ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

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Comments from the European Council on Refugees and Exiles

on the

Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final)

The European Council on Refugees and Exiles (ECRE) a network of 77 refugee assisting non-governmental organisations in 30 European countries, welcomes the opportunity to submit its comments on the Commission Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (draft Return Directive).

SUMMARY

While ECRE considers that the EU has a role to play in the development of balanced and fair return policies, the pre-requisite for such policies is that fair and efficient asylum systems are in place. However, it is ECRE's opinion that this is not the situation in Europe today: asylum systems in Europe have major flaws and fail in some cases to grant protection to those who need it. Unfortunately the Council Directives on asylum issues adopted by the EU to date offer no solution to this problem, meaning the development of a Common European Asylum System is far from complete. This draft Return Directive would be the first EU instrument dealing with the expulsion of persons found not to be in need of protection. There is a need for common standards guaranteeing return in dignity and safety of those third country nationals who have no right or no longer have a right to stay in Europe. The European Commission proposal explicitly states that, legal safeguards guaranteeing the effective protection of the interests of the individuals concerned are essential objectives in developing such common standards. Our first concern therefore is that the principle of *non-refoulement* is not undermined.

ECRE's comments on the draft Return Directive centre around its potential implications for asylum seekers whose applications have been rejected and refugees whose status is withdrawn. They are also based on the principle that all returns should be safe, dignified and sustainable.

ECRE has noted a number of positive elements in the Commission's proposal:

- The acknowledgment of the priority of voluntary return over forced return (Preamble, para. 6);
- The obligation for Member States to take due account of the third country national's 'residence history' in the host Member State and his/her family relationships when implementing the Directive (Article 5);
- The obligation to provide for an appropriate period for so-called 'voluntary departure' (Art. 6(2));
- The possibility to postpone the enforcement of return decisions and the obligation to postpone the execution of a removal order in certain circumstances (Article 8);
- The guarantee of an effective judicial remedy with suspensive effect or the right to apply for the suspension of the enforcement of the return decision (Article 12);
- The obligation to ensure a number of minimum reception conditions such as the right of freedom of movement, the respect for family unity, schooling and education for minors, access to emergency health care when a third country national cannot be removed temporarily (Article 13).

ECRE notes with concern, however, the highly ambiguous nature of the Commission proposal. Many of the above mentioned safeguards are undermined by other vaguely defined concepts, the implementation of which could render some safeguards meaningless in practice. In particular, ECRE is concerned about the following provisions in the proposal:

- The possibility for Member States not to apply the Directive in transit zones: crucial safeguards in the proposal such as the right to an effective remedy would not be guaranteed to third country nationals in such zones (Article 2(2));
- The inclusion in the definition of return of forced return (namely transfer) to a third country or even a transit country. ECRE opposes in principle transfers to third countries of persons whose asylum applications have been rejected without their consent and to countries with which they do not have a meaningful link;
- The obligation for Member States to issue a return decision to any illegally staying third country national as a principle of European law (Article 6(1)), while there is no obligation for Member States to issue a legal status to those third country nationals who cannot return;
- As the proposal does not define the risk of absconding (Article 6(2) and Article 7(1)), the provision that there is no longer an obligation to provide for an appropriate period of 'voluntary departure' if there is no risk of absconding is too vague;
- Return decisions and removal orders may be issued together: this may lead to situations where there is not sufficient time for an individual to make use of his/her right to an effective judicial remedy (Article 6(3) and Article 7(3));
- The obligation to include re-entry bans of up to 5 years in removal orders and the possibility to include such bans in return decisions creates another potential obstacle to access to protection while provisions allowing for their withdrawal or suspension are weak (Article 9),
- In the case of postponement of a return decision, crucial reception conditions such as housing are not guaranteed (Article 13 (1)). In ECRE's view, in order to be effective, safeguards pending return should at least include the right to housing as set out in

Article 14 on modalities for material reception conditions in the Council Directive on Reception Conditions;[1]

- The proposal makes it possible to detain third country nationals even before a removal order or a return decision has been issued for an unacceptably long period of six months (Article 14 (1) and (4)). ECRE believes that detention can only be used as a last resort, while certain groups such as unaccompanied minors, should never be detained.

When one considers all the provisions together, the draft return Directive contains some puzzling contradictions and allows a combination of very repressive measures which could lead to disproportionately harsh return practices. For example, an individual whose asylum application has been rejected could find themselves issued with a return decision and a removal order at the same time, they could then be detained automatically for up to 6 months on the assumption that they may abscond, removed while an appeal is pending and then face a 5 year re-entry ban. This kind of treatment would amount to punishing people for seeking asylum in the EU.

INTRODUCTION AND GENERAL REMARKS

While ECRE has always recognised that it is legitimate for states to return people, the pre-requisite for that assumption is that fair and efficient asylum systems, that properly consider whether an asylum seeker would be at risk of persecution if returned, are in place. The credibility of an asylum and removal system is undermined if it fails to protect those in need of international protection. Today, unfortunately, ECRE cannot have full confidence in the asylum systems of the Member States and believes that an asylum seeker whose application has been rejected on European territory is not necessarily a person not in need of international protection. Regrettably, much of the worst practices at national level have been incorporated into EU asylum legislation and ECRE, as well as other NGOs and UNHCR, have criticised the flaws in the relevant directives and regulations adopted to date.[2]

The proposed common standards and procedures for returning illegally staying third country nationals are to be applied regardless of the reason why the third country national concerned no longer has or does not have any legal basis to remain on the territory of one of the Member States. As a consequence, the scope of the proposal is potentially very wide: it may include persons whose claim for protection has been rejected, as well as persons who simply overstayed their temporary visa or persons who entered illegally on the territory of one of the Member States and never applied for a legal status. In line with ECRE's mandate the following comments will be limited to those aspects of the proposal that might affect those persons whose asylum applications have been rejected, or whose protection status has been

[1] *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*

[2] See ECRE, *Broken Promises – Forgotten Principles. An ECRE evaluation of the development of EU minimum standards for refugee protection Tampere 1999 – Brussels 2004*; ECRE, *Comments from the European Council on Refugees and Exiles On the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, March 2002. ECRE and other NGO's including Amnesty International and Human Rights Watch called for the withdrawal of the Asylum Procedures Directive on several occasions. See Press releases: "Refugee NGOs in more than 30 European countries reject draft directive on asylum procedures", 28 September 2003, "Refugee and human rights organisations across Europe call on EU to scrap key asylum proposal", 29 March 2004, "Refugee and human rights organisations across Europe express their deep concern at the expected agreement on asylum measure in breach of international law", 28 April 2004, www.ecre.org.

withdrawn or ceased, and will not deal with the possible impact on the position of persons who never approached authorities of a Member State with a protection-related claim.

