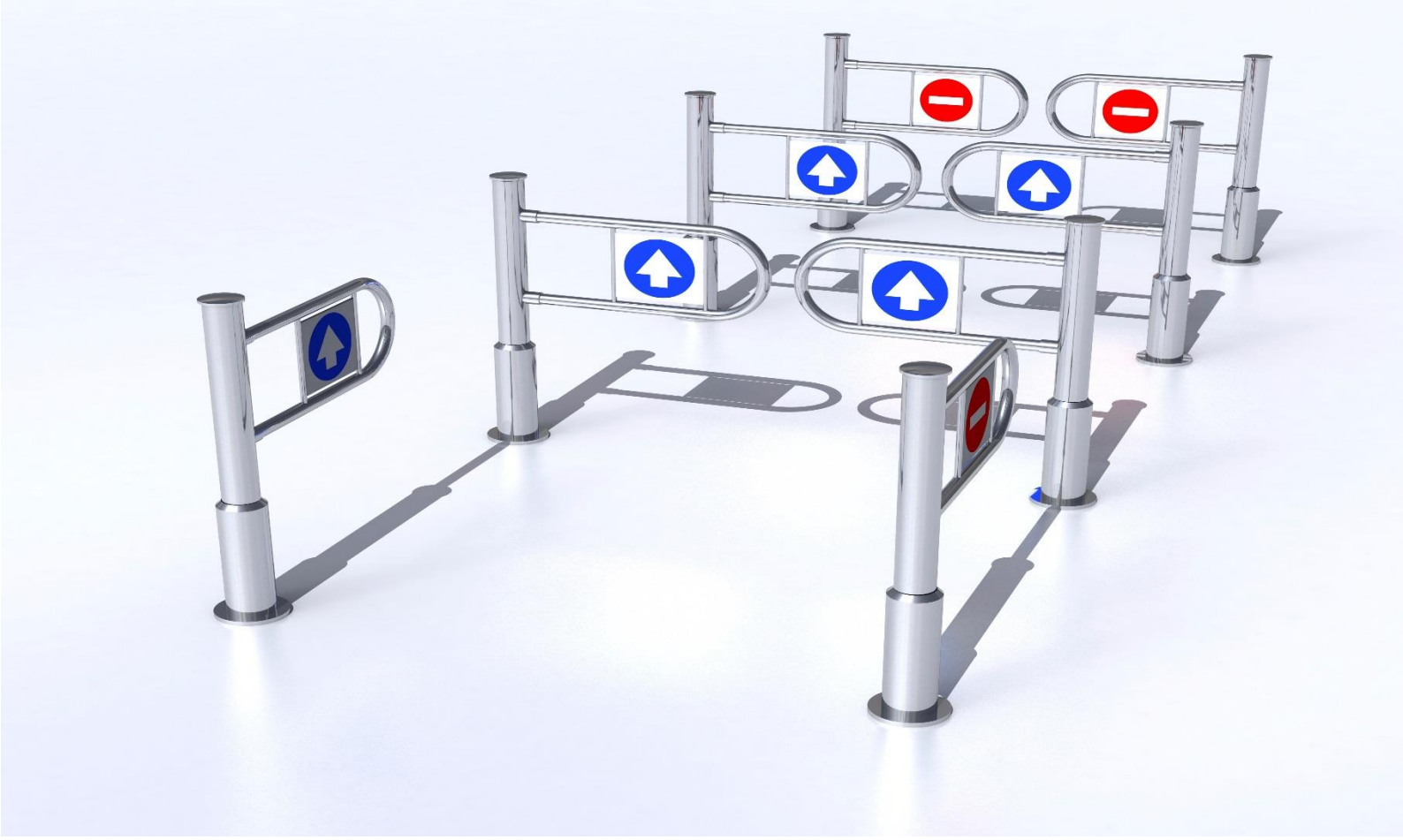
European Commission

EMN INFORM

The Return of Rejected Asylum Seekers: Challenges and Good Practices



4th November 2016

Migration & Home Affairs

The European Migration Network (EMN) is co-ordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway.

