on the Legal Status of Aliens, Article 132.

<sup>25</sup> Residence Act, 69a(1).

but who have not been removed. Mechanisms should be set up either at Union or Member State level to avoid a situation where persons who are not removed remain in a legal limbo for many years.

In addition, following the evaluation of the Returns Directive planned for 2014, the European Commission should propose amendments to the Directive to ensure that the basic rights of persons who are not removed are respected.

Member States should issue a certification of postponement of removal as required by the Returns Directive. It is an important tool to protect non-removed persons and to facilitate their access to rights. This should also be done when removal is postponed only *de facto*.

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