The proposal contains a number of concrete measures, some of which have an obligatory character (so-called **'shall provisions'**), while others leave it to the discretion of the Member States to implement or not (so-called **'may provisions'**). ECRE notes with regret that most of the measures implying enforcement of return are drafted as 'shall provisions', whereas most measures laying down safeguards for the rights of third country nationals during or prior to return procedures are drafted as 'may provisions'. This fundamental imbalance throughout the proposal reinforces the widespread perception of illegally staying third country nationals as persons without rights against whom states are legitimately using ever harsher instruments to remove them from our territories. ECRE strongly rejects this approach and reminds EU institutions and Member States alike that international human rights obligations towards third country nationals staying illegally on their territory must be observed.

ECRE regrets that the proposal does not contain any provisions on the **monitoring of returns** and that it would therefore not support measures to evaluate the impact of the envisaged return policy on the persons concerned as well as on the country or society to which they would be sent. At present little is known about the fate of returned persons. Monitoring on whether returnees had reached their destination safely, whether the *non-refoulement* principle had been respected in practice or whether returnees' human rights were being respected upon return, would clearly be useful for all. It would not only monitor the correctness of decisions to return individuals, it would also help instil confidence in potential returnees. It could be used to inform and improve return policies as well as evaluate them, while allowing the sustainability of return to be assessed.[3] In ECRE's view this is an important element of any return policy, which should be addressed by the EU in this Directive.

ECRE would like to point out that a distinction can be made between **three different categories of return: voluntary return/repatriation, mandatory return and forced return**.[4] *Voluntary repatriation* is the term used to describe the return of persons with a legal basis for remaining in the host state who have made an informed choice and who have freely consented to repatriate to their country of origin or of habitual residence. The term *mandatory return* is used for persons who no longer have a legal basis for remaining in the territory of the host state for protection-related reasons and are therefore required by law to leave the country. It also applies to individuals who have consented to leave, or have been induced to leave by means of incentives or threats or sanctions. The term *forced return* is used to describe the return of persons who are required by law to leave but have not consented to do so and therefore might be subject to sanctions or force in the form of restraints in order to effect their removal from a country. It should be noted that although the Commission proposal contains references to 'voluntary return', it is in fact dealing exclusively with mandatory and forced return, as its scope is strictly limited to the return of third country nationals staying illegally in the territory of a Member State. The terminology in the Commission's proposal may lead to confusion and thus ECRE recommends the use of the terminology above, which more accurately draws the distinctions between the different kinds of return.

[3] See ECRE, *The Way Forward. The Return of Asylum Seekers whose applications have been rejected in Europe*, June 2005, recommendations 33 and 34.
[4] See ECRE, *Position on Return*, October 2003.

SPECIFIC COMMENTS

Preamble

The Preamble in **paragraph (6)** explicitly states that "*voluntary return should be preferred over forced return and a period for voluntary departure should be granted*". ECRE welcomes this important principle, which should be seen as the basis of any return policy. However, the paragraph also states that this principle can only be upheld "*where there are no reasons to believe that this would undermine the purpose of a return procedure*". ECRE considers this to be a vague condition undermining the principle as it does not determine when or under which circumstances the preference of voluntary return over forced return would undermine the purpose of a return procedure.

- ECRE calls for the deletion of the first part of paragraph (6) of the Preamble: "*Where there are no reasons to believe that this would undermine the purpose of a return procedure,…*".

In addition to **paragraph (9)** of the Preamble, ECRE would like to remind the European Parliament and the Member States of the Guidelines on forced return recently adopted by the Council of Europe's Committee of Ministers,[5] in which it is explicitly recognised that returning asylum seekers whose applications have been rejected requires specific safeguards as in some cases they are more vulnerable than returnees who never had any protection claim.

- ECRE suggests the inclusion of an explicit reference to the 2005 Council of Europe Guidelines on forced return in paragraph (9) of the Preamble.

Chapter I: General Provisions

Article 2 – Scope

Article 2(2) allows Member States not to apply the Directive to third country nationals who have been refused entry in a transit zone of a Member State. In ECRE's view, this may undermine the respect for states' *non-refoulement* obligation under international law for those people. Especially in those Member States where access to asylum procedures in transit zones is not guaranteed and/or those in place are inadequate, additional safeguards in return procedures are necessary. Recent events at the Italian island of Lampedusa made painfully clear that denial of access to an asylum procedure is unfortunately still a reality in Europe today.[6]

Moreover, there is no reason why Member States should be allowed to determine zones on their territories where the Directives' safeguards do not fully apply. The European Court of Human Rights in the Amuur case clearly stated that the European Convention on Human Rights and Fundamental Freedoms (ECHR) fully applies in transit zones and that the latter should be considered as an integral part of their territory.[7]

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[5] *Twenty Guidelines on forced return*, CM(2005)40 final, 9 May 2005.

[6] See UNHCR, *Italy: UNHCR deeply concerned about Lampedusa deportations of Libyans*, Briefing Note, 18 March 2005.

[7] Amuur v. France, 10 June 1996, 22 EHRR 533. This principle has been re-confirmed by the European Court in a case concerning detention in the transit zone of Warsaw airport. See Shamsa c. Pologne, 27 February 2004, par. 45: "La Cour constate que meme si les requérants ne se trouvaient pas en Pologne au sens ou l'entend le Gouvernement, leur maintien dans la zone de transit les faisait relever en fait du droit polonais. Rien dans

- This Directive and the safeguards it contains for respecting the *non-refoulement* principle should fully apply to transit zones in Member States and Article 2(2) should therefore be deleted.