EMN European Migration Network

1 Introduction

Given the recent increase in asylum applications in the EU and considering the general gap between third-country nationals issued a return decision and those that have returned, the EMN conducted this study with the purpose of investigating the specific challenges of the return of rejected asylum seekers and Member State responses to these challenges.

1.1 KEY POINTS TO NOTE

- The number of asylum applications rejected in the EU from 2011 to 2015 increased broadly in line with the increase in applications for asylum. This has put **significant additional pressure on Member States to increase the effectiveness of return** in general and specifically of rejected asylum seekers.

- Member States employ a range of measures to encourage return. Incentives to encourage return are generally provided within the framework of AVR(R) packages and include the maintenance of rights for rejected asylum seekers after the time-limit for voluntary departure, while disincentives often relate to the withdrawal of certain rights and benefits, such as the rights to accommodation and employment. **In several Member States there has been a shift from incentivising return to disincentivising stay**.

- Challenges to return are plentiful. On top of the common challenges of returning third-country nationals, **rejected asylum seekers are more likely to be affected by some return challenges**, such as the volatile security situation in some countries of origin, public resistance to return and political pressure not to implement removals; stronger individual resistance to return; greater difficulties in obtaining travel documents, compounded by the fact that asylum seekers are more frequently undocumented than other third-country nationals; and greater prevalence of medical cases among rejected asylum seekers than among other returnees.

- Additionally, **aspects of the due process of the asylum procedure may delay returns**, such as the possibility for lodging late-stage appeals and judicial reviews, combined with the impossibility for Member States to establish contact with the authorities of the country of origin before the asylum procedure is closed.

- **To counter these challenges, Member States have put in place different measures**, including cooperation arrangements with third-country authorities to promote collaboration in the identification and re-documentation process; use of database checks, early screening interviews to support re-documentation; the provision of medical support before, during and after travel for the purpose of return; and detention (or alternatives thereof) to tackle individual resistance to return. Several Member States also sometimes enforce removals through surprise raids.

- The focus and the rationale behind the different policies and measures vary quite significantly and without evaluative evidence it is difficult to draw conclusions as to which practices are more effective. However, **the practice of drastically removing rights** following a rejection and/or return decision, **may increase the likelihood of absconding, or at least of rejected asylum seekers falling out of contact with the authorities** thus affecting the feasibility and effectiveness of return operations. **It may also likely to increase the likelihood of destitution**.

- The study also found that **variations existing between Member States,** in terms of when they issue / enforce a return decision, **may lead to uneven treatment of asylum seekers across the EU**, as at present **return decisions are issued and enforced at different moments in the asylum procedure**. In some Member States all appeals have a suspensive effect, and therefore return decisions can only be enforced once all appeals are exhausted; by contrast, in others a return decision can be enforced pending an appeal, although as these cases are exception, it is more likely for return decisions to be issued at later stage in process.

Nonetheless, the differences may undermine the coherence and level of harmonisation of Member States' asylum and return procedures, and could lead to breaches of the obligation defined under Article 46(5) of the Asylum Procedure Directive to allow applicants for international protection to remain on the territory until the time limit within which they should exercise their right to an effective remedy against a negative decision, and pending the outcome of this remedy.[1]

- When return is not immediately possible, there are also significant differences in national practice. The majority of Member States officially acknowledge when return cannot be immediately implemented, though less than half of them then grant a status to the third-country national. In Member States which do not provide such acknowledgement, and also in those which provide one but without granting a status, **third-country nationals for whom return is impossible risk staying in a limbo**, as their situation is highly uncertain and may change every day.

- When return is not immediately possible, certain basic rights are always provided independently of the stage in the return procedure or the individuals' status, though these are very minimal, defined by international law (emergency healthcare and access to education for children). However, the study finds that most Member States reinstate access to rights and services, including employment and education once it has become clear that the third-country national cannot yet return. Member States providing such access consider this as a **good practice**, not only **in terms of preventing the persons concerned from falling in situations of extreme social and economic vulnerability,** but also in **facilitating the eventual enforcement of returns** by ensuring that they can be traced by the authorities.

1.2 MAIN FINDINGS

What is the scale of rejected asylum seekers in the EU and the scale of non-return?

