

Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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To The European Parliament
Att. The members of the Committee on Civil Liberties, Justice and Home
Affairs

Reference CM06-06
Regarding Proposal for a Directive of the European Parliament and of the Council on
common standards and procedures in member states for returning illegally
staying third-country nationals Brussels, 1 September 2005,
COM(2005)391 final

Date 4 May 2006

Dear Sir/Madam,

The Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') has read mainly with approval the Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals. In particular, it appreciated the requirement of written return decisions and removal orders (Article 11), the right to an effective judicial remedy to appeal against or to seek review of a return decision and/or removal order and the possibility to obtain legal advice, representation and, where necessary, linguistic assistance and legal aid (Article 12). The Standing Committee also appreciated that return decisions shall in principle provide for an appropriate period for voluntary departure of up to four weeks (Article 6). The proposed provisions of Chapter IV on temporary custody too are considered as positive while temporary custody is seen as *ultimum remedium* only (when there is a risk of absconding and where it would not be sufficient to apply less coercive measures). The Standing Committee notes with appreciation that temporary custody orders shall in principle be issued and monthly reviewed by judicial authorities and that the duration of the custody is clearly maximised to six months. Positive as well are the provisions concerning the conditions of temporary custody and its supervision by international and non-governmental organisations and the particular attention to the situation of minors and other vulnerable groups. Also the guarantees for unaccompanied minors in the postponement provision of Article 8 meet agreement.

Nevertheless, the Standing Committee kindly requests your attention as regards two provisions.

Article 9/re-entry ban

According to Article 9 removal orders shall include a re-entry ban of a maximum of 5 years. The Standing Committee doubts whether an obligatory re-entry ban included in a removal order may provoke a greater willingness to leave the country voluntarily after a return decision. On the contrary, the Standing Committee foresees the opposite effect. In many instances a re-entry ban may frustrate the actual removal to a third country while it negatively affects the willingness of a third country and of the third-country national concerned to cooperate with the removal. Illegality may increase as a consequence of an obligatory re-entry ban and when it proves to be impossible to execute the removal order the third-country national is doomed to illegality by the obligatory re-entry ban. The Standing Committee strongly advises to reconsider the blanket re-entry ban included in any removal order and to limit the use of such a ban to specific circumstances where the third-national concerned constitutes a threat to public order or public security.

Article 16/non refoulement

Article 16(a) stipulates that, *vis-à-vis* a third country national who is the subject of a return decision or removal order issued in a Member State ('the first Member State'), and who is apprehended in the territory of another Member State ('the second Member State'), the second State may recognise the return decision or removal order issued by the first Member State and carry out the

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removal. This article raises considerable concerns with regard to the right to an effective judicial remedy and the principle of 'non refoulement'.

There is no provision in the Proposal which guarantees the right to an effective remedy against the recognition of the return decision or removal order by the second State. Article 12 of the Proposal only grants this right of appeal against a return decision and/or removal order, but not against a recognition of such a decision. Article 16 does not provide for an effective remedy either.

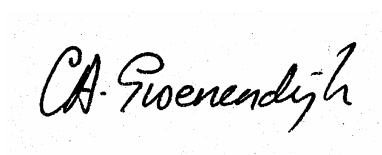
The Standing Committee notes that Article 20 of the Proposal stipulates that Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals is repealed. According to the Preamble under 13, Art. 16 of the Proposal must be considered to supersede the Directive. However, Article 4 of Directive 2001/40/EC stipulated that 'Member States shall ensure that the third country national may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any measure referred to in Article 1(2).' This means that a third country national currently has a right to appeal against a recognition of an expulsion order by the second State. The Standing Committee sees no justification for repealing this right. It can never be excluded that there are valid reasons for a third country national to move to a second Member State in order to avoid expulsion contrary to international obligations of the first Member State.

In its decision in T.I. against The United Kingdom (Application nr. 43844/98, 7 March 2000) the European Court of Human Rights the Court held that States are not absolved from their obligations under the Convention when they establish agreements to pursue co-operation in certain field of activities. A recognition of an expulsion order by a 'second Member State', followed by a removal, without giving the third country national access to an effective remedy against the recognition of the expulsion order or the removal decision, could amount to a breach of international obligations by the second State, such as the right to non-refoulement, the right to education and the right to family unity, as mentioned in article 6(4). Indeed, if a second State were to automatically rely on return decisions of the first Member State, there is a serious risk that in the situation of article 6(4) second sentence, where the first Member State had to withdraw a return decision because of a breach with international recognised human rights, no remedy would exist and the removal by the second State would result in irreversible harm.

The Standing Committee recommends to incorporate in article 12 the right to an effective remedy against any measures referred to in art 16(a) .

Yours sincerely,

On behalf of the Standing Committee,



Prof. Mr. C.A. Groenendijk
Chairman