Article 3 – Definitions

The proposal defines return as the process of going back to one's country of origin, transit or another third country, whether voluntary or enforced. ECRE objects to this definition as it includes enforced *transfer* to a country of transit or another third country as a solution to Member States' inability to return people to their country of origin. According to ECRE return can only be defined as such if it involves the country of origin or the country of habitual residence. ECRE equally opposes in principle the transfer to third countries of persons whose asylum applications have been rejected.

If European countries choose to transfer unsuccessful asylum applicants to third countries, very stringent conditions and safeguards should be put in place to ensure that states do not breach their obligations under international law and that this leads to a sustainable life in that country. These conditions include, *inter alia*, that the human rights of the individual will be respected in that country, especially their right to family life, that the person has a meaningful link with the third country and that a legal residence status is guaranteed. Also the voluntary and informed consent of the individual should be obtained. [8]

- ECRE urges the deletion in Article 3 (c) of the words "*transit or another third country"*.

Article 4 – More favourable provisions

ECRE strongly welcomes the possibility for Member States to apply more favourable provisions laid down not only in other EC legislation on asylum and immigration, but also in bilateral or multilateral agreements and even national legislation. The inclusion of a more favourable provision clause in other EU instruments on immigration and asylum is proving a useful way of allowing Member States to maintain or adopt best practice usually representing higher standards than the minimum ones set out.

Article 5 – Family relationships and the best interest of the child

This provision obliges Member States to take due account of crucial aspects of the third country national's "*residence history*" in that Member State as well as his/her family relationships when implementing the Directive, namely:

- the nature and solidity of the third country national's family relationships
- the duration of his stay in the Member State
- the existence of family, cultural and social ties with his country of origin.

ECRE welcomes the proposal's acknowledgement that return procedures cannot be implemented in a social vacuum and agrees that the mentioned elements are the most important factors to be taken into account before taking or executing any removal decision.

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l'argumentation présentée par le Gouvernement ne lui permet de considérer que la zone en question bénéficie du statut d'extraterritorialité."

[8] See ECRE, *The Way Forward. Europe's role in the global refugee protection system. The Return of Asylum Seekers whose applications have been rejected in Europe*, June 2005, recommendation 32.

The separation of families is a particular risk when family members have different nationalities (mixed couples). Practice has shown that sometimes families are being separated for return reasons, because the country of destination does not allow entry for certain members of the family.

- The Directive should contain a clear reference to Article 8 of the European Convention on Human Rights and guarantee that families cannot be separated because of return and should in principle be returned as a unit. Even when mixed couples can be returned as a unit, there is still a need to establish whether both persons would be safe and whether they would face any discrimination based on the fact that they are a mixed couple.

ECRE welcomes the reference to the duration of stay of the third country national as an element to be taken into account but would like to point to the specific situation of refugees whose status has been withdrawn due to changed circumstances and asylum seekers whose applications have been rejected. Many may have been through long asylum procedures as a result of backlogs in the system. The length of their stay during the asylum procedure should therefore be taken into account by Member States when taking a decision on return or removal of asylum seekers whose applications were rejected. ECRE has stated that "*in relation to persons in this situation who have been present in the host country for 3 years or more and have thus put down roots in their host country, states should not enforce removals and should give people the opportunity to apply for a permanent legal status*".[9]

- ECRE strongly recommends the inclusion in Article 5 of an explicit reference to the duration of asylum procedures as a factor to be taken into account by the Member States when implementing the Directive.

Article 5 also places an obligation on Member States to "*take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child*". ECRE notes with concern that this wording is not in accordance with the Convention on the Rights of the Child (UNCRC) which states that the best interests of the child shall be a primary consideration, which is however reflected in the wording of paragraph (18) of the Preamble to the Directive**.**

- ECRE recommends that the wording to be used in Article 5 referring to the best interests of the child as the primary consideration, to correctly reflect states' obligations under the UNCRC and to make it coherent with paragraph 18 of the Preamble.

ECRE notes that Article 5 lacks any reference to the possible impact of return on the education and the well-being of vulnerable persons. Member States should be under an obligation to pay special attention to the situation of persons who are particularly vulnerable due to their age, health or sex when implementing this Directive.

- ECRE recommends an explicit reference in the Preamble and in Article 5 that when implementing this Directive Member States must accord special attention to the situation of persons who are particularly vulnerable due to their age, health or sex.

Obviously, return will cause the interruption of any education programmes followed by the third country nationals concerned. Especially where minors are involved, ECRE strongly believes that education should not be unnecessarily interrupted and that this should be taken into account when Member States decide on the timing of return. For one, this would support

[9] ECRE, *The Way Forward. Europe's role in the global refugee protection system. The Return of Asylum Seekers whose applications have been rejected in Europe*, June 2005, recommendation 15.

the sustainability of return. ECRE reminds the European Commission, the European Parliament and the Member States that the Temporary Protection Directive[10] confirms this principle by stating in Article 23(2) that "*Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.*"

- For reasons of fairness and in the interest of achieving coherence between different EC legislative instruments, ECRE suggests the Return Directive ensures children facing return are allowed to complete the current school period.

Chapter II. Termination of illegal stay

Article 6 – Return decision

Article 6(1) lays down an obligation for Member States to issue a return decision to any third country national staying illegally on their territory. ECRE is fundamentally opposed to the introduction of such a radical principle as a new principle of EU immigration and asylum law, in particular since ECRE's evaluation of existing EU instruments in the field of asylum has shown them to have serious flaws from the perspective of refugee protection.[11] The minimum standards agreed so far at EU level, leave a lot to the discretion of Member States on crucial aspects of these instruments to the Member States. As long as EU asylum legislation has not reached an acceptable level of harmonisation guaranteeing the granting of international protection to those who need it, it would be dangerous to impose such a blunt obligation upon the Member States.

- ECRE urges the deletion of the obligation laid down in Article 6(1) and its replacement with the wording "Member States may issue a return decision…" leaving it to the discretion of the Member States to decide in each individual case whether or not a return decision should be issued. This would help ensure the respect of states' *non-refoulement* obligation and ensure coherence within the Directive.