From 2010 to 2013 more than 60% of all first instance decisions on asylum were rejections.[2] In 2014 and 2015 a smaller proportion (53% and 47% respectively) of first instance asylum decisions were negative, likely because of the increase in applicants with clear protection needs from (predominantly) Syria. However, as the number of asylum applications lodged in the EU significantly increased in 2014 and 2015 (doubling from 2014 (626,960) to 2015 (1.32 million applications) the absolute number of rejections showed an increase from 2011 (191,000) through 2014 (209,000) to 2015 (296,000).

Within specific Member States (for which data are available), rejected asylum seekers make up either: a high proportion (over 60%) of all third-country nationals issued a return decision (IE, LU); less than 30% (LT); between 10 and 35% (FI, FR, HU, IT, PL) or less than 10% of all return decisions issued (BG, EE, LV).

Data is not currently available, except for a few Member States, as to the proportion of rejected asylum seekers who actually return after having been issued a return decision. It is thus not possible to draw any conclusions on whether rejected asylum seekers who cannot return / be returned represent a large or particularly problematic sub-group of the global group of persons whose return is not immediately possible in the EU. However, the fact that both the number of asylum applications lodged and the asylum applications rejected has risen in the last three years in the EU has spurred some Member States (e.g. AT, BG, DE, FI, HU, SE) to place increasing policy importance on the return of this particular group.

What types of national policies have Member States introduced to encourage rejected asylum seekers to leave the EU territory?

In line with the EU Return Action Plan,[3] Member States tend to provide incentives at the beginning of the return procedure to encourage voluntary return and disincentives to stay once the rejected asylum seeker refuses to cooperate.

[1] This may only be the case for those Member States that are bound by the Directive.

[2] Asylum aplications are rejected when they are considered inadmissible or unfounded.

[3] See the EU Action Plan on Return, p. 3.

To encourage voluntary return, several Member States (e.g. BE, CZ, FI, LU, NL, PL, SE, SI, SK, UK) provide accommodation conditional on the third-country national cooperating with the authorities and/or opting for assisted voluntary return once voluntary departure ends.

Within the more general framework of Assisted Voluntary Return (and Reintegration) AVR(R) some Member States (e.g. AT, BE, CZ, FI, FR, IT, SE) place emphasis on the provision of counselling early on in the asylum procedure in order to 'prepare' potential rejected asylum seekers to return .[4]

Overall, however, in most Member States, rights granted to rejected asylum seekers are generally kept to a minimum. Support provided consists mostly of material aid (i.e. accommodation and food) and emergency healthcare. The rationale for keeping rights to a minimum flows directly from the desire to make further stay unattractive and to not undermine the credibility and sustainability of the EU migration and asylum systems.[5]

All Member States also use detention to prevent absconding, thus facilitating return. However, in line with the Return Directive, Member States initially give preference to a range of alternatives to detention to prevent absconding, including:

- Regular reporting (AT, BE, DE, EE, EL, ES, FI, FR, HR, IE, IT, LV, LU, MT, NL, PL, SE, SI, SK, UK),
- Requiring a security deposit (AT, BE,[6] EL, FI, HR, LU, NL, PL, SI, SK),
- Handing over of ID or travel documents (BE,[7] DE, EE, EL, ES, FI, HR, HU, IT, LU, LV, MT, NL, PL, SI),
- An order to take residence at a certain place (AT, DE, EE, EL, ES, FI,[8] FR, HR, HU, IT, LU, PL, SI, UK),
- The inspection of residences (LU, PL),
- Electronic monitoring (UK) and
- The obligation to inform the authorities should a change of residence be considered (DE, EE, MT).

At what stage after a negative asylum decision can a return decision be issued and enforced?

According to Article 9 of the recast Asylum Procedures Directive (2013/32/EU),[9] asylum applicants have the right to remain on the territory for the purpose of the procedure, until a decision on their application is made. Article 46(5) further provides that Member States must allow all applicants to remain on the territory until the time limit within which they can exercise their right to an effective remedy has expired unless the appeal is against a decision on a manifestly unfounded or inadmissible application, or following an accelerated procedure.[10]

However, these provisions are sufficiently broad to allow Member States to issue and enforce a return decision following a negative decision on the asylum application at different points in the asylum procedure. Within Member States, the situation that applies often depends also on the context (for more details see section 4.2 of the Synthesis Report and National Reports). Indeed, in Member States, the return decision either becomes enforceable:

[4] For further details about Member States' return counselling and information policies, see EMN Synthesis Report for the EMN Focussed Study 2015, 'Dissemination of Information on Voluntary Return: how to reach irregular migrants not in contact with the authorities', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emnstudies/info_on_return_synthesis_report_20102015_final.pdf, last accessed on 9th August 2016.

