

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by email)

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Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
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Reference Regarding

CM1209
Detention provisions in the recast proposals for the Reception Conditions Directive and the Dublin Regulation and the right to a remedy with suspensive effect

Date

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Dear Members of the Civil Liberties, Justice and Home Affairs Committee,

The Meijers Committee has taken note of the state of the negotiations with regard to the recast proposals for the Reception Conditions Directive (Council Document 9021/12 of 24 April 2012) and the Dublin Regulation (Council Document 7683/12 of 16 March 2012). At the start of the trilogue discussions between the European Parliament, the Council and the European Commission on both proposals, the Meijers Committee would like to express several concerns regarding the detention provisions in the recast proposals. Furthermore it is argued that the recast of the Dublin Regulation should include a right to an effective remedy with suspensive effect.

1. Detention provisions

Harmonising detention provisions in EU migration legislation

First of all, the Meijers Committee has concerns about the inclusion of separate provisions on detention and procedures in different instruments (see on this issue our earlier note to the European Commission of 18 March 2009, CM0902). Provisions on detention appear in the Returns Directive and in the pending proposals recasting the Dublin Regulation and the Reception Conditions Directive (the detention provision in the proposal recasting the Procedures Directive refers to the Reception Conditions Directive). These sets of rules are to some extent comparable, but differ on a few important elements while the reasons for the differentiation are not always clear and evident. If these various sets of rules serve the purpose of securing observance of the same standards in international human rights law and general EU law on detention and procedures, notably Article 6 of the EU Charter of Fundamental Rights, there is no ground for differences.

The Committee favours a common, harmonised set of provisions. The Committee is of the opinion that the Returns Directive should serve as the general instrument on the topic, because the basic provisions on detention are already to be found in this directive. The other instruments may refer to this common set of provisions, but can contain specific deviations, e.g. in the case of asylum applicants.

Extra guarantees for asylum applicants

The Meijers Committee is of the opinion that the fact that the request for international protection of persons is pending and still falls within the scope of the Reception Conditions Directive and the Dublin Regulation, must amount to extra guarantees and certainly not to less guarantees than those included in the Returns Directive. In its judgment on *MSS v. Belgium and Greece* (Appl. No.

30696/09) the European Court of Human Rights (ECtHR) made clear that asylum seekers can be seen as particularly vulnerable. Therefore, they should be entitled to extra guarantees when it comes to detention. Moreover, the recent judgment of the ECtHR in *I.M. v. France* (Appl. No. 9152/09) made clear that the detention of asylum applicants may undermine their ability to substantiate their asylum account. The fact that I.M. was detained during the accelerated asylum procedure was one of the factors which contributed to the violation of the right to an effective remedy (Article 13 ECHR). The Meijers Committee therefore stresses that it is of utmost importance that detention of asylum applicants is only applied in exceptional cases and on clearly defined grounds for the shortest possible period of time. In this light, the Meijers Committee is also concerned that the proposed Dublin Regulation does no longer require that the detention of the applicant is necessary.

It also follows from the ECtHR's judgment in *Saadi v. the United Kingdom* (Appl. No. 13229/03) that detention conditions should be adapted to the specific situation of asylum applicants. The ECtHR considered that the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".

Dublin Regulation: conditions for detention and guarantees for persons detained

As opposed to the Returns Directive and the amended proposal recasting the Reception Conditions Directive, Article 27 of the proposed Dublin Regulation does not contain any provisions regarding conditions for detention and guarantees for persons detained. It only states that national legislation concerning these conditions and guarantees should be in accordance with applicable EU and international instruments. The Meijers Committee is of the opinion that Article 27 of the proposed Dublin Regulation should - as a minimum- refer to Articles 15 (2), 16 and 17 of the Returns Directive which set out standards as to judicial review of detention measures, the conditions of detention and the detention of unaccompanied minors and families with children. Furthermore, the Meijers Committee notes that the rules on vulnerable persons in the Dublin Regulation have been weakened by e.g. cutting back the scope of the proposed changes on unaccompanied minors and dropping a proposed ban on transferring asylum seekers who are not fit to travel. The Meijers Committee does not see any reason why the special provisions for vulnerable persons and persons with special reception needs included in Article 11 of the proposed Reception Conditions Directive should not apply to vulnerable applicants falling within the scope of the Dublin Regulation.

Maximum duration of detention measures

As detention of asylum seekers is not primarily intended to facilitate removal, specific criteria must be given in the Reception Conditions Directive and the Dublin Regulation as to the maximum duration of the detention. The Meijers Committee would like to recall that the ECtHR has on multiple occasions underlined, in cases involving the deportation or extradition of persons under Article 5 (1)(f) ECHR, the importance of the existence in domestic law of time-limits on detention (ECtHR 11 October 2007, *Nasrulloev v Russia*, appl. 656/06, paras 73-77; ECtHR 24 April 2008, *Ismoilov v Russia*, 2947/06, par 140; ECtHR 11 December 2008, *Muminov v Russia*, appl. 42502/06, par 122).