According to **Article 6(2)** a return decision shall provide for an appropriate period for 'voluntary departure' of up to four weeks. Although ECRE reiterates that the use of the term 'voluntary' is itself inappropriate in this context, it welcomes the general idea that third country nationals under an obligation to leave the territory of a Member State should be given the opportunity to do so in their own way. ECRE believes that this kind of return is preferable to forced return. However in the case of asylum seekers whose applications have been rejected, a period of four weeks is usually too short to organise such a departure for a variety of reasons. Firstly, many continue to believe they have cause to fear for their life, and need some time to accept the negative decision.[12] Secondly, departures may need considerable administrative preparation and some countries of origin cooperate better than others.[13]

- ECRE recommends that the period of four weeks for a person to organise their own departure be extended to an absolute minimum of six weeks, which Member States

[10] *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.*

[11] See inter alia ECRE, *Broken Promises – Forgotten Principles. An ECRE evaluation of the development of EU minimum standards for refugee protection Tampere 1999 – Brussels 2004*.

[12] For factors causing anxiety at the prospect of return to asylum seekers whose asylum claim has been unsuccessful see ECRE, *The Way Forward. Europe's role in the global refugee protection system. The Return of Asylum Seekers whose applications have been rejected in Europe*, June 2005.

[13] For an analysis of the reasons why authorities do not cooperate, see *ibid*.

should be able to extend if necessary (due to lack of cooperation by country of origin, difficulties in obtaining travel documents etc.).

Moreover, the need for basic reception conditions during this period is not addressed in the proposal. There is a clear trend on the part of European governments of driving asylum seekers whose applications have been unsuccessful into destitution through the withdrawal of all forms of support. ECRE has strongly condemned such practices as it may lead to violations of states obligations under the ECHR, in particular Articles 3 and 8.

- The Return Directive should require Member States to provide basic socio-economic support to asylum seekers whose applications have been rejected during the 'voluntary departure' period and until actual return is possible. Beneficiaries of reception conditions under the Reception Conditions Directive (i.e. persons who were beneficiaries when they received the return decision) should, for the period of 'voluntary departure' including any extensions, continue to enjoy the same reception conditions.[14]

Article 6 (2) also makes the period of four weeks for 'voluntary departure' conditional on the absence of "*reasons to believe that the person concerned might abscond during such a period*". In ECRE's view, this condition is too vaguely phrased and can easily be used as a catch-all provision by Member States, rendering the principle of giving priority to 'voluntary departure' meaningless. It is unclear what elements can underpin the assumption that a person might abscond: Member States could easily assume that, since it was necessary to impose an obligation on the third country nationals concerned to leave their territory and they did not spontaneously comply with its immigration laws, that there is always a risk of absconding, even during a 'voluntary departure' period. ECRE believes that it is preferable to postpone any judgment on the risk of absconding until after expiration of the period for 'voluntary departure' and limit it to dealing with the removal decision.

- ECRE calls for the deletion of the words "*unless there are reasons to believe that the person concerned might abscond during such a period*" in the first sentence of Article 6(2).

According to **Article 6(3)**, a return decision shall be issued as a separate act or decision or together with the removal order. The latter option should be firmly rejected as it neutralises potentially positive aspects of the Directive such as the opportunity to include a period of 'voluntary departure' in return decisions.

- ECRE calls for the deletion of the words "*or together with the return removal*" in Article 6(3).

ECRE welcomes **Article 6(4)** as it prevents a return decision from being issued, or makes the withdrawal of a return decision mandatory, whenever Member States are subject to obligations derived from fundamental rights. Member States are always under an obligation to respect all rights and fundamental freedoms laid down in the ECHR while other international human rights instruments, such as the UNCRC, the Convention against Torture (CAT) and the 1951 Refugee Convention obviously need to be respected by Member States as well. This provision therefore supports the notion that Article 6(1) should allow for the discretion of each Member State in issuing a return decision.

[14] See also comments on Article 8.

- ECRE recommends that relevant international refugee and human rights law, such as the 1951 Refugee Convention, the CAT and the UNCRC, be referred to in Article 6 (4) in addition to the ECHR.

Article 6(5) allows Member States to grant a residence permit to illegally staying third country nationals, which should prevent the issuing of a return decision or lead to the withdrawal of such a decision. ECRE welcomes this paragraph, noting that it too supports the notion that Article 6(1) should allow for the discretion of each Member State in issuing a return decision.

ECRE notes the fact that the implementation of the provisions within **Article 6** may still allow people to be left in limbo situations and /or facing destitution, as it does not contain an explicit obligation on Member States to provide persons who cannot be returned with a legal status or access to basic socio-economic support. The draft Directive only contains an obligation to ensure a minimum set of reception conditions in situations when a return decision cannot be enforced (see Article 13 and ECRE's comments). Such an obligation is all the more necessary in cases where no return decision can be *issued* or a return decision has to be *withdrawn*.

- ECRE recommends that Article 6 be amended to include an obligation on Member States to provide a legal status in the situations governed by Article 6(4), as long as no return decision can be issued or when a return decision is withdrawn and until actual return is possible. Article 6 should also guarantee access to at least basic socio-economic support when a legal status or residence permit is granted.

Finally, **Article 6(7)** and **(8)** provide for an obligation on Member States to refrain from issuing a return decision if the third country national in question is the subject of a pending procedure for renewing his residence permit. It is also possible to refrain from issuing a return decision when the third country national is the subject of a pending procedure for granting a residence permit. In ECRE's view it is neither sensible nor resource-efficient to issue a return decision while a procedure for obtaining a residence permit is still pending. The aim of the latter procedure is to examine whether the individual is entitled to stay on the territory on a legal basis. The outcome of such a procedure should always be awaited before issuing a return decision.

- We recommend that the discretion allowed to Member States in Article 6 (8) to refrain from issuing a return decision until pending procedures for granting a residence permit are finished be replaced by an obligation, with the words 'shall refrain'.