[5] As argued by the Netherlands in their National Report (p14).

[6] Defined by law but not applied in practice.

[7] A copy only.

[8] At the time of writing this report, the Ministry of the Interior had submitted a government bill that would add this interim measure as an alternative to detention.

[9] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013 (from hereon 'recast Asylum Procedures Directive'), pp. 60–95.

[10] Understood as expedited procedures for the examination of an application which is already deemed manifestly unfounded, which involves serious national security or public order concerns, or which a subsequent application is. See EMN Glossary, online version.

- Before the deadline for the asylum applicant to appeal the negative asylum decision has expired, (BE, DE, FI,[11] FR, MT, NL, SE, SK, UK) (This is only in exceptional cases – e.g. – depending on the Member State - where the application is manifestly unfounded or inadmissible and accelerated procedures apply; when the return decision does not lead to a risk of direct or indirect refoulement and it is a first subsequent asylum application lodged within 48 hours before the removal in order to delay or prevent it or a second or more subsequent asylum application);
- Pending the outcome of the first level appeal because it does not have suspensive effect on the return decision (AT, CZ, LT, NL, SK);
- After the first level appeal on the asylum decision i.e. once the court has ruled on the matter (AT, BE, CY, CZ, DE, EE,[12] ES, FI, LU, HU, NL, PL, SK); or
- After all possibilities for appeal of the asylum decision are exhausted (AT, BG, CZ, EL, FI, FR, HR, IE, IT, LT, LU, LV, PL, SE, SI, SK, UK).

Can the return decision be appealed against?

According to Article 13 of the Return Directive, third-country nationals subject to a return decision must be granted an effective remedy against it, either in the form of an appeal or a review.[13] The authority in charge of the remedy has the power to suspend the enforcement of the decision, unless a temporary suspension is applicable under national law.

Subsequently, the majority of Member States participating in this study (AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LV, LT, LU, MT, NL, PL, SE, SI, SK)[14] offer the possibility for asylum seekers whose applications were rejected to challenge a return decision.

In **Finland** and the **Netherlands**, the return decision is an integral part of the asylum decision, therefore the appeal against a return decision is part of the appeal against the rejection of the asylum application.

The **United Kingdom** is not bound by the Return Directive; return decisions there are usually issued once asylum appeals have been exhausted and the return decision cannot therefore be appealed.

Several Member States (BG, DE, FR, HR, LV, LT, PL, SE, SI) reported that in practice, appeals against a return decision rarely had an impact on its enforcement although Belgium, Croatia and Ireland reported that this can happen in some cases.

What challenges are faced in Member States in The Return of Rejected Asylum Seekers?

EMN informs and Ad-Hoc Queries identify a number of general challenges that Member States face when trying to effect the return of irregular migrants, including resistance of the third-country national to return in the form of physical resistance, self-injury (including hunger striking); absconding and the presentation of multiple asylum applications to prevent removal; a lack of cooperation from the authorities of the countries of return; difficulties in the acquisition of travel and identity documents; administrative and organisational challenges; and medical obstacles rendering travel difficult or impossible.

As part of this study Member States identified additional barriers, including special considerations required when returning vulnerable persons (AT, BE, FI, FR, SE, UK); obstacles connected to the use of detention in return procedures concerning in particular legal limits to the use of detention (AT, BE, DE, FR, UK) and insufficient detention capacity (BE, LU, UK); the inability to cover expenses for the implementation of the return (EL); public resistance and political pressure (BE, DE, FR, NL) (for more information see below); and the risk of detention in the country of return (AT).

