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To

Mr. Manfred WEBER
Rapporteur
European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 BRUXELLES

Reference CM08010 I
Regarding Mandatory expulsion and entry ban decisions in Returns Directive violate general principles of Community law
Date 27 May 2008

Dear Mr. WEBER,

On 23 April 2008, a compromise was reached between the Council and the European Parliament on the text of the Returns Directive (2005-0167 (COD), COM(2005) 391). In the meantime some aspects of the text have been changed. Still, the text, in its present form, violates important principles of Community law. Such is in particular the case where the draft directive contains binding Community legislation compelling Member States to take *mandatory expulsion* measures or *mandatory entry ban* measures in certain categories of cases. A system of mandatory decisions is at variance with the need to assess, in the individual case, whether such measures are justified in the light of all relevant circumstances. The Standing Committee is of the opinion that the draft Directive must not be accepted by the European Parliament.

Article 63(3) EC Treaty provides no legal basis for using the instrument of harmonisation in order to categorically deprive individuals of their civil and fundamental rights[1]. Compulsory measures affecting an individual's liberty to move will unavoidably neglect the proportionality principle and thus risk to be arbitrary. Further, any right to an effective remedy or a right to be heard is bound to be meaningless if the decision is already on forehand dictated by law. At stake are the principles of proportionality, of an effective judicial remedy and of the right to be heard.

The draft Returns Directive will have to comply with these and other relevant principles of Community law, otherwise it risks to be annulled by the Court of Justice. In the case of the Parliament v. the Council on the Family Reunification Directive[2] the Court was of the opinion that *optional* clauses offering some freedom to the Member States for making exceptions to the rule laid down in the directive can still be applied by the Member States without violating the applicable principles of Community Law. However, when a directive contains *mandatory* provisions obliging Member States categorically to restrict individual liberties in certain cases, it is hard to imagine how the Court will be able to see any room for the Member States – when having to comply with these obligations - to effectively apply the proportionality principle in individual cases. In the attached note, an account of the relevant case law of the European Court of Human Rights and the UN Human Rights Committee can be found.

The Standing Committee urges the Council and the European Parliament to secure that the final text of the directive will effectively guarantee an individual assessment of whether expulsion, entry ban or detention is justified in the light of all relevant circumstances of the individual case.

Yours sincerely,

Prof. dr. C.A. Groenendijk
Chairman

Prof. dr. P. Boeles
Secretary

[1] On the contrary: Article 61(b) EC Treaty explicitly requires that measures under Title IV must safeguard the rights of third country nationals.
[2] Parliament-Council, ECJ 27 June 2006, Case 540/03.

Note on the relevant case law necessitating an individual assessment

Case law of the Court of Justice, Court of First Instance EC:

- **The proportionality principle.** According to the *Dokter* judgment (ECJ 2006, case C-28/05, para 72) "measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it". In this passage, the Court refers to earlier case law: Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 45; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-0000, paragraph 68.

- **The right to an effective judicial remedy** has been firmly established in the case law of the Court. For instance in the cases of Johnston [1986], Case 222/84, and Heylens[1987], Case 222/86. See also C-340/89, Vlassopoulou [1991]. See for application of this principle in immigration law cases C-327/02 Panayotova, C-136/03, Dörr [2005] The Court of Justice considers the principle of effective judicial protection a fundamental right which is essential in order to secure for the individual effective protection of the (fundamental) rights granted by EC-law. It reflects a general principle of law, which underlies the constitutional traditions common to the Member States. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.
  In Parliament v. Council (ECJ 27 June 2006, Case 540/03, para 38), the Court for the first time acknowledged the relevance of the Charter as a source of inspiration for the assessment of principles of Community law. Relevant in the present context is Article 47 of the CFR which reads: *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law (…)*

- **The right to be heard.** The Court of First Instance (CFI) stated in the *Alrosa* judgment (2007, Case T 170/06, para 191:"It should also be noted that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question"[3].

Case law of the European Court of Human Rights (EctHR)

In various contexts, the EctHR has consistently stressed the need for an individual assessment. In applying General Principles of Community law to the Return Directive, the Court of Justice will doubtless draw inspiration from the European Convention of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the Charter on Fundamental Rights of the EU as it has done before[4]. The Community Law Principles may provide individuals with a stronger protection than traditional human rights instruments do, but it is very unlikely that Community Law Principles might provide a lesser level of protection.

[3] The CFI refers to Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21.
[4] Parliament-Council, ECJ 27 June 2006, Case 540/03, para 38.

- **Article 4 Fourth Protocol ECHR**

  A general standard requiring an individual assessment of whether expulsion is justified is implied in Article 4 Fourth Protocol, prohibiting collective expulsion. According to the EctHR, an expulsion must be made " on the basis of a reasonable and objective examination of the particular case of each individual". (Juric v. Sweden, ECtHR 23 February 1999, nr 45924/99; Andric v. Sweden, ECtHR 23 february 1999, nr 45917/99; Conka v. Belgium, ECtHR 5 February 2002, nr. 51564/99, para. 59; Berisha and Haljiti v. Macedonia, ECtHR 16 June 2005, nr 18670/03.