Article 7 – Removal order

Article 7 requires Member States to issue a removal decision and allows them to do this at the same time as issuing the return decision, "*if there is a risk of absconding*", while no definition of this term is provided, leaving it entirely up to the Member States to determine when or whether such a risk exists. There can be no automatic assumption that an individual will abscond as soon as they have lost the prospect of obtaining a legal basis for remaining in a European country and certain vulnerable persons, such as the sick, older people or families with young children, remain highly unlikely to abscond even in such circumstances. According to this proposal states could make automatic assumptions, which is a cause for concern as it could lead to discriminatory treatment between third country nationals in the EU.

- ECRE suggests amending to the wording of **Article 7(1)** as follows: "Member States may issue a removal order concerning a third country national who is the subject of a

return decision, if the obligation to return has not been complied with within the period of voluntary departure granted in accordance with Article 6(2) and where there are serious grounds for believing there is a risk of absconding". ECRE also proposes that individualised assessments of risk be required in this Article so that such assessments can never be applied to groups, thus avoiding discriminatory treatment.

Article 7(3) reflects and reinforces Article 6(3) and should be amended accordingly, in view of our comment above on Article 6 (3).

- ECRE calls for the deletion of the words "*or together with the return decision"* in Article 7(3).

Article 8 – Postponement

ECRE welcomes this provision in general and encourages Member States to implement this provision in a generous way. **Article 8(2)** mentions three types of situations in which Member States are obliged to postpone the execution of a removal order. ECRE agrees that these three situations broadly reflect the main obstacles to return in Europe today.

Unaccompanied minors are a particularly vulnerable group and ECRE believes that specific safeguards should be taken into account in relation to their return. Article 8 (2) (c) suggests it may be acceptable to entrust a child to "*an equivalent representative*" or "*a competent official of the country of return"* but does not define who may qualify as such. This is not an adequate safeguard. ECRE reiterates that unaccompanied minors should only be subject to mandatory return when it is in their best interest, in compliance with the UNCRC and when they can be returned to the legal guardianship of a family member or a foster parent in the country of origin.[15]

- ECRE calls for the deletion of the option to hand over an unaccompanied minor to an "*equivalent representative*" and "*a competent official of the country of return*" in Article 8 (2).

Article 8(3) imposes the obligation on Member States to postpone the execution of the removal order in the situations set out, but does not specify the duration of any postponement, meaning an individual concerned could be facing the prospect of return for an indefinite period of time. ECRE considers it to be highly undesirable to put third country nationals in situations of semi-legal, tolerated stay as it further enhances the insecurity and instability these persons are already facing. This point is particularly relevant for asylum seekers whose applications have been rejected, who have sometimes been through long asylum procedures and for whom the prospect of yet another period of uncertainty may simply be unbearable.

- ECRE recommends the inclusion in Article 8 of the principle that any postponement of the removal order may only be for a short period. In case removal cannot be executed within this short period for reasons beyond the control of the individual, Member States should be under an obligation to withdraw the removal order and issue a legal status guaranteeing further access to reception conditions.

Article 9 – Re-entry ban

ECRE is in principle opposed to the notion of a 5 year re-entry ban being imposed on asylum seekers whose applications have been rejected and who are facing return, as removal should

[15] See ECRE, *Position on Return*, October 2003, para. 91. and Save the Children and the Separated Children in Europe Programme *Position paper on Returns and Separated Children*, September 2004.

be considered sufficient resolution to their situation and should not be a direct result of seeking asylum. Such a measure might also encourage people in fear of persecution to remain illegally in Member States rather than apply for asylum.

- ECRE recommends the deletion of Article 9.

If the possibility to issue a re-entry ban remains in the proposal, Article 9 should include additional safeguards to ensure such bans do not adversely affect the right to seek asylum in the EU. A re-entry ban may have devastating effects on the right to seek asylum and may lead to serious breaches of international human rights and refugee law. While the proposal acknowledges that such a ban could not be applied to the detriment of the right to seek asylum in the EU, this is not supported by concrete provisions that would ensure the principle of *non-refoulement* is effectively upheld. The proposal should also acknowledge that a re-entry ban cannot be applied to the detriment of other human rights, such as the right to family life.

Article 9 (1) requires Member States to include a re-entry ban in any removal order, while it is left to the discretion of Member States as to whether to include it in return decisions. ECRE is opposed to any obligation on Member States to include a re-entry ban in removal orders. It should always be possible for Member States not to impose a re-entry ban whenever they consider it appropriate. The inclusion of a re-entry ban and the length of the re-entry ban should be determined with due regard to all relevant circumstances of the individual case..

- If Member States insist on maintaining a re-entry ban, ECRE calls for the word 'shall' to be replaced by 'may' in the first sentence of Article 9(1), to read: "Removal orders may include a re-entry ban of a maximum of 5 years".

The re-entry ban as set out represents a harsh measure, bearing in mind the length specified and the possibility for the 5 years to be extended in some circumstances. The lack of access to a legal remedy to appeal such a ban is therefore extremely concerning.

- If Member States insist on maintaining a re-entry ban, Article 9 should also require Member States to allow an individual access to an effective remedy to appeal the decision to impose a re-entry ban on them.

ECRE welcomes the general safeguard clause in **Article 9(5)** for the application of a re-entry ban to not prejudice the right to seek asylum in the EU. However, even if an asylum claim has been rejected for the right reasons in a fair and humane asylum procedure, future developments in the country of origin and future needs for international protection remain unpredictable. Guaranteeing full access to protection in Europe or any asylum system is, therefore, extremely important. It should be recalled that even today, in certain cases, asylum seekers are being denied the right to lodge an asylum claim in EU Member States, for instance when applying for asylum at the border.[16] If border guards simply deny entry to a person for whom a re-entry ban applies without taking into consideration any asylum claim, such a safeguard clause could be meaningless. Additional guarantees therefore need to be introduced that will ensure a re-assessment of the need to uphold the re-entry ban in light of the asylum seekers' changed profile or activities or changed circumstances in his/her country of origin. The conditions for withdrawing a ban set out in **Article 9(3)** are insufficient as they do not refer to any protection-related circumstances.