Some Member States identified the following challenges as specific or more pertinent to the return of rejected asylum seekers:

- Opposition by the Member State population and representatives of religious organisations (DE);
- Non-refoulement challenges when asylum seekers are excluded from refugee status or subsidiary protection status on the basis of article 1F of the 1951 Refugee Convention (BE, FI, FR);

[11] In **Belgium**, **Estonia**, **Germany**, **Greece** and the **Netherlands**, an appeal for annulment against a return decision is not automatically suspensive, but it can be lodged together with a request for suspension. In **Finland**, this is the case for appeals before the Supreme Administrative Court.

[12] If the rejected asylum seeker makes an appeal to the second instance court, the suspensive effect is at the court's discretion.

[13] Appeals are brought to challenge the outcome of a decision by the authority concerned while reviews analyse whether this decision was lawful or not.

[14] The **United Kingdom** does not offer this possibility, but it is not bound by the Return Directive so it not breaching EU legislation.

- Re-documentation challenges due to a lack of identification documents (DE, FI);
- Stronger individual resistance to return (HU, MT);
- Impossibility for the Member State to establish contact with the authorities of the country of origin before the procedure is closed in order to establish return (LU, MT);
- The fragile security situation in countries of origin (DE, NL);
- Greater prevalence of medical cases (NL);
- Legislation limiting the use of accelerated international protection procedures and the detention of asylum seekers (PL); and
- Aspects of the due process of the asylum procedure, such as the possibility for lodging late-stage appeals and judicial reviews or the lengthiness of the asylum procedure delaying return (BE, FR, PL, SE, UK).

What measures are taken to address these challenges?

To address a lack of cooperation on the part of the rejected asylum seeker, Member States mainly try to disincentivise stay by reducing rights (as discussed above), detaining the third-country national and - in some Member States (AT, BG, DE, EE, HU, IE, PL, SE, SK, UK) - carrying out surprise raids to enforce removals. To persuade third-country authorities to cooperate in return procedures, Member States apply a combination of incentives e.g. aid packages (BE, CY, ES, FR, NL) and disincentives e.g. political pressure (BE, DE, FR, LT, NL, PL, SE).

Re-documentation challenges have been mainly addressed through the repetition of fingerprint capture attempts (BG, CY, DE, ES, FI, FR, LU, NL, PL, SE, SI, UK) and the use of language experts to detect nationality (AT, BE, BG, CY, DE, EE, ES, FI, FR, HR, HU, LT, LU, NL, PL, SE, SI, SK). Three Member States (NL, SE, UK) drawn attention in their National Reports to the effectiveness of involving third country officials in identification interviews in order to speed up particularly difficult returns.

Cooperation arrangements between relevant authorities in Member States (BE, BG, CY, DE, EE, ES, FI, FR, IE, LT, LU, NL, PL, SE, SI, SK, UK), the appointment or use of return services providers in the Member State and in third countries (AT, BE, EE, FI, FR, LU, UK) and budget flexibility to enable the injection of funds into return practices (AT, BE, BG, EE, ES, FI, FR, HU, IE, LU, NL, PL, SE, SK, UK) have proven useful at overcoming administrative challenges in many Member States.

Finally, to address challenges posed by the return of rejected asylum seekers with medical issues, Member States have tended to organise medical support for before, during (AT, BE, ES, FI) and after (BE, ES, FI) the return journey.

What happens if return is not immediately possible?

Whereas a majority of Member States may in some circumstances officially acknowledge when a third-country national cannot (immediately) be returned (AT, BG, CY, CZ, DE, EE, EL, FI, HR, HU, LV, LT, LU, MT, NL, SE, SI, SK, UK), in others no such official acknowledgement is given (BE, FR, IE, IT, PL) or is only given in exceptional circumstances (NL).

The impossibility of immediate return can be acknowledged through:

- The granting of a 'tolerated stay' or other temporary status (AT, CZ, DE, FI, HU, LT, MT, NL, PL, SI, SK, UK)
- The issuance of an order to suspend removal (BG, DE, EE, LT, LU)
- A revocation of the return decision (CY)
- The issuance of a document by the Police Administration (EL, HR, SI)
- Extension of the time limit for departure (NL, SK).

Regularisation of a general character is possible in only two Member States (AT, HU) and is possible on a case-by-case basis under specific circumstances in a further ten (BE, DE, EE, ES, FR, MT, NL, SE, SI, UK).