

EUROPEAN GROUP OF NATIONAL HUMAN RIGHTS INSTITUTIONS

**Stockholm Programme should strengthen the human rights of non-removable persons**

1. The European Group of National Institutions for the promotion and protection of Human Rights (NHRIs) welcomes the proposal of the European Commission to consider better protection for so-called non-removable persons through European legislation. In its communication of 10 June 2009 on the ‘Stockholm Programme’ on the direction of EU cooperation on Justice and Home Affairs up to the end of 2014, the Commission<sup>1</sup> wrote: “ ... all too often repatriation measures cannot be carried out on account of legal or practical obstacles. In the absence of clear rules, we should study national needs and practices and consider the possibility of establishing common standards for taking charge of illegal immigrants who cannot be deported.”

2. The purpose of this paper of the European Group of NHRIs, at the final stage of the negotiations process (Stockholm Programme) by Member States, is to stress that the improvement of the legal situation of non-removable persons should be included in the Stockholm Programme.

3. As a study of the situation of non-removable persons in several Member States carried out by European NHRIs has shown<sup>2</sup>, persons can be non-removable for various reasons. The authorities in the host country often cannot even say if they have actually left the country or not, since non-removability is seldom formally assessed or certified by them. Non-removable persons may have family, economic or social ties in the host country.

4. Despite comprehensive human rights obligations of all Member States towards all persons residing in their territories, there exist vast differences within the EU in regard to the status of non-removable persons and their access to fundamental rights. The above mentioned study of national legislation and practices revealed a huge diversity in the situation of non-removable persons within the Member States. Whereas in some countries non-removable persons may be treated differently depending on the reason for or the duration of their non-removability in other countries all persons who are not deported are treated the same. Frequently they enjoy only limited or no access to human rights, such as the rights to health, housing, food, education (school) and work.

5. Non-removable persons, regardless the peculiarities of their individual cases, often share the common condition of being in an irregular situation and of having no realistic prospects of obtaining a regular residency status either under national law or under international protection mechanisms. They frequently have no status at all in their country of residence.

6. At the moment there exists no comprehensive regulation regarding non-removable persons in European secondary legislation. There are only a few regulations from which non-removable persons could derive some benefit despite the fact they are unclear and weakly formulated. Recital 12 and Article 14 of the Return Directive (2008/115/EC) identifies “the situation of third country nationals who are staying illegally but who cannot yet be removed” as one which shall require, that the affected persons be provided with written confirmation of their non-removability. Furthermore Article 14 of the Return Directive provides only some safeguards for non-removable persons:

- the maintenance of family unity
- access to emergency health care and essential treatment of illness
- access to the basic education system for minors
- that the special needs of vulnerable persons be taken into account

7. As yet, the European secondary legislation, i.e. the Return Directive, has treated the issue of non-removability merely as a temporary phenomenon while experience shows that this is not necessarily the case.

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<sup>1</sup> Commission of the European Communities, Communication from the Commission to the European Parliament and the Council. COM (2009) 262/4, p.26

<sup>2</sup> This paper is based on a study of the members of the NHRI network of experts on EU migration and asylum matters from June 2008 until September 2009. The experts especially studied the situation in Belgium, Germany, France, Greece, Luxembourg, Portugal and Spain.

## Possible Reasons for non-removability

8. The non-removability of a foreigner can arise for multiple reasons, for example:
- In situations linked with Article 3 of the European Convention on Human Rights (ECHR). This article prohibits torture as well as cruel, inhuman or degrading treatments. The provision engages the responsibility of the contracting states if an expulsion would lead to the prohibited treatment. Thereby not only circumstances in the country of destination are relevant on this issue. Individual characteristics of the foreigner him/herself such as advanced age and/or severe illness<sup>3</sup>, minority status, the (temporary) inability to travel, an advanced stage of pregnancy, etc. can play a considerable role in individual cases and may prevent the expulsion. Thus the character of Article 3 ECHR is absolute; it allows for no exceptions to the prohibition of expulsion.
  - In situations linked with Article 8 ECHR: the protection of privacy and of family life may obstruct a deportation if this would cause a disruption to one's family<sup>4</sup> or private life situation.
  - In situations where the Convention on the Rights of the Child (CRC), e.g. the principle of the best interests of the child (Article 3 CRC)<sup>5</sup>, has to be considered in particular<sup>6</sup>, as for an unaccompanied minor.
  - In situations where de facto elements prevent the expulsion. Where there is a lack of identification (i.e. where competent authorities for the provision of identity or travel documents are unable or unwilling to do so, or do not exist), or where there is a lack of transport capacity<sup>7</sup>.