- Additional procedural safeguards should be included in the Directive to ensure re-entry bans do not block access to the right to seek asylum in the EU. This should include swift and clear procedures at borders as well as in Member States' embassies

[16] See ECRE, *Towards Fair and Efficient Asylum Systems in Europe. The Way Forward – Europe's role in the global refugee protection system*, September 2005, p.15.

abroad allowing the withdrawal or suspension of re-entry bans in the case of persons wishing to seek asylum. Article 9(3) should also state that any re-entry ban should be lifted automatically where a need for resettlement to a Member State has been recognised or an application for resettlement has been approved.

Article 10 – Removal

Firstly, although this Article rightfully states that coercive measures should be proportional and should not exceed reasonable force, it is equally important to assert that such measures must always be a last resort. Secondly, this Article should also state that the use of coercive measures implying physical force should be avoided when removing vulnerable persons, such as children, the elderly and people with disabilities or serious health conditions. Thirdly, this Article should also refer to the Council of Europe's Guidelines on the return of rejected asylum seekers and the Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)'s Twenty guidelines on forced return[17] which contain essential safeguards

- ECRE recommends that Article 10 states that coercive measures should only be used as a last resort, and that they be avoided when removing vulnerable persons. It should also refer to relevant Council of Europe guidelines.

Chapter III – Procedural Safeguards

Article 11 – Form

The basis of any return procedure should be a fair and efficient asylum procedure, which includes an effective remedy, and a genuine possibility to submit a new application if new facts or circumstances come up between a final rejection and the removal. Although ECRE believes that such issues should be dealt with in an asylum procedure, national procedures and the EU directive on asylum procedures show serious gaps, making it important that any EU measure on return includes an effective remedy as well as access to free legal assistance. ECRE welcomes this provision as it places an obligation on Member States to issue any decision on return in writing, containing the reasons in fact and in law and the available legal remedies against such decision. There have been cases in EU Member States, where return decisions/removal orders have been issued only hours before forced return has taken place, thereby making any legal remedy against the decision meaningless in practice. Return decisions, as previously stated, should allow an absolute minimum of six weeks for 'voluntary departure'. In the case of persons who have not left following a return decision, the subsequent removal order should be issued in writing and in a manner that allows sufficient time before removal for the individual to obtain expert legal advice and representation. The general safeguard on the possibility to obtain legal advice in Article 12 (3) does not remedy this as it lacks any effective safeguard that such a possibility will be offered in a timely manner.

- ECRE recommends that in the case of persons who have not left following a return decision, the subsequent removal order should be issued in writing and in a manner that allows sufficient time before removal for the individual to obtain expert legal advice and representation.

[17] See Council of Europe Committee of Ministers, *Recommendation No. R(99)12 of the Committee of Ministers to member states on the return of rejected-asylum seekers* and Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Twenty Guidelines on forced return*, CM(2005)40 final, 9 May 2005.

The right of an asylum seeker to be informed of all the aspects of the procedure and of his/her rights and obligations is a basic requirement of a fair asylum procedure. Moreover, for this right to be exercised effectively, the information must be provided in a language the asylum seeker fully understands.[18] ECRE sees no reason why that should be different for a decision on return or removal of asylum seekers whose applications were unsuccessful. The current wording in **Article 11(2)** risks seriously limiting third country nationals' right to be informed of all aspects of a decision.

- As a principle, Member States must be under an obligation to fully and correctly inform the individual concerned of a return decision or removal order. ECRE therefore recommends the deletion of the words "*upon request"* and replacing the words "*may reasonably be supposed to understand*" with 'understands' in Art. 11 (2).

Article 12 – Legal remedies

ECRE strongly welcomes the guarantee of "*an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order*" but is at the same time concerned that this important principle is undermined in **Article 12 (2)** where it is stated that the judicial remedy "*shall have either suspensive effect or comprise the right for the third country national to apply for the suspension of the enforcement of the return decision or removal order*". The second option is problematic in the case of asylum seekers whose applications have been rejected.

In this context ECRE recalls its grave concerns regarding the lack of effective remedy in the recently adopted Asylum Procedures Directive.[19] ECRE considers that it is vital that asylum seekers have a right to remain on the territory until their appeal is decided as a right to appeal becomes meaningless if the asylum seeker has already been sent to the country where he/she may face persecution, torture, inhuman or degrading treatment. The right to an effective remedy before a court or tribunal is embodied in EC law, Article 47 of the Charter of Fundamental Rights of the European Union and in Article 13 of the European Convention on Human Rights.[20]

If a first instance decision on an asylum application constitutes a return/removal decision then the applicant is automatically guaranteed a judicial remedy by Article 12 of this draft Directive, and ECRE reiterates that this must have automatic suspensive effect in order to be effective. However, even where this appeal is subsequently rejected ECRE believes that all applicants should still have the opportunity to challenge removal before the higher courts where a risk of *refoulement* can be demonstrated.

- Article 12 (2) should be amended to include guarantees for an effective remedy against return decisions/removal orders, which has suspensive effect and, where an appeal is rejected, applicants should still have the opportunity to challenge removal

[18] See ECRE, *Comments on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States on granting and withdrawing refugee status*, March 2003.

[19] This Directive does not contain the necessary guarantees that every asylum seeker in the EU will have a suspensive right of appeal against a negative decision in the asylum procedure as it is left to the Member States to deal with "the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome", see Article 39, 3 (a) of the Asylum Procedures Directive.

[20] The European Court of Human Rights has ruled that Article 13 "requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible". See ECtHR, *Conka* vs. Belgium, 5 February 2002, par.79.

before the higher courts where a risk of *refoulement* can be demonstrated. This should include the possibility to apply for an order or injunction suspending removal. This might particularly be necessary where new facts/circumstances arise or where an applicant had previously been unrepresented.

In the asylum procedure normally only protection needs as regards one's country of origin or country of habitual residence have been taken into account. As a result of the definition of return in Article 3 (c) a Member State may want to 'return' a person to a third country where he might face serious human rights violations. It is likely that the person's situation in that third country will not have been examined in the preceding asylum procedure which will have dealt with the country of origin. In addition, ECRE is opposed to transfers to third countries without a person's informed consent.