- **Article 2 Fourth Protocol**

  To a certain extent, a right to liberty of movement is implied in Article 2 Fourth Protocol. This liberty may not be restricted arbitrarily. In İletmiş v. Turkey (6 December 2005, nr. 29871/96, para 50), the Court considered (original text in French):

  "At a time when freedom of movement, particularly across borders, is considered essential to the full development of a person's private life, especially when, like the applicant, the person has family, professional and economic ties in several countries, for a State to deprive a person under its jurisdiction of that freedom for no reason is a serious breach of its obligations. The fact that "freedom of movement" is guaranteed as such under Article 2 of Protocol no. 4, which Turkey has signed but not ratified, is irrelevant given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols (see *Poiss v. Austria*, judgment of 23 April 1987, series A no. 117, p. 108, § 66)". Consequently, the Court found a violation of Article 8 ECHR.

  In Riener v. Bulgaria (EHRM 23 mei 2006, nr. 46343/99) the Court said:

  "In sum, having regard to the automatic nature of the travel ban, the authorities failure to give due consideration to the principle of proportionality, the lack of clarity in the relevant law and practice with regard to some of the relevant issues and the fact that the prohibition against the applicant leaving Bulgaria was maintained over a lengthy period, the Court considers that it was disproportionate to the aim pursued. It follows that has been a violation of the applicant's right to leave any country, as guaranteed by Article 2 § 2 of Protocol No. 4. (para 130)."

- **Article 3 ECHR**

  In the Case of Jabari v. Turkey (11 July 2000, nr. 40035/98), the EctHR found a judicial review of expulsion inadequate because there had not been "a meaningful assessment of the applicant's claim, including its arguability"

- **Article 5 ECHR**

  In Saadi v UK, 29 January 2008, nr. 13229/03, the Grand Chamber elaborated on the notion of arbitrariness under Article 5§ 1 under f.

  "It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention. (para 67)"

  "The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Witold Litwa,* cited above, § 78; *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004; *Enhorn v. Sweden*, cited above, § 44). The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (see *Vasileva v. Denmark*, no. 52792/99, § 37, 25 September 2003). The duration of the detention is a relevant factor in striking such a balance (ibid., and see also *McVeigh and Others v. the United Kingdom*, applications nos. 8022/77, 8025/77, 8027/77, Commission decision of 18 March 1981, DR 25, pp. 37-38 and 42). (para 70)"

"To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur*, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued" (para 74).
"The Chamber found a violation of this provision, on the ground that the reason for detention was not given sufficiently "promptly". It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention. The first time the applicant was told of the real reason for his detention was through his representative on 5 January 2001 (see paragraph 14 above), when the applicant had already been in detention for 76 hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2 of the Convention, the Chamber found that a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given "promptly"." (para 84)

Though the Court seems to read in Article 5 § 1 (f) more discretion for detention of aliens than in relation to other forms of detention, the notion of arbitrariness developed by the Grand Chamber still requires an individual assessment:

- It is necessary to assess whether the detention is "closely connected to the purpose of preventing unauthorised entry";
- It is necessary to assess whether the detention is carried out in good faith;
- The mere fact that detention has been ordered in conformity with a provision of law is not a satisfactory justification;
- Neither are general parliamentary announcements sufficient to justify detention in an individual case.

Further it should be noted that – apart from the Court's conclusions in relation to the meaning of the wordings of 5 § 1(f) - the Court has deducted an obligation to strike a fair balance in cases of detention from Article 8 ECHR (see the judgment re Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, referred to below).

- **Article 8 ECHR**

An *expulsion* decision or an *entry ban* must be in accordance with law. According to the Al-Nashif v. Bulgaria judgment (20 June 2002, nr 50963/99) the quality of law requires that the legal regime must "provide the necessary safeguards against arbitrariness".
The mere fact that a person is staying illegally in the country does – in itself - not provide sufficient grounds for expulsion. In the Liu v. Russia judgment (6 December 2007, Nr 42086/05), the Court found "the legal provisions on the basis of which the first applicant's deportation was ordered did not provide for the adequate degree of protection against arbitrary interference".
Arbitrary expulsion is prohibited under Article 8, not only when family life is involved but also when private life is at stake. In the Üner judgment (18 October 2006 nr 46410/99, para 59), the Grand Chamber said: "Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect."

Expulsion decisions and entry bans have always equally been tested under Article 8 ECHR on whether they were justified in the individual case. For instance, in the aforementioned Üner judgment, the Court had to deal with an entry ban. It considered: "Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland,* cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no.

52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued." (r.o. 57)

The justification of detention was tested under Article 8 in the Mubilanzila Mayeka and Kaniki Mitunga v. Belgium judgment (12 October 2006, nr 13178/03). In para. 79 et seq. the Court assessed whether the detention which was ordered under the authorities' powers to control the entry and residence of aliens on the territory of the Belgian State, was necessary in a democratic society. The court determined "whether the second applicant's detention struck a fair balance between the competing interests in the case".

Case law of the Human Rights Committee

The ICCPR is one of the sources for assessing the content and meaning of Community Law Principles. Therefore it is useful to look at the case law on detention of immigrants under Article 9 ICCPR.

In the case of Bakhtiyari (6 November 2003, nr 1069/2000) the Human Rights Committee considered:

"As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification." (r.o. 9.2)

"As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to Mrs Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4." (r.o. 9.4)

In the case of C. v Australia (13 November 2002, nr 900/1999), the Human Rights Committee found:

"As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgment of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4." (r.o. 8.3)

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