## Human Rights of non-removable persons

9. The European Union is founded on the principles of liberty, democracy, respect for human rights and the rule of law.<sup>8</sup> Furthermore all Member States are contracting states to a number of international human rights instruments which are relevant to non-removable persons. These include conventions protecting all human beings such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of 1966. In addition there are existing conventions which concretise human rights protection for specific groups such as the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989). This list of human rights instruments shows that, when mapping out a legal framework for non-removable persons, a wide range of human rights obligations are to be observed.

10. Human rights apply to all human beings, irrespective of whether they fulfil the preconditions for legal residence. Human rights treaties contain comprehensive non-discrimination clauses<sup>9</sup> deriving from the equal dignity of every human being. All substantial rights – for instance the right to health (Article 12 ICESCR) or to education (Article 13 ICESCR) – must therefore be guaranteed on a non-discriminatory basis.<sup>10</sup>

11. The EU legislation should therefore provide a strong position on the fundamental rights of non-removable persons. The EU should design a legal framework for non-removable persons, which includes fundamental

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<sup>3</sup> See also Article 5 c) and Article 9 (2) b) of Directive 2008/115/EC (Return Directive). See also existing Case Law.

<sup>4</sup> Article 5 of Directive 2008/115/EC (Return Directive) accordingly emphasises that when implementing the Directive, Member States shall respect the principle of non-refoulement and shall take due account of the family life of the individuals concerned. The Directive does not, however, mention private life, although this is also protected by Article 8 ECHR and can play a crucial role in individual cases and may prevent an expulsion. See also existing Case Law.

<sup>5</sup> Article 3 CRC states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration."

<sup>6</sup> See also Recital 22 and Article 5 a) of Directive 2008/115/EC (Return Directive).

<sup>7</sup> See also Article 9 of Directive 2008/115/EG (Return Directive), which recognises a postponement of removal, inter alia because of technical reasons such as a lack of transport capacity or a lack of identification.

<sup>8</sup> Article 6 (1) Treaty on European Union.

<sup>9</sup> E.g. Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR), Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 (1) of the Convention on the Rights of the Child (CRC), Article 14 of the European Convention on Human Rights (ECHR).

<sup>10</sup> See for example General Comment No. 20 of the Committee on Economic, Social and Cultural Rights of 2 July 2009, E/C.12/GC/20.

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rights, such as the rights to education, work, health, adequate food and housing, all on a non-discriminatory basis.

12. This legal framework regarding non-removable persons should include the possibility to obtain legal residency. Individuals should have a reasonable prospect to obtain a residence permit if they are non-removable, for example according to Article 2 ECHR (the right to life), Article 3 ECHR (the protection from torture and inhumane treatment), Article 8 ECHR (the right to respect for private and family life), article 3 CRC (the best interests principle of the Convention) or because of de facto reasons.

13. The European Group of National Human Rights Institutions emphasises that the Stockholm Programme, while addressing the issue of non removability, should strengthen the human rights of non-removable persons.

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This paper is based on a study of the members of the NHRI network of experts on EU migration and asylum matters. The following Institutions are members of the NHRI network: Belgian Centre for Equal Opportunities and Opposition Against Racism, Danish Institute for Human Rights, French Consultative Human Rights Commission, German Institute for Human Rights, Irish Human Rights Commission, The Office of the Ombudsman of the Republic of Latvia, Luxembourg Consultative Human Rights Commission, Northern Ireland Human Rights Commission, Portuguese Ombudsman, Romanian Institute for Human Rights, Spanish Ombudsman Office, Greek National Commission for Human Rights.