- Article 12 (2) should be amended to include guarantees against forced transfers to third countries or transit countries of asylum seekers whose applications have been rejected, including an effective remedy with full suspensive effect in order to ensure that a person's human rights would be respected in a third country.

Article 12(3) implies subjecting legal aid for those who lack sufficient resources to a test as to whether such aid is necessary to ensure effective access to justice. ECRE is strongly opposed to this as it will unnecessarily block access to legal aid for those who most need it, creating another layer in the process, which is neither in the interest of the authorities nor the third country national concerned. As the proposal does not determine what authority should take such a decision, the Member States could allocate this responsibility to the same authority that took the return decision or that is responsible for executing the removal order, which would be unacceptable.

- ECRE calls for the deletion of the words in Article 12 (3) "*insofar as such aid is necessary to ensure effective access to justice*".

Article 13 – Safeguards pending return

According to this provision, Member States must guarantee that a limited set of conditions of stay are granted to those third country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8. These conditions shall be no less favourable than the minimum standards laid down in Articles 7 to 10, 15 and 17 to 20 of the Reception Conditions Directive.[21] ECRE welcomes this provision in general as it lays down the important principle that people should be prevented from falling into destitution. Currently in Europe such categories of people are often merely tolerated on the territory of the Member State, without access to basic reception conditions or even health care. This provision offers a partial solution to this problem but should be more ambitious in respect of the categories of people to be covered and the reception conditions to be guaranteed.

While Article 6 (2) provides for an appropriate period of 'voluntary departure', **Article 13(1)** does not seem to cover this period, explicitly referring only to the enforcement of the return decision or to the circumstances enumerated in Article 8 (2). Being left without any support mechanisms is likely to prevent an individual from assessing their situation and making a well-informed decision. The provision also lacks an explicit reference to situations arising

[21] *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*. For ECRE's views on this Directive see *ECRE information note on the Council Directive 2003/9/EC of 27 January 3003 laying down Minimum Standards for the reception of Asylum Seekers*, June 2003.

from the safeguards on judicial remedies in Article 12. Reception conditions should be guaranteed pending an appeal with suspensive effect.

- ECRE calls for the amendment of Article 13 (1) to include the obligation to grant reception conditions during a 'voluntary departure' period and appeal proceedings.

Secondly, only a limited number of reception conditions as laid down in the Reception Conditions Directive are actually guaranteed. These are: the right to freedom of movement, respect for family unity, schooling and education of minors, access to at least emergency health care and certain minimal safeguards for vulnerable groups These guarantees are important but may be rendered meaningless when a person is without any resources or housing. ECRE regrets that other provisions in the Reception Conditions Directive, such as the provisions on material reception conditions (Articles 13 and 14), and the right to an appeal against decisions relating to the granting of benefits (Article 21) are not included in this list. [22]

- Article 13 (1) should be amended to include an explicit reference to at least Articles 13, 14 and 21 of the Council Directive on Reception Conditions.

ECRE welcomes the safeguard provided in **Article 13(2)** of this provision. It is very important for these categories of third country nationals to have a written document confirming the postponement of the enforcement of the return decision. Such a document may not only avoid a lot of confusion in contacts between the individual and official authorities (police or other), it may also be an important tool to prevent authorities from making potentially fatal mistakes in executing removals.

Chapter IV – Temporary Custody for the Purpose of Removal

Article 14 – Temporary custody

Article 14 places a duty on Member States to hold in temporary custody third country nationals when there are serious grounds to believe that there is a risk of absconding and other less coercive measures would not be sufficient. The obligation applies not only to third country nationals who are subject to a removal order or a return decision, but also to third country nationals who will be subject to such a decision or order. Furthermore it is stated that a temporary custody order may only be issued by judicial authorities and that custody can be extended to a maximum of six months. ECRE welcomes the safeguards in this Article, in particular the requirement for detention to be reviewed by judicial authorities at least once a month. However what we see on the ground is a growing number of persons in detention in Europe, often in harsh conditions and overall we believe this provision would not address this problem. ECRE would like to recall the fact that the right to liberty is a fundamental right set out in international human rights instruments such as the ECHR (Article 5). Detention in the context of this Returns Directive can only serve one purpose: to assure the enforcement of the return decision.

- Article 14 should contain an explicit reference to relevant international human rights standards, use the term 'detention' instead of 'temporary custody' (which more

[22] The Rapporteur for the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe calls in a recent report on the Policy of return for failed asylum seekers in the Netherlands for the Council of Europe Member States to "ensure an appropriate level of access to housing, social benefits and health care for all failed asylum seekers up to the time of their departure from the country". See Council of Europe, Parliamentary Assembly, Doc. 10741, 15 November 2005.

accurately reflects the wording used in other human rights instruments and EU instruments)[23] and affirm that detention should only be used as a last resort.

ECRE is also opposed to the inclusion in **Article 14(1)** of the obligation to detain. Member States should always have the opportunity not to detain third country nationals for individual reasons, even in cases where there is a risk of absconding or less coercive measures cannot be applied. It may, for instance, be inappropriate to detain persons suffering from trauma or having other serious psychological problems.

- Article 14(1) should clearly state that any decision to detain should be taken on a full and comprehensive assessment of the particular circumstances of the individual concerned. The term "*shall keep under temporary custody*" should be replaced by "may detain".

ECRE is also concerned at the lack of clarity in the wording "*serious reasons to believe that there is a risk of absconding*" in **Article 14(1)**. As already mentioned, a risk of absconding could be considered to exist in the case of all asylum seekers who have received a final negative decision in the asylum procedure based on the presumption that these persons will not voluntarily return to the country of origin. ECRE welcomes the fact that the primacy of less coercive measures such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents etc. is explicitly confirmed. At the same time, however, Member States are only obliged to assess where these alternatives would not be sufficient without necessarily explaining why that would be the case.

- ECRE calls for the re-wording of Article 14(1) to include an obligation on Member States to explicitly state in the decision on detention the reasons that constitute the risk of absconding and why less coercive measures cannot be applied in each individual case. This article should also introduce an obligation for the Member States to introduce such less coercive measures in their national legislation.