The Dublin Regulation links the duration of detention to the time *reasonably necessary to fulfill with due diligence the required administrative procedures until the transfer under this Regulation is carried out*. Under the Reception Conditions Directive the asylum applicant may be detained *as long as the grounds for detention mentioned in Article 8 (3) are applicable*. In practice, both Dublin proceedings (see Article 28 of the proposal) and asylum proceedings (see Article 31 of the amended proposal recasting the Procedures Directive) may take considerable time. The Meijers Committee would therefore prefer that the Dublin Regulation and the Reception Conditions Directive specify that detention orders and/or the domestic laws of the Member States provide a clear guarantee – in the form of a time-limit – which ensures adherence to the principle that detention is only allowed for the shortest possible period, referred to in Article 27 of the proposed

Dublin Regulation and Article 9 (1) of the proposed Reception Conditions Directive. Furthermore, the Dublin Regulation should, like the proposed Reception Conditions Directive (Article 9 (1)) explicitly state that delays in the administrative procedures that cannot be attributed to the asylum applicant shall not justify a continuation of detention. The maximum duration of detention under the Dublin Regulation or the Reception Conditions Directive should minimally conform to the limits set by the Returns Directive (six months with a possibility of extension of a further twelve months). We seriously doubt whether a further extension of the detention with twelve months can ever really be justified with respect to asylum seekers

Detention of children

The proposed Dublin Regulation and the Reception Conditions Directive allow for the detention of unaccompanied minors and families with children. The Meijers Committee is concerned that the Dublin Regulation does not provide for any special guarantees for the detention of children. Furthermore some of the special conditions for the detention of minors included in the Reception Conditions Directive deserve reconsideration. Article 11 (2) provides that unaccompanied minors 'shall be detained only in particular circumstances', which is such a vague wording that in practice it will not provide any extra safeguards for the detention of unaccompanied minors. Furthermore, the Reception Conditions Directive provides for lower standards than laid down in the Return Directive as it solely states that unaccompanied minors shall not be kept in prison accommodation. The Returns Directive also requires that unaccompanied minors as far as possible be provided with accommodation in institutions provided with personnel and facilities, which take into account the needs of persons of their age. Moreover, the provision in the Reception Conditions Directive seems to imply that Member States are allowed to detain families with children in prison accommodation.

The detention provisions in the Dublin Regulation and Reception Conditions Directive are arguably at odds with the recent case-law of the ECtHR concerning the detention of children in facilities for aliens detention. In these judgments the ECtHR underlined the vulnerability and special needs of asylum seeking children (see for example ECtHR 13 December 2011, *Kanagaratnam v. Belgium*, Appl. No. 15297/09, para 67). In *Popov v. France* (ECtHR 19 January 2012, Appl. Nos. 39472/07 et 39474/07) the ECtHR held that the detention of a family with children during a period of fifteen days constituted a violation of Articles 3, 5 (1) and 8 ECHR. The fact that the situation in the detention facility was tense and that the accommodation was not sufficiently adapted to the needs of young children contributed to these violations.

In *Popov v. France* (para 124) the ECtHR also considered that children who accompany their parents in detention must have access to an effective remedy against their detention. In this light the Dublin Regulation and the Reception Conditions Directive should provide that not only the asylum applicant who is detained, but also the children who are accompanying him in detention must have access to speedy judicial review of the detention measure.

2. Dublin Regulation: the right to a remedy with suspensive effect

The proposed recast of the Dublin Regulation does no longer guarantee that an applicant will not be transferred until a court has reviewed the decision to transfer the applicant to another Member State. Instead Article 26 (3) of the proposal refers to the Member State's obligations under the Charter of Fundamental Rights and the case-law of the ECtHR.

The ECtHR has ruled that in case of an arguable claim of *refoulement* a remedy with automatic suspensive effect should be provided in order to prevent irreparable harm (ECtHR 26 April 2007, *Gebremedhin v. France*, Appl. No. 25389/05). The Court of Justice's judgment in *N.S. and others* (Case C-411/10) and the ECtHR's judgment in *M.S.S. v. Belgium and Greece* (21 January 2011, Appl. No. 30696/09) make clear that such an arguable claim may also be present in case of a transfer to another Member State. Consequently, taken into account these judgments, the EU right to an effective remedy laid down in Article 47 of the Charter, reflected in Article 26 (1) of the

proposed Dublin Regulation requires that an applicant is allowed to stay in the transferring Member State until a court or tribunal has thoroughly assessed whether there is an arguable claim of direct or indirect *refoulement* (see *M.S.S. v. Belgium and Greece*, para 385 and further). The Meijers Committee is therefore of the opinion that the Dublin Regulation should provide that the remedy mentioned in Article 26 (1) has suspensive effect or that the applicant is allowed to await the court or tribunal's decision on his request for interim relief.

This would also be in line with Article 47 (5-7) of the proposal for the recast of the Procedures Directives.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



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Chairman