The inclusion of third country nationals "*who will be subject of a removal order or a return decision*" in **Article 14(1)** is unacceptable as it makes detention possible even when a return decision has not been taken or a removal order has not yet been issued. As the purpose of including detention measures in this directive can only be to prepare for return, it can only come into play after such a decision has been taken. Detaining a third country national while a final decision on residence is still pending is disproportional and unnecessary.

- ECRE calls for the deletion of the words "*or will be subject of a removal order or a return decision*" in Article 14(1).

ECRE welcomes the principle laid down in **Article 14(2)** according to which any decision on detention should be taken by a judicial authority. The provision should also expressly require judicial instances to take into account both the legality (is detention in conformity with legal provisions and necessary for return?) and the proportionality (notwithstanding the fact that detention is lawful, is it acceptable in the particular case taking into account the individual's age, health, sex, etc?) of the detention measure. This is necessary as an individual assessment of the person's particular circumstances by the competent judicial authority would otherwise not be possible.

- Article 14(2) should expressly require judicial instances to take into account both the legality and the proportionality of the detention measure.

[23] See Article 18 of the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee*.

Judicial authorities should, of course, have the same competences when reviewing detention measures **(Article 14(3))**. The obligation to provide for a monthly review of the detention measure by judicial authorities is strongly welcomed. However, ECRE sees no reason why an individual should not additionally be entitled to a review whenever his or her circumstances change or new elements support his or her release.

- ECRE calls for the right for the individual to a review of the detention measure whenever a change of circumstances or new elements support such review to be added to Article 14(3).

As far as the maximum time limit for detention in **Article 14(4)** is concerned, the principle of proportionality implies that detention is for the minimum period necessary, and never prolonged unduly or indefinitely where there is no prospect of removal or where removal proceedings are not being conducted with due diligence. Detention should only be used as a last resort and in full compliance with international human rights.[24] ECRE is therefore of the opinion that prolonging detention of up to six months is excessive. It should be noted that current legislation in certain Member States provides for shorter maximum time limits. French legislation, for instance, only allows for detention prior to removal for a maximum period of 32 days.[25] Moreover the effectiveness of detention recedes the longer detention lasts. [26]

Article 15 – Conditions of temporary custody

ECRE strongly objects to the possibility in **Article 15(2)** for Member States to detain in prisons. This would amount to the criminalisation of asylum seekers whose applications have been rejected further stigmatising asylum seekers and reinforce a growing tendency in public opinion to mix the issue of immigration and asylum with security issues.

- ECRE calls for the deletion of the second sentence in Article 15(2) allowing detention in ordinary prisons.

Article 15(3) should contain an explicit prohibition to detain unaccompanied minors as detention can never be in the best interest of the child as laid down in Article 2 of the UNCRC. Detention of minor children who are accompanied by their parents should be prohibited as well. Studies have shown that even when accompanied by their parents, detention can have damaging effects on the psychological health of minors as well as on parental authority as such.[27]

- ECRE calls for an explicit prohibition of detention of unaccompanied minors to be included in Article 15(3).

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[24] See ECRE, *Position on Return*, October 2003, p.14.

[25] A recent study by the University of Tilburg on the return of illegally staying third country nationals found that the length of detention of these persons does not influence the actual removal of the illegally staying third country national. According to this study, long detention periods rather seem to obstruct than promote return. The study also recommends the use of alternatives to detention such as regular reporting with the authorities. See A.M. van Kalmthout e.a., *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring. Een onderzoek naar verhinderende, bemoeilijkende of vergemakkelijkende factoren van terugkeer van vreemdelingen in vreemdelingenbewaring*, 2004, p. xi-xii.

[26] A Swiss report has shown that between 60 and 80 percent of all ordered detention in all the Cantons do not last longer than one month, and where it does the rate of successful removal is not significantly higher, see Parlamentsdienste /Services du Parlement, *Evaluation der Zwangsmassnahmen im Ausländerrecht, Schlussbericht zuhanden der Geschäftsprüfungskommission des Nationalrates/Evaluation des mesures de contrainte en matière de droit des étrangers, Rapport final à l'attention de la Commission de gestion du Conseil national*, March 2005.

[27] See Save the Children, *No place for a child. Children in UK immigration detention: Impacts, alternatives and safeguards*, 2005, p 13-25.

ECRE welcomes **Article 15 (4)** but sees no reason why visits to detention facilities to assess the adequacy of the detention conditions by international and non-governmental organisations should be subject to authorisation. Prior authorisation processes could obviously render control by such organisations meaningless. For such visits to be effective, these should be spontaneous.

- ECRE calls for the deletion of the words "*Such visits may be subject to authorisation*" in Article 15(4).

Chapter V – Apprehension in other Member States

Article 16 – Apprehension in other Member States

The sole Article of this chapter aims mainly at facilitating the enforcement of a return decision issued by one Member State whenever the third country national concerned is apprehended on the territory of another Member State. ECRE is concerned about the principle of *non-refoulement* and the right to an effective judicial remedy, as there is no right to an effective remedy against the recognition of the return decision or removal order by the second state. Article 4 of the Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals, which will be replaced by this Directive, stipulates 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).*" The Returns Directive should also contain provisions to this effect.

- ECRE stresses the need to provide for an effective remedy against a return decision or removal decision taken by the Member State on whose territory the third country national has been apprehended. It recommends the incorporation in Article 16 or in Article 12 of the right to an effective remedy against any measures referred to in Article16, namely a right of appeal against the decision to expel which has suspensive effect.

ECRE welcomes the possibility in **Article 16 (d)** for Member States to issue a residence permit or authorisation to stay for protection-related reasons. ECRE has repeatedly stated that current asylum systems in the EU Member States contain serious flaws and as a result protection is often denied for the wrong reasons. Moreover, major differences between the Member States as to the interpretation of the 1951 Refugee Convention and subsidiary forms of protection continue to exist. Whether an individual is recognised as in need of international protection therefore remains akin to a lottery. The possibility for Member States to issue a residence permit for protection-related reasons on the basis of this Directive may in part address this